

156 FERC ¶ 61,049
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Midwest Independent Transmission
System Operator, Inc.

Docket Nos. ER12-678-004
EL14-58-001

ORDER GRANTING REHEARING

(Issued July 21, 2016)

1. The Commission has issued a series of orders addressing the proposal by Midwest Independent Transmission System Operator, Inc. (MISO)¹ to revise its Open Access Transmission, Energy and Operating Reserve Markets Tariff (Tariff) so as to appropriately recover and allocate costs associated with the commitment of resources to meet voltage or local reliability (VLR) requirements.² In its June 2014 Order, the Commission found that MISO had not supported its initial method of allocating the costs of VLR commitments, and in granting the request for rehearing on that question, the Commission instituted an investigation pursuant to section 206 of the Federal Power Act (FPA)³ as to the just and reasonable allocation of VLR costs to pseudo-tied load.⁴ Accordingly, pursuant to FPA section 206, the Commission established a prospective

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

² *Midwest Indep. Transmission Sys. Operator, Inc.*, 138 FERC ¶ 61,235 (2012) (March 2012 Order); *Midwest Indep. Transmission Sys. Operator, Inc.*, 140 FERC ¶ 61,171 (2012) (August 2012 Order); and *Midwest Indep. Transmission Sys. Operator, Inc.*, 147 FERC ¶ 61,268 (2014) (June 2014 Order).

³ 16 U.S.C. § 824e (2012).

⁴ June 2014 Order, 147 FERC ¶ 61,268 at PP 19-21.

refund effective date of July 9, 2014. WPPI Energy (WPPI) sought rehearing as to the prospective relief, seeking refunds as of September 1, 2012, the date MISO's original rate proposal went into effect. In this order, in light of the fact that we acknowledged that we committed legal error,⁵ and the issuance of a recent court decision (discussed below) addressing the Commission's authority to remedy its legal error in such circumstances,⁶ we grant rehearing.

I. Background

A. Previous Orders

2. As discussed in the previous orders in this proceeding, under certain circumstances, generators and demand response resources in MISO receive Revenue Sufficiency Guarantee (RSG) payments if they do not receive sufficient revenues in the energy and operating reserve markets to cover their costs. In 2012, MISO made a filing with the Commission to change its existing allocation of RSG costs, and allocate a greater proportion of the RSG costs associated with the commitment of resources to meet VLR requirements to the load in the Local Balancing Authority Area (Local BAA) that benefited from such commitments.

1. March 2012 Order

3. On March 30, 2012, the Commission issued an order accepting and suspending the filing subject to the outcome of a technical conference and further Commission order.⁷ The Commission found that "MISO's proposed definition of VLR commitments [and] its proposed allocation of the costs associated with VLR commitments in Docket No. ER12-678-000 . . . may be unjust, unreasonable, unduly discriminatory or preferential. However, in light of . . . the potential financial harm from allocating [VLR] costs in a manner that could be inconsistent with cost causation . . . we accept and suspend for five months MISO's proposals in these two dockets, subject to a technical conference and further order by the Commission."⁸ Thus, the Commission ordered the

⁵ *Id.* PP 14, 20-21.

⁶ *Xcel Energy Servs. Inc. v. FERC*, 815 F.3d 947 (D.C. Cir. 2016) (*Xcel*).

⁷ March 2012 Order, 138 FERC ¶ 61,235 at P 1.

⁸ *Id.* P 48.

filing, including its cost allocation and rate provisions, to become effective September 1, 2012, subject to the limitations noted above.⁹

2. August 2012 Order

4. After a technical conference and further proceedings, the Commission issued a second order on August 31, 2012. In the August 2012 Order, the Commission “conditionally accept[ed] MISO’s proposals based on the entire record of the proceeding, including the technical conference and subsequent pleadings.”¹⁰ In that order, the Commission considered the issue of the appropriate allocation of costs of VLR commitments undertaken to benefit pseudo-tied loads.¹¹ MISO proposed to allocate VLR costs to all loads in a Local BAA, including pseudo-tied loads. Although some parties protested that proposal and argued that VLR costs should be allocated only to load physically located in the Local BAA, the Commission found that “protesting parties have not demonstrated the proposal is unjust and unreasonable.” Additionally, based on the MISO Post-Technical Conference Reply Comments, the Commission found that “[a]s a threshold matter, MISO’s proposal is reasonable since the Local BAA of the host load is responsible for voltage management in the pseudo-tied Local BAA, and therefore MISO’s proposal comports with cost causation.”¹²

3. June 2014 Order

5. WPPI filed a request for rehearing of the August 2012 Order, asking the Commission to require that VLR costs be allocated to loads in the Schedule 2 pricing zones where responsibility for responding to localized thermal and voltage constraints actually lies, rather than to the host Local BAA as proposed by MISO.¹³ In its June 2014 Order, the Commission found that, in the August 2012 Order, it had “erred in finding that

⁹ *Id.* at Ordering Paragraph A.

¹⁰ August 2012 Order, 140 FERC ¶ 61,171 at P 1.

¹¹ Load that is pseudo-tied is effectively transferred from a source Local BAA (the Local BAA in which that load is physically located) to a different host Local BAA (i.e., sink Local BAA) even though no physical tie exists for the transfer. The pseudo-tie uses a telemetered value that is updated in real-time and reflected in the Area Control Error equation of the source and host Local BAAs.

¹² August 2012 Order, 140 FERC ¶ 61,171 at P 87 (citing MISO Post-Technical Conference Reply Comments at 13).

¹³ WPPI October 1, 2012 Request for Rehearing at 5-6.

MISO had met its burden under FPA section 205 of showing that its proposal as to how to allocate [VLR] costs to pseudo-tied load is just and reasonable.”¹⁴ Thus, the Commission granted WPPI’s request for rehearing on the question of “whether it is just and reasonable to allocate the costs of VLR commitments made in the host Local BAA to load that is physically located outside the host Local BAA, but is contractually pseudo-tied to it.”¹⁵

6. The Commission then found that the part of MISO’s proposal that allocated VLR costs to pseudo-tied load raised issues of material fact that could not be resolved based on the record. The Commission stated that “[w]e find, based on parties’ arguments on rehearing, that MISO’s proposed cost allocation for pseudo-tied load has not been shown to be just and reasonable and may be unjust, unreasonable, and unduly discriminatory or preferential, or otherwise unlawful. Therefore, we will grant rehearing to provide a forum for parties to address this issue.”¹⁶

7. The Commission stated that, because it accepted MISO’s cost allocation without suspension or setting it for hearing, it would institute a section 206 proceeding and establish hearing and settlement judge procedures to address these issues.¹⁷ The Commission noted that “where . . . the Commission institutes a section 206 investigation on its own motion, section 206(b) of the FPA requires that the Commission establish a refund effective date that is no earlier than publication of the notice of the Commission’s initiation of its investigation in the Federal Register,” and the Commission therefore established, as a refund effective date, the date the notice of the initiation of the investigation was published in the Federal Register.¹⁸ That notice was subsequently published in the Federal Register on July 9, 2014.¹⁹

B. Request for Rehearing of June 2014 Order

8. While the parties commenced settlement, WPPI filed a request for rehearing of the June 2014 Order. WPPI asserts that the Commission erred in deciding to investigate the

¹⁴ June 2014 Order, 147 FERC ¶ 61,268 at P 14.

¹⁵ *Id.* P 19.

¹⁶ *Id.* P 20.

¹⁷ *Id.* PP 20-24.

¹⁸ *Id.* P 22.

¹⁹ 79 Fed. Reg. 38,882 (2014).

justness and reasonableness of MISO's original VLR cost allocation proposal as it applies to pseudo-tied load through a section 206 proceeding on the basis that the Commission had previously accepted MISO's cost allocation without suspension or hearing. WPPI states that, contrary to this statement, the initial order on MISO's proposal suspended the proposed tariff changes for the maximum five-month statutory period and initiated an investigation in the form of a technical conference, and that at no time has the Commission accepted the MISO proposal in a final order that would terminate the Commission's ability to continue to proceed under section 205.

9. WPPI states that under the Commission's procedural approach, WPPI will be deprived of the potential for relief from improper cost allocation for a period of nearly two years: from September 1, 2012 (the time MISO's original rate proposal went into effect) to July 9, 2014 (the refund effective date set by the Commission in the June 2014 Order). It states that the Commission's choice to initiate section 206 proceedings, rather than continuing to act solely under section 205, is unnecessary and unjustified in this situation and leaves the parties in an uncertain posture as to the burden of proof.²⁰

10. WPPI argues that the Commission explicitly stated in the June 2014 Order that it was proceeding under section 206 because "the Commission accepted MISO's cost allocation without suspension or setting it for hearing,"²¹ but in fact, the Commission's March 2012 Order (issued prior to MISO's proposed effective date of April 1, 2012) suspended MISO's VLR cost allocation proposal for the maximum five-month period allowed by statute, and required further investigation of the proposal pursuant to a technical conference. WPPI then states that the Commission's August 2012 Order, issued after the technical conference and one day prior to the expiration of the five-month suspension period, acknowledged that the proposed tariff provisions would go into effect as of September 1, 2012, and that given that the Commission had already suspended the proposed tariff changes for the statutory maximum period, the Commission could not have imposed a new suspension. WPPI argues that:

That unavoidable fact . . . does not mean that the second order constituted final and unconditional acceptance of MISO's

²⁰ WPPI Request for Rehearing at 5-6, 6 n.4. WPPI cites to *Cities of Batavia v. FERC*, 672 F.2d 64, 77 (D.C. Cir. 1982), in which the court remanded a case to the Commission to determine whether it was an appropriate case in which to exercise its section 205 suspension and refund power, where the Commission's decision not to review a fuel adjustment clause under section 205 "appear[ed] to be based upon its mistaken belief" that the Commission was precluded from proceeding under section 205.

²¹ WPPI Request for Rehearing at 6 (citing June 2014 Order, 147 FERC ¶ 61,268 at P 21).

VLR RSG cost-allocation proposal, such that subsequent changes to it could be made only in a Section 206 proceeding. Rather, the Commission conditionally accepted MISO's proposal subject to further compliance requirements, and accordingly MISO's proposal continued to be subject to the Commission's review under Section 205.²²

11. WPPI further notes that the August 2012 Order was subject to WPPI's timely request for rehearing, and that even now, after the Commission's most recent action in this proceeding, the VLR cost allocation proposal is not final, and thus remains subject to the Commission's review under section 205. WPPI states:

From the time the Commission issued its first order suspending the proposed tariff provisions, MISO and all of the market participants potentially affected by MISO's VLR RSG cost-allocation proposal have been on notice that the proposed tariff changes were subject to further modification until the Section 205 review proceedings – including fulfillment of MISO's remaining compliance obligations and resolution of WPPI's request for rehearing – reached their full conclusion.²³

12. WPPI thus argues that the Commission has not terminated the section 205 proceedings in this case, but rather, to the contrary, it has consolidated the ongoing proceedings in Docket No. ER12-678-001 with its new section 206 investigation in Docket No. EL14-58. For the above reasons, WPPI argues that the Commission continues to have the power to act under section 205.

13. WPPI further argues that the Commission's choice to proceed under section 206 leaves unclear whether MISO will continue to bear the burden of proof, as the proponent of its VLR cost allocation proposal under section 205, or whether WPPI would be required to carry the burden of showing MISO's proposed cost allocation to be unjust and unreasonable.²⁴ WPPI states that the Commission acknowledged in the June 2014 Order that MISO did not make the necessary showing under section 205 that its VLR cost allocation filing was just and reasonable. Thus, WPPI argues, by now proceeding under section 206 (and limiting the refunds available to WPPI), the Commission has erred by

²² *Id.* at 7.

²³ *Id.*

²⁴ *Id.* at 9.

failing to place the parties back into the position they would have been in, absent the Commission's legal error in accepting MISO's filing in the August 2012 Order.²⁵ Finally, WPPI argues that the Commission should make clear that refunds will be (at least potentially) available should the Commission decide based on the further record to be developed that it is unjust and unreasonable and/or unduly discriminatory for remotely located pseudo-tied load to be allocated a share of the inherently local costs of VLR commitments.²⁶

C. Settlement Proceedings

14. The parties negotiated a settlement, which the Commission is approving concurrently with this order.²⁷ In that settlement, the parties settled on a methodology to allocate VLR costs to pseudo-tied load on a going forward basis,²⁸ and also agreed that MISO would resettle its VLR payments according to this methodology back to July 9, 2014.²⁹

15. The settlement noted WPPI's pending request for rehearing of the June 2014 Order, and stated that the settlement "does not resolve, and is without prejudice to" the question of the effective date for resettlements raised in that rehearing request. The terms of the Settlement further provide that:

if the Commission grants WPPI's July 30, 2014 rehearing request, the Tariff revisions in Attachment 1 shall become effective September 1, 2012 . . . and shall be the basis for MISO's further resettlements of WPPI's VLR RSG payments back to September 1, 2012³⁰

²⁵ *Id.* at 10, 12.

²⁶ *Id.* at 13.

²⁷ Offer of Settlement (Settlement), filed February 18, 2015; certified as uncontested on April 7, 2015 (*Midwest Indep. Transmission Sys. Operator, Inc.*, 151 FERC ¶ 63,001 (2015)); approved by the Commission concurrently with this order (*Midwest Indep. Transmission Sys. Operator, Inc.*, 156 FERC ¶ 61,048 (2016)).

²⁸ Settlement, section 3.2.

²⁹ *Id.*, section 4.1.

³⁰ *Id.*, section 4.2.

16. The parties stated that “[i]n this way, the Commission and the parties will avoid the need for any additional settlement or hearing process in the event WPPI prevails on its rehearing request,” and provided that, if the Commission issued an order granting WPPI’s rehearing request, “the further resettlements of WPPI’s VLR RSG payments shall be performed as soon as possible after the installation of necessary software changes and WPPI’s submission of required meter data for Internal Commercially Pseudo-Tied Load.”³¹

II. Discussion

17. We grant WPPI’s request for rehearing.

18. In the June 2014 Order, the Commission found that it “erred in finding that MISO had met its burden under FPA section 205 of showing that its proposal as to how to allocate VLR-related RSG costs to pseudo-tied load is just and reasonable.”³² The D.C. Circuit has since held that, in such circumstances, the Commission may correct its legal error.³³ We therefore grant WPPI’s request for rehearing and find that the Commission retains authority to act pursuant to FPA section 205.

19. We note that, pursuant to the terms of the Settlement approved in a companion order,³⁴ as a result of the Commission granting WPPI’s rehearing request, MISO will provide refunds to customers back to the effective date of MISO’s filing (September 1, 2012).³⁵

³¹ *Id.*

³² June 2014 Order, 147 FERC ¶ 61,268 at P 14.

³³ *Xcel*, 815 F.3d at 954; *see also Transcontinental Gas Pipe Line Corp. v. FERC*, 54 F.3d 893, 899 (D.C. Cir. 1995) (finding that the Commission’s failure to order recoupment on rehearing amounted to legal error).

³⁴ *Midwest Indep. Transmission Sys. Operator, Inc.*, 156 FERC ¶61,048 (2016).

³⁵ Settlement, section 4.2. The Settlement also provides that “resettlements of WPPI’s VLR RSG payments shall be performed as soon as possible after the installation of necessary software changes and WPPI’s submission of required meter data for Internal Commercially Pseudo-Tied Load.” *Id.*

The Commission orders:

WPPI's request for rehearing is hereby granted, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.