

161 FERC ¶ 61,059
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Cheryl A. LaFleur, and Robert F. Powelson.

Midcontinent Independent System Operator, Inc.

Docket Nos. ER14-1242-006
ER14-2860-003
ER14-2862-003

OPINION NO. 556

ORDER ON INITIAL DECISION

(Issued October 19, 2017)

Table of Contents

	<u>Paragraph Numbers</u>
I. Background and Procedural History	<u>2.</u>
A. MISO Tariff – SSR Provisions	<u>2.</u>
B. Presque Isle Units	<u>6.</u>
II. Discussion	<u>11.</u>
A. Original SSR Agreement.....	<u>14.</u>
1. Fixed-Cost Component.....	<u>14.</u>
a. Initial Decision	<u>14.</u>
b. Briefs on Exceptions	<u>16.</u>
c. Briefs Opposing Exceptions	<u>20.</u>
d. Commission Determination	<u>26.</u>
2. Variable-Cost Component	<u>33.</u>
a. Initial Decision	<u>33.</u>
b. Commission Determination	<u>34.</u>
3. Clawback Provision	<u>35.</u>
a. Initial Decision	<u>35.</u>
b. Briefs on Exceptions	<u>38.</u>
c. Briefs Opposing Exceptions	<u>43.</u>
d. Commission Determination	<u>51.</u>
4. Refunds	<u>61.</u>
a. Initial Decision	<u>61.</u>
b. Briefs on Exceptions	<u>62.</u>
c. Briefs Opposing Exceptions	<u>64.</u>
d. Commission Determination	<u>67.</u>
B. Replacement SSR Agreement	<u>70.</u>
1. Fixed-Cost Component.....	<u>70.</u>
a. Initial Decision	<u>70.</u>
b. Briefs on Exceptions	<u>74.</u>
c. Briefs Opposing Exceptions	<u>77.</u>
d. Commission Determination	<u>79.</u>
2. Variable-Cost Component	<u>86.</u>
a. Initial Decision	<u>86.</u>
b. Briefs on Exceptions	<u>87.</u>
c. Commission Determination.....	<u>88.</u>
3. Refunds	<u>90.</u>
a. Initial Decision	<u>90.</u>
b. Briefs on Exceptions	<u>91.</u>
c. Briefs Opposing Exceptions	<u>96.</u>
d. Commission Determination	<u>98.</u>
C. Other Matters.....	<u>102.</u>

1. MISO’s Errata Filing	<u>102.</u>
2. Policy Considerations	<u>103.</u>
a. Briefs on Exceptions.....	<u>103.</u>
b. Briefs Opposing Exceptions.....	<u>104.</u>
c. Commission Determination.....	<u>112.</u>
3. Alleged Manipulation	<u>116.</u>
a. Initial Decision	<u>116.</u>
b. Briefs on Exceptions	<u>117.</u>
c. Briefs Opposing Exceptions	<u>119.</u>
d. Commission Determination	<u>124.</u>

1. This order addresses briefs on and opposing exceptions to an Initial Decision¹ issued on July 25, 2016 by the Presiding Administrative Law Judge (Presiding Judge) in the captioned proceedings. The Initial Decision sets forth the Presiding Judge's findings concerning the compensation provided for in two System Support Resource (SSR)² agreements between Wisconsin Electric Power Company (Wisconsin Electric) and MISO covering the time period from February 1, 2014 through January 31, 2015. In this order, we affirm in part and reverse in part the Initial Decision and order refunds.

I. Background and Procedural History

A. MISO Tariff – SSR Provisions

2. Under MISO's Tariff, market participants that have decided to retire or suspend a generation resource or SCU must submit a notice (Attachment Y Notice), pursuant to Attachment Y (Notification of Potential Resource/SCU Change of Status) of the Tariff, at least 26 weeks prior to the resource's retirement or suspension effective date. During this 26-week notice period, MISO will conduct a study (Attachment Y Study) to determine whether all or a portion of the resource's capacity is necessary to maintain system reliability, such that SSR status is justified. If so, and if MISO cannot identify an SSR alternative that can be implemented prior to the retirement or suspension effective date, then MISO and the market participant shall enter into an agreement, as provided in Attachment Y-1 (Standard Form SSR Agreement) of the Tariff, to ensure that the resource continues to operate, as needed.³ The SSR Agreement is filed with the Commission and specifies the terms and conditions of the service, including the hourly compensation to be provided to the resource. For each SSR Agreement filed with the Commission, a separate rate schedule must be filed to provide for recovery of the costs

¹ *Midcontinent Indep. Sys. Operator, Inc.*, 156 FERC ¶ 63,013 (2016) (Initial Decision).

² Midcontinent Independent System Operator, Inc.'s (MISO) Open Access Transmission, Energy and Operating Reserve Markets Tariff (Tariff) defines SSR Units as "Generation Resources or Synchronous Condenser Units (SCUs) that have been identified in Attachment Y – Notification to this Tariff and are required by the Transmission Provider for reliability purposes, to be operated in accordance with the procedures described in Section 38.2.7 of this Tariff." MISO, FERC Electric Tariff, Module A, § 1.S "System Support Resource (SSR)" (39.0.0). Unless indicated otherwise, all capitalized terms shall have the same meaning given them in the MISO Tariff.

³ See *Midwest Indep. Transmission Sys. Operator, Inc.*, 108 FERC ¶ 61,163, *order on reh'g*, 109 FERC ¶ 61,157 (2004).

identified in the SSR Agreement, in accordance with the SSR cost allocation provision in section 38.2.7.1 of MISO's Tariff.

3. The Tariff provides that MISO will negotiate with the resource owner to determine the appropriate level of compensation for the SSR Unit, but that compensation be limited to the resource's going-forward costs (for SSR Agreements entered into prior to July 22, 2014)⁴ or full cost-of-service (for SSR Agreements entered into on or after July 22, 2014).⁵ The Commission requires MISO to file under section 205 of the Federal Power Act (FPA) for cost recovery at the time it seeks to charge customers for SSR costs.⁶ The Commission stated that MISO's approach for negotiating compensation is consistent with a cost-based approach, "as MISO will provide compensation only for an SSR's going forward costs and will consider cost-based factors, such as a resource's fixed and variable operating and maintenance costs, when negotiating compensation."⁷ The Commission further noted that load-serving entities that may be allocated SSR costs and other interested parties may present any concerns raised by the compensation provisions of SSR Agreements when those agreements are filed with the Commission.⁸

⁴ MISO, FERC Electric Tariff, Module C, § 38.2.7.e(ii) (30.0.0) ("The SSR Agreement will provide compensation only for going forward costs (i.e., the costs that will be incurred by an SSR Unit owner or operator to remain in-service that are in excess of the costs the SSR Unit would have incurred had it been retired or suspended.")).

⁵ On July 22, 2014, the Commission directed revisions to the Tariff to allow compensation up to a resource's full cost-of-service, including the fixed costs of existing plant, rather than a resource's going-forward costs. *Ameren Energy Resources Generating Co. v. Midcontinent Indep. Sys. Operator, Inc.*, 148 FERC ¶ 61,057, at PP 11, 87 (2014) (*Ameren*); *see also* MISO, FERC Electric Tariff, Module C, § 38.2.7.e(ii) (39.0.0) ("The SSR Agreement will provide compensation only for costs incurred by an SSR Unit owner or operator that do not exceed the full cost-of-service (including the fixed cost of existing plant.")).

⁶ *Midwest Indep. Transmission Sys. Operator, Inc.*, 140 FERC ¶ 61,237, at P 140 (2012) (2012 SSR Order) (quoting *Midwest Indep. Transmission Sys. Operator, Inc.*, 108 FERC ¶ 61,163 at P 372).

⁷ 2012 SSR Order, 140 FERC ¶ 61,237 at P 140. As noted above, in the *Ameren* decision, the Commission later directed revisions to the Tariff to allow compensation up to a resource's full cost-of-service, including the fixed costs of existing plant, rather than a resource's going-forward costs.

⁸ *Id.*

4. MISO's Tariff effective at the execution of the two SSR Agreements at issue in the Initial Decision, as further described below, required MISO to consider at least the following cost-based factors:

(a) fixed and variable operating and maintenance costs to existing equipment; (b) applicable state, federal, local or property taxes; (c) non-capital costs of any environmental waivers, allowances, and/or exemptions that are obtained by the SSR Unit and not otherwise recoverable by the SSR Unit owner or operator; and (d) capital costs associated with continued operation, including reasonable and prudent costs to comply with environmental regulations or local operating permit requirements....⁹

5. The Tariff also described a requirement to refund certain SSR compensation in the event that a suspension or retirement SSR Unit returns to service (Clawback Provision):

The owner or operator of a Generation Resource or SCU must refund to the Transmission Provider with interest all costs, less depreciation, for repairs and capital expenditures that were needed to continue operation of the Generation Resource or SCU and to meet applicable regulations and other requirements (including environmental) while the Generation Resource or SCU was subject to an SSR Agreement if the owner or operator: (1) rescinds its decision to Suspend or to Retire the unit while it is designated a SSR, (2) returns a unit to service following its previous designation as an SSR Unit and later retirement of the unit; or (3) returns a unit to service on schedule (i.e. returns to service consistent with an Attachment Y Notice to Suspend operations) from the designation as an SSR Unit.¹⁰

B. Presque Isle Units

6. On January 31, 2014 in Docket Nos. ER14-1242-000 and ER14-1243-000, MISO filed an SSR Agreement and associated rate schedule, respectively, for Wisconsin Electric's Presque Isle Power Plant Units 5-9 (Presque Isle Units), which are generation resources located in Marquette, Michigan within the footprint of the

⁹ MISO, FERC Electric Tariff, Module C, § 38.2.7.e(ii) (30.0.0); MISO, FERC Electric Tariff, Module C, § 38.2.7.e(ii) (39.0.0); *see also* Initial Decision, 156 FERC ¶ 63,013 at P 27.

¹⁰ MISO, FERC Electric Tariff, Module C, § 38.2.7.e(i) (39.0.0).

American Transmission Company LLC.¹¹ MISO stated that on August 1, 2013, Wisconsin Electric submitted to MISO an Attachment Y Notice for suspension of the Presque Isle Units, effective February 1, 2014 through June 1, 2015.¹² MISO stated that after it conducted an Attachment Y Study, it determined that the Presque Isle Units were needed to avoid reliability standards violations and determined that no reasonable alternatives existed to address the reliability issues. Consequently, MISO designated the Presque Isle Units as SSR Units and entered into an SSR Agreement (Original SSR Agreement) to continue operation of the Presque Isle Units.¹³

7. MISO stated that the Original SSR Agreement, which was entered into prior to the *Ameren* decision, provided that MISO would pay Wisconsin Electric \$4,352,832 per month in fixed-cost compensation, which reflected going-forward costs.¹⁴ MISO stated that the fixed-cost component was based on historical actual costs for the Presque Isle Units including: non-fuel operation and maintenance (O&M) costs, ongoing capital expenditures, and return on inventories.¹⁵ MISO also stated that the Original SSR Agreement outlined a variable-cost component whereby MISO would pay Wisconsin Electric its production cost for the amount of actual energy injections and operating reserve cost, as defined by the Tariff, in each instance that MISO dispatched an SSR Unit.¹⁶ On April 1, 2014, the Commission issued an order accepting and suspending the Original SSR Agreement and associated rate schedule, subject to refund and further Commission order.¹⁷ On July 29, 2014, the Commission issued a further order that addressed substantive arguments regarding the need for the Original SSR Agreement and also determined that the fixed-cost component of the SSR compensation had not been shown to be just and reasonable, and may be unjust, unreasonable, unduly discriminatory, or otherwise unlawful. The Commission noted specific examples where MISO had not provided adequate support: (1) the proposed 11.53 percent annual rate of return on capital costs of inventory; and (2) the proposed \$13.5 million compensation for the

¹¹ MISO, Filing, Docket No. ER14-1242-000 (filed Jan. 31, 2014); MISO, Filing, Docket No. ER14-1243-000 (filed Jan. 31, 2014).

¹² MISO, Filing, Docket No. ER14-1242-000, at 2 (filed Jan. 31, 2014).

¹³ *Id.*

¹⁴ *Id.* at 10-12.

¹⁵ *Id.* at Attachment E (Direct Testimony of Christine T. Akkala).

¹⁶ MISO, Filing, Docket No. ER14-1242-000, at 10-11 (filed Jan. 31, 2014).

¹⁷ *Midcontinent Indep. Sys. Operator, Inc.*, 147 FERC ¶ 61,004, at P 12 (2014).

capital costs associated with keeping the SSR Units operational for the term of the Original SSR Agreement. Consequently, the Commission set for hearing and settlement the fixed-cost component of the SSR compensation.¹⁸

8. On September 12, 2014 in Docket Nos. ER14-2860-000 and ER14-2862-000, MISO filed another SSR Agreement and associated rate schedule, respectively, for the Presque Isle Units to replace the Original SSR Agreement and rate schedule to reflect the change in status of the Presque Isle Units from suspended to retired.¹⁹ Specifically, MISO stated that on April 15, 2014, Wisconsin Electric notified MISO of its decision to retire the Presque Isle Units and submitted a second Attachment Y Notice, which resulted in the second SSR Agreement between Wisconsin Electric and MISO (Replacement SSR Agreement). MISO stated that the Replacement SSR Agreement, entered into after the *Ameren* decision, outlined a 14.5-month period, beginning October 15, 2014 and ending December 31, 2015, with fixed-cost compensation of \$8,084,500 per month, which was proposed to reflect the SSR Units' full cost-of-service.²⁰ MISO stated that the fixed-cost component in the Replacement SSR Agreement was subject to a formula rate based upon information contained in Wisconsin Electric's FERC Form No. 1. MISO stated that the fixed-cost compensation was based on projected costs subject to an actual cost true-up adjustment aside from cost of capital and depreciation.²¹ On November 10, 2014, the Commission issued an order accepting and suspending the Replacement SSR Agreement, subject to refund. The Commission found that the compensation under the Replacement SSR Agreement had not been shown to be just and reasonable and set the "compensation issues" for hearing and settlement judge procedures "including the cost-of-service, formula rate, and true-up procedures."²² The Commission also consolidated the proceeding with the ongoing hearing and settlement judge procedures established in the Original SSR Agreement Order and terminated the Original SSR Agreement, effective October 15, 2014.²³

¹⁸ See *Midcontinent Indep. System Operator, Inc.*, 148 FERC ¶ 61,071, at P 89 (2014) (Original SSR Agreement Order).

¹⁹ MISO, Filing, Docket No. ER14-2860-000 (filed Sept. 12, 2014); MISO, Filing, Docket No. ER14-2862-000 (filed Sept. 12, 2014).

²⁰ MISO, Filing, Docket No. ER14-2860-000, at 10-13 (filed Sept. 12, 2014).

²¹ *Id.* at 12-13.

²² *Midcontinent Indep. Sys. Operator, Inc.*, 149 FERC ¶ 61,114, at P 53 (2014) (Replacement SSR Agreement Order).

²³ Replacement SSR Agreement Order, 149 FERC ¶ 61,114 at PP 1, 53. The

9. On February 19, 2015, the Commission issued an order addressing, among other things, requests for rehearing filed in Docket Nos. ER14-2860 and ER14-2862. In that order, the Commission clarified that SSR compensation under the Replacement SSR Agreement was already subject to hearing and settlement judge procedures and that the variable-cost compensation under the Original SSR Agreement, in addition to the fixed-cost compensation, was already set for hearing and settlement judge procedures.²⁴

10. On February 1, 2015, the Presque Isle Units were returned to non-SSR service and the Replacement SSR Agreement was terminated.²⁵ Consequently, the Original SSR Agreement covered the time period from February 1, 2014 through October 14, 2014, and Wisconsin Electric collected \$36,999,072 in fixed-cost compensation.²⁶ The Replacement SSR Agreement was in effect from October 15, 2014 through January 31, 2015, and Wisconsin Electric collected \$28,295,750 in fixed-cost compensation, subject to true-up (\$26,915,146 in total under the true-up stated by Wisconsin Electric).²⁷

II. Discussion

11. On July 25, 2016, the Presiding Judge issued the Initial Decision finding that MISO did not carry its burden of proof regarding the justness and reasonableness of the fixed-cost component to compensation under the Original SSR Agreement or the Replacement SSR Agreement. The Presiding Judge found that MISO *did* sustain its burden of proof regarding the variable-cost component to compensation under both the Original and the Replacement SSR Agreements. Consequently, the Presiding Judge determined that refunds are due under both the Original and the Replacement SSR Agreements. Additionally, the Presiding Judge determined that additional refunds are required pursuant to the Clawback Provision in section 38.2.7.e of Module C of the Tariff

Commission also accepted, subject to refund and further Commission order, the rate schedule associated with the Replacement SSR Agreement. *Id.* at ordering para. (F).

²⁴ *Pub. Serv. Comm'n of Wis. v. Midcontinent Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,104, at PP 94, 148 (2015).

²⁵ *Midcontinent Indep. Sys. Operator, Inc.*, Docket No. ER15-1070-000, *et al.* (Apr. 17, 2015) (delegated letter order).

²⁶ Joint Statement of Background and Procedural History, Docket No. ER14-1242-006, at 5 (filed May 16, 2016).

²⁷ *Id.* at 7.

following the Presque Isle Units' return to service. On July 26, 2016 and August 2, 2016, the Presiding Judge issued erratas to the Initial Decision.²⁸

12. MISO, Wisconsin Electric, the Michigan Aligned Parties,²⁹ the Michigan Public Service Commission (Michigan Commission), and Commission Trial Staff (Trial Staff) each filed a brief on exceptions and opposing exceptions to the Initial Decision. On October 4, 2016, MISO filed a motion for leave to make an errata filing to its brief opposing exceptions and the Michigan Aligned Parties, the Michigan Commission, and Trial Staff each filed an answer in opposition to MISO's motion to leave to file the errata.

13. We address the Presiding Judge's findings in the Initial Decision and the issues raised by the parties' briefs with regard to both the Original and Replacement SSR Agreements in detail below.

A. Original SSR Agreement

1. Fixed-Cost Component

a. Initial Decision

14. The Presiding Judge found that MISO has not carried its burden of proof regarding the justness and reasonableness of the fixed-cost component of compensation under the Original SSR Agreement and found that the fixed-cost component of compensation under the Original SSR Agreement (a total of \$36,999,072 for the 8.5 months that the Original SSR Agreement was in effect) is not just and reasonable.³⁰ The Presiding Judge rejected MISO's and Wisconsin Electric's arguments that the compensation is just and reasonable because it was negotiated at arm's length through the normal course of business and in accordance with the Tariff and Commission precedent. The Presiding Judge found that, although MISO and Wisconsin Electric seemingly followed the Tariff procedures regarding the SSR program in place at the time, it is unreasonable for MISO to compensate Wisconsin Electric for more than the Presque Isle Units' going-forward

²⁸ Errata to Initial Decision, Docket No. ER14-1242-006, *et al.*, (July 26, 2016 & August 2, 2016).

²⁹ Michigan Aligned Parties include Tilden Mining Company L.C. and Empire Iron Mining Partnership, Cloverland Electric Cooperative, Verso Corporation, the City of Mackinac Island, The Sault Ste. Marie Tribe of Chippewa Indians, and Upper Peninsula Power Company.

³⁰ Initial Decision, 156 FERC ¶ 63,013 at PP 25, 29-40.

costs.³¹ The Presiding Judge agreed with the Michigan Aligned Parties and the Michigan Commission that a forward-looking analysis was necessary to determine reasonable compensation for the fixed-cost component, and found that MISO's approach of taking the simple average of three years of historical capital spending did not ensure that Wisconsin Electric's compensation was restricted to going-forward costs.³² The Presiding Judge found that, because MISO and Wisconsin Electric knew or should have known that going-forward costs would not resemble past costs, using the average historical spending is not a reasonable basis for compensation.³³ The Presiding Judge also noted the disparity between the projected and actual capital expenditures, such that Wisconsin Electric was ultimately being compensated nearly nine times more than the costs it actually incurred.³⁴ The Presiding Judge cited a First Circuit opinion holding that rates 45 percent higher than those that would have been produced with actual data were the product of estimates "seriously in error."³⁵

15. The Presiding Judge determined that the appropriate amount of fixed-cost compensation under the Original SSR Agreement should be based on actual going-forward costs and further determined that amount to be \$24,083,374.³⁶ The Presiding Judge largely adopted the alternative fixed-cost compensation that was proposed by Trial Staff in its initial brief, which is based on actual cost data and reflects only (1) going-forward costs; (2) the Presque Isle SSR Units' return to service; and (3) updated cost-of-capital analyses, including a Discounted Cash Flow analysis regarding rate of return on equity (ROE).³⁷ Moreover, the Presiding Judge accepted Trial Staff's and the Michigan Commission's arguments that skeleton work crew costs required to maintain the Presque Isle Units while suspended from service do not qualify as going-forward costs eligible for recovery under the Original SSR Agreement and determined that adjustments to skeleton

³¹ *Id.* P 37.

³² *Id.* PP 37-38.

³³ *Id.* P 39.

³⁴ *Id.* P 40.

³⁵ *Id.* (citing *Distrigas of Mass. Corp.*, 737 F.2d 1208, 1220 (1st Cir. 1984)).

³⁶ *Id.* PP 45, 50.

³⁷ *Id.* P 41. The alternative fixed-cost compensation proposed by Trial Staff and adopted by the Presiding Judge also removed compensation for capital expenditures, which the Presiding Judge determined was properly excluded pursuant to the Clawback Provision. *Id.* P 46.

work crew costs were required.³⁸ Therefore, the Presiding Judge determined that an amount for costs associated with a skeleton work crew, which Wisconsin Electric had recovered under the Original SSR Agreement, should be subtracted in order to determine the appropriate going-forward compensation. Related to this, the one modification the Presiding Judge made to Trial Staff's recommendation is an adjustment to the amount of skeleton work crew cost to be subtracted from the amount recovered by Wisconsin Electric under the Original SSR Agreement, as recommended by the Michigan Commission.³⁹ The Presiding Judge determined that, because the Michigan Commission proposed to use actual cost data for the duration of the Original SSR Agreement to calculate the cost of skeleton work crew, whereas Trial Staff proposed to use the average actual cost data for all of 2014, an adjustment using the more accurate data is just and reasonable.⁴⁰ The Presiding Judge determined that Trial Staff's total recommendation of \$23,903,931, minus Trial Staff's proposed skeleton work cost (\$2,469,658), plus the Michigan Commission's proposed skeleton work crew cost (\$2,649,101) is the total appropriate fixed-cost component to compensation under the Original SSR Agreement: a total of \$24,083,374.⁴¹

³⁸ *Id.* PP 46-47.

³⁹ *Id.* PP 46, 50.

⁴⁰ *Id.* (citing Ex. PSC-29 at 4:7-23).

⁴¹ As discussed below, the Presiding Judge erred in his calculation of the adjustment related to use of the Michigan Commission's proposed skeleton work crew cost. This is because Trial Staff's recommended amount of total going-forward compensation of \$23,903,931 already included the subtraction of Trial Staff's proposed skeleton work crew cost of \$2,469,658 from the compensation collected by Wisconsin Electric under the Original SSR Agreement. The Presiding Judge, however, agreed that the Michigan Commission's higher proposed skeleton work crew cost of \$2,649,101 should have been subtracted instead. This adjustment should have actually lowered Trial Staff's recommended amount of total going-forward cost compensation of \$23,903,931 by an additional \$179,443, which is the difference in Trial Staff's proposed skeleton work crew cost of \$2,469,658 (which is reflected in the total of \$23,903,931) and the higher Michigan Commission skeleton work crew cost of \$2,649,101 that should have been used. Given this, the correct calculation is \$23,724,488.

b. Briefs on Exceptions

16. Wisconsin Electric argues that the Presiding Judge erred in finding that the fixed-cost component of the Original SSR Agreement is unjust and unreasonable.⁴² Wisconsin Electric argues that the Commission should find that the use of a simple three-year average of historical actual costs to determine the fixed-cost component of the Original SSR Agreement is an appropriate methodology for establishing a just and reasonable compensation. Wisconsin Electric contends that the Initial Decision incorrectly summarizes Wisconsin Electric's position regarding the justness and reasonableness of the fixed-cost compensation. Wisconsin Electric states that the Initial Decision failed to acknowledge that the fixed-cost compensation under the Original SSR Agreement was determined by taking the simple average of three years (2010, 2011, and 2012) of actual costs (i.e., three years of historical actuals), which Wisconsin Electric argues is consistent with the same methodology used by MISO in numerous SSR agreements prior to the Presque Isle SSR Units.⁴³ Wisconsin Electric argues that the fixed-cost component of the Original SSR Agreement was based on: (1) fixed and variable operating and maintenance costs to existing equipment; (2) applicable state, federal, local or property taxes; (3) noncapital costs of any environmental waivers, allowances, and/or exemptions that are obtained by the SSR Unit and not otherwise recoverable by the SSR Unit owner or operator; and (4) capital costs associated with continued operation, including reasonable and prudent costs to comply with environmental regulations or local operating permit requirements. Wisconsin Electric argues that the Initial Decision incorrectly interprets testimony and exhibits related to Wisconsin Electric's presentation to MISO of a "budget" for 2014 capital expenditures (2014 Capital Budget), and contends that the 2014 Capital Budget was presented only for "comparison purposes."⁴⁴ Wisconsin Electric argues that the Initial Decision incorrectly references "the use of test-figures" and "estimates" when neither were the basis of the fixed-cost component of the Original SSR Agreement.⁴⁵ Wisconsin Electric argues that because the use of three years of historical actuals was based on the cost components identified in Commission orders and the Tariff as reflecting going-forward costs, the

⁴² Wisconsin Electric Brief on Exceptions at 13.

⁴³ *Id.* at 10 (referencing the following SSR Agreements: White Pine Unit No. 1 (Docket No. ER14-1724-000, *et al.*), Escanaba (Docket No. ER13-37-000, *et al.*), Escanaba II (Docket No. ER13-1695-000, *et al.*), Consumers – Straits (Docket No. ER14-112), and Consumers – Gaylord (Docket No. ER14-109)).

⁴⁴ *Id.* at 15 (quoting Tr. 371:22-25; 378:2-7 (Wolter)).

⁴⁵ *Id.* (citing Initial Decision, 156 FERC ¶ 63,013 at P 37).

Initial Decision erred in finding that MISO failed to focus on going-forward costs during the negotiations.⁴⁶

17. Wisconsin Electric also argues that the Initial Decision errs in finding that only actual costs are compensable under the Original SSR Agreement.⁴⁷ Wisconsin Electric contends that the Initial Decision's reliance on Wisconsin Electric's actual costs substitutes after-the-fact judgment and applies a cost-of-service methodology to a negotiated agreement contrary to the MISO Tariff that included cost categories for MISO to consider when negotiating SSR compensation that the Commission had previously determined comprised going-forward costs. Wisconsin Electric argues that the level of actual capital expenditures should only be relevant if the Commission required that SSR owners only receive the level of actual capital expenditures incurred during the term of an SSR Agreement or if the Original SSR Agreement included a true-up provision, neither of which are present in this proceeding. Wisconsin Electric also argues that the Initial Decision's approach of conflating a cost-of-service approach in the context of MISO's SSR methodology causes a shift in the FPA section 205 burden from MISO to Wisconsin Electric, without any of the associated benefits. Additionally, Wisconsin Electric argues that MISO rejected Wisconsin Electric's request for a true-up mechanism for the Original SSR Agreement, which further underscores that MISO carries the burden but Wisconsin Electric shoulders the risk.⁴⁸

18. The Michigan Commission, the Michigan Aligned Parties, and Trial Staff argue that the Presiding Judge miscalculated the adjustment to the fixed-cost compensation attributable to the skeleton work crew.⁴⁹ The Michigan Commission does not disagree with the Presiding Judge's determination that skeleton work crew costs do not qualify as going-forward costs eligible for recovery under the Original SSR Agreement, but contends that the Presiding Judge *added* rather than *subtracted* the \$2,649,101 in skeleton work crew costs from the balance of total fixed-cost compensation. The Michigan Commission and the Michigan Aligned Parties note that the Presiding Judge adopted the Michigan Commission's skeleton work crew adjustment (\$2,649,101) in lieu of Trial Staff's skeleton work crew adjustment (\$2,469,658) that was already embedded within Trial Staff's recommended fixed-cost compensation for the Original SSR Agreement. The Michigan Aligned Parties note that the Michigan Commission

⁴⁶ *Id.* at 17 (citing Initial Decision, 156 FERC ¶ 63,013 at P 39).

⁴⁷ *Id.* at 17-20.

⁴⁸ *Id.* at 19-20.

⁴⁹ Michigan Commission Brief on Exceptions at 12-13; Michigan Aligned Parties Brief on Exceptions at 29-31; Trial Staff Brief on Exceptions at 4-5.

adjustment was larger than Trial Staff's adjustment and, because the cost of the skeleton work crew has to be deducted from Wisconsin Electric's fixed-cost compensation, adoption of the Michigan Commission's larger adjustment reduces the fixed-cost compensation. The Michigan Aligned Parties contend that the Initial Decision's calculation did not reduce the fixed-cost compensation by using the Michigan Commission's adjustment and instead added the Michigan Commission adjustment to Trial Staff's recommended fixed-cost compensation. The Michigan Commission and Trial Staff state that, after accounting for the Presiding Judge's miscalculation, the total amount of fixed-costs eligible for recovery under the Original SSR Agreement is \$23,724,488.⁵⁰

19. The Michigan Aligned Parties argue that the Presiding Judge erred in using Trial Staff's suggested long-term cost of capital of 9.68 percent that was based upon discounted cash-flow analysis principles in order to calculate Wisconsin Electric's carrying cost of inventory. The Michigan Aligned Parties argue that under the circumstances of the Original SSR Agreement, where a going-forward cost recovery standard was applicable to a short-term, suspension SSR Agreement, the use of Wisconsin Electric's short-term cost of borrowing was more appropriate than a long-term cost of capital in determining Wisconsin Electric's carrying cost of inventory.⁵¹ The Michigan Aligned Parties argue that testimony of their electric utility rate expert provided a convincing explanation for use of Wisconsin Electric's short-term borrowing costs to determine the recoverable carrying cost of inventory, but that the Presiding Judge rejected the recommended adjustment because the Michigan Aligned Parties did not provide any Commission policy or precedent justifying the adjustment.⁵² The Michigan Aligned Parties contend that the absence of citation of supporting Commission precedent can hardly qualify as reasoned decision-making regarding a disputed and contentious issue.⁵³ The Michigan Aligned Parties argue that use of Wisconsin Electric's short-term

⁵⁰ Michigan Commission Brief on Exceptions at 12-13; Trial Staff Brief on Exceptions at 5. The Michigan Aligned Parties contend that the difference between the two adjustments is \$179,443 and, because this amount was added instead of subtracted from the fixed-cost compensation, the net effect is twice that amount, or \$358,886. Michigan Aligned Parties Brief on Exceptions at 31.

⁵¹ Michigan Aligned Parties Brief on Exceptions at 21-24 (citing Initial Decision, 156 FERC ¶ 63,013 at P 46).

⁵² *Id.*; see also Ex. MAP-1 at 28:2-29:20.

⁵³ Michigan Aligned Parties Brief on Exceptions at 23-24.

borrowing cost in lieu of the long-term cost of capital adopted by the Initial Decision results in a reduction in Wisconsin Electric's recoverable costs of \$986,716.⁵⁴

c. Briefs Opposing Exceptions

20. The Michigan Commission and Trial Staff reject as without merit Wisconsin Electric's claim that the Original SSR Agreement was negotiated in accordance with the MISO Tariff and, therefore, the negotiated fixed-cost compensation is just and reasonable.⁵⁵ The Michigan Commission disagrees with Wisconsin Electric's claim that the Presiding Judge erred in determining that the Commission intended the owner of SSR Units to establish and justify, on a cost-of-service basis, the level of compensation that would be deemed just and reasonable.⁵⁶ The Michigan Commission argues that the Presiding Judge did not require proof of cost-of-service rates and the intervening parties did not advocate for cost-of-service rates. Instead, the Michigan Commission argues, the intervening parties argued, and the Presiding Judge agreed, that the only method to determine whether the SSR compensation proposed in the Original and Replacement SSR Agreements was just and reasonable was to compare it to actual costs. The Michigan Commission argues that Wisconsin Electric apparently believes that it did not need to defend the reasonableness of its proposed compensation level because it was sufficient to announce its position that the amount of compensation it negotiated with MISO is just and reasonable without further examination. The Michigan Commission contends that this cannot be the case because the Commission specifically found that the amount of compensation proposed in the Original and Replacement SSR Agreements had not been shown to be just and reasonable and set the matter for hearing and settlement judge procedures.⁵⁷ The Michigan Commission also argues that the Commission's approval of negotiated SSR rates in the 2012 SSR Order does not mean, as Wisconsin Electric argues, that the level of compensation negotiated in an SSR Agreement cannot be tested under a cost-based approach. The Michigan Commission argues that the Commission expressly preserved the rights of interested parties to analyze the reasonableness of negotiated rates using a cost-based approach in the 2012 SSR Order.⁵⁸ The Michigan Commission also

⁵⁴ *Id.* at 24, Appendix A.

⁵⁵ Michigan Commission Brief Opposing Exceptions at 7-22; Trial Staff Brief Opposing Exceptions at 8-11.

⁵⁶ Michigan Commission Brief Opposing Exceptions at 8.

⁵⁷ *Id.* at 7-9 (citing Original SSR Agreement Order, 148 FERC ¶ 61,071 at P 89).

⁵⁸ *Id.* at 20-22 (citing 2012 SSR Order, 140 FERC ¶ 61,237 at P 140 ("We are not persuaded to revisit the Commission's previous acceptance of a negotiated approach to determine SSR compensation. However, we note that Michigan Agencies' request that

argues that the MISO Tariff makes clear that the level of SSR costs negotiated by MISO and Wisconsin Electric is subject to review under section 205 of the FPA. The Michigan Aligned Parties make similar arguments that SSR Agreements and their compensation must be reviewed under section 205 to determine their justness and reasonableness.⁵⁹ The Michigan Commission and Trial Staff argue that the Commission is not bound to rely on projected cost estimates when there is a substantial disparity between estimates and actuals that would produce unreasonable results or where the estimates are seriously in error.⁶⁰ The Michigan Aligned Parties likewise argue that well-established Commission precedent under section 205 of the FPA supported the Presiding Judge's determination to reject Wisconsin Electric's unreasonable and inflated projected costs in favor of Wisconsin Electric's actual costs.⁶¹

21. Trial Staff argues that authorizing Wisconsin Electric to retain approximately \$37 million in fixed-cost compensation when the actual going-forward costs were approximately \$24 million would be clearly unreasonable.⁶² Trial Staff argues that Wisconsin Electric states that it should receive fair compensation, but does not attempt to show that recovery of its actual going-forward costs does not result in fair compensation. Trial Staff notes that MISO refers to a Commission order in its brief on exceptions where the Commission held that "nothing in the SSR Program would require a generator to absorb any uncompensated going-forward costs," but Trial Staff argues that Wisconsin Electric would not be required to absorb any going-forward costs if it were authorized to

MISO use a cost-based approach to determine SSR compensation is consistent with MISO's approach for negotiating compensation, as MISO will provide compensation only for an SSR's going forward costs and will consider cost-based factors, such as a resource's fixed and variable operating and maintenance costs, when negotiating compensation.")).

⁵⁹ Michigan Aligned Parties Brief Opposing Exceptions at 30-35.

⁶⁰ Michigan Commission Brief Opposing Exceptions at 20-22 (citing MISO, FERC Electric Tariff, Module C, § 38.2.7.j (39.0.0); *Distrigas of Mass Corp. v. FERC*, 737 F.2d 1208, 1220 (1st Cir. 1984)); Trial Staff Brief Opposing Exceptions at 10.

⁶¹ Michigan Aligned Parties Brief Opposing Exceptions at 30 (citing *Sw. Pub. Serv. Co. v. FERC*, 952 F.2d 555, 557 (D.C. Cir. 1992); *Ellwood City v. FERC*, 731 F.2d 959, 966 (D.C. Cir. 1984); *William Basin Interstate Pipeline Co.*, 84 FERC ¶ 61,081, at 61,362-363 (1998)).

⁶² Trial Staff Brief Opposing Exceptions at 10.

collect its actual going-forward costs.⁶³ Trial Staff argues that the mere fact that an agreement was negotiated between two parties does not mean that the resulting compensation is just and reasonable.⁶⁴ Trial Staff also argues that section 205(a) of the FPA and Commission precedent provide that all jurisdictional rates and charges received by any public utility must be just and reasonable and the Commission must rectify the problem if any rate falls short of that standard.⁶⁵ Trial Staff contends that the courts have repeatedly held that “it is long-established that the primary aim [of the FPA] is the protection of consumers from excessive rates and charges.”⁶⁶

22. The Michigan Commission, the Michigan Aligned Parties, and Trial Staff argue that Wisconsin Electric’s argument that the Commission has repeatedly accepted a simple three-year average of historical costs as a sufficient basis for compensation in other SSR proceedings in unavailing.⁶⁷ The Michigan Commission reviews the five cases cited by Wisconsin Electric (Escanaba I, Escanaba II, Consumers-Gaylord, Consumers-Straits, and White Pine Unit No. 1 SSR Agreements) and distinguishes them from the instant case.⁶⁸ The Michigan Aligned Parties also argue that Wisconsin Electric’s reliance on prior Commission approval of a three-year average of historical costs is unavailing considering that the cited agreements concerned facilities much smaller than the Presque Isle Units (with SSR compensation from \$330,000 to \$9 million).⁶⁹ Responding to the

⁶³ *Id.*

⁶⁴ *Id.* at 9 (citing *Florida Power and Light Co.*, 98 FERC ¶ 61,325, at P 9 (2002) (“[T]he Commission has an express statutory responsibility to ensure that jurisdictional agreements are just and reasonable . . . [T]he fact that both parties to a jurisdictional agreement have agreed does not put their agreement beyond our reach and does not require that we accept whatever terms and rates they may have agreed to.”)).

⁶⁵ *Id.* (citing 16 U.S.C. § 824d(a); *FERC v. Electric Power Supply Ass’n*, 136 S.Ct. 760, 767 (2016)).

⁶⁶ Wisconsin Electric Brief Opposing Exceptions at 9 (citing *Xcel Energy Services Inc. v. FERC*, 815 F.3d 947, 952-953 (D.C. Cir. 2016)).

⁶⁷ Michigan Commission Brief Opposing Exceptions at 11-20; Michigan Aligned Parties Brief Opposing Exceptions at 42-45; Trial Staff Brief Opposing Exceptions at 9-11.

⁶⁸ Michigan Commission Brief Opposing Exceptions at 11-20.

⁶⁹ The Michigan Aligned Parties also point out that the Big Rivers SSR Agreement included a true-up, and argues that this indicates a true-up should have been included in the Original SSR Agreement. Michigan Aligned Parties Brief Opposing Exceptions at

Michigan Aligned Parties' proposed short-term debt cost for the carrying cost of inventory, Trial Staff argues that the Commission treats fuel inventory as part of working capital which is placed in rate base and earns a return predicated on the weighted cost of long-term capital, i.e., the same rate of return traditionally applied to all rate base items in Commission ratemaking.⁷⁰ Therefore, Trial Staff argues, it is appropriate to use the economic cost of capital proposed by Trial Staff to compute carrying costs rather than the Michigan Aligned Parties' proposal to attempt to trace the fuel costs to a particular funding source.

23. The Michigan Aligned Parties argue that the Presiding Judge correctly determined that Wisconsin Electric's compensation under the Original SSR Agreement should be limited to actual costs.⁷¹ They contend that Wisconsin Electric would have the Commission believe that the Presiding Judge impermissibly relied on Wisconsin Electric's actual costs without adequate consideration of the justness and reasonableness of the negotiated SSR costs, but neither the record nor the Initial Decision support such a contention. The Michigan Aligned Parties argue that the Presiding Judge relied on Wisconsin Electric's actual costs to determine the just and reasonable compensation to which Wisconsin Electric was entitled only after making the preliminary determination that a substantial disparity existed between the negotiated capital costs and Wisconsin Electric's actual costs, and that the use of the projected costs would yield unreasonable results. The Michigan Aligned Parties contend that the Initial Decision is based on the unique facts related to these particular SSR Agreements and the Presiding Judge did not substitute after-the-fact judgment or apply a cost-of-service methodology to a negotiated agreement as Wisconsin Electric claims.⁷²

24. The Michigan Aligned Parties argue that Wisconsin Electric must have known that its actual capital spending would not resemble historical spending levels. They also argue that Wisconsin Electric's complaint that MISO refused to accept a true-up is unavailing because Wisconsin Electric had the right to file directly with the Commission and chose not to do so.⁷³

43-44.

⁷⁰ Trial Staff Brief Opposing Exceptions at 23-34 (citing *Southern California Edison Co.*, 53 FERC ¶ 61,408, at 62,418-62,419 (1990)).

⁷¹ Michigan Aligned Parties Brief Opposing Exceptions at 45-48.

⁷² *Id.* at 46-47.

⁷³ *Id.* at 44.

25. Trial Staff argues that Rule 711(d)(2) of the Commission's Rules of Practice and Procedure provides that a participant waives its objections to any part of an initial decision if it does not object in its brief on exceptions.⁷⁴ Trial Staff contends that Wisconsin Electric did not except to the Presiding Judge's holding that adopted Trial Staff's recommended fixed-cost compensation with one modification. Trial Staff contends that Wisconsin Electric also did not except to the Presiding Judge's holding that adopted Trial Staff's cost of capital proposals. Accordingly, Trial Staff argues, the appropriate fixed-cost compensation under the Original SSR Agreement is \$23,724,488 with a refund amount of \$13,274,584.⁷⁵

d. Commission Determination

26. As an initial matter, we agree with Trial Staff that Rule 711(d)(2) of the Commission's Rules of Practice and Procedure provides that a participant waives its objections to any part of an initial decision if it does not object in its brief on exceptions. We also agree that Wisconsin Electric did not specifically object to the Presiding Judge's holding that adopted Trial Staff's recommended fixed-cost compensation with one modification or the Presiding Judge's holding regarding Trial Staff's cost of capital proposals. The Commission's regulations provide that Wisconsin Electric has waived its objection to the Presiding Judge's holding. We nevertheless also find that Wisconsin Electric's arguments regarding fixed-cost compensation fail on the merits, as discussed below.

27. We affirm the Presiding Judge's finding that the negotiated fixed-cost component, based on a three-year historical average, has not been shown to be just and reasonable based on the record here.⁷⁶ We affirm the Presiding Judge's calculation of actual going-forward costs incurred by Wisconsin Electric, with one exception discussed below, as the just and reasonable fixed-cost component under the Original SSR Agreement.⁷⁷

⁷⁴ 18 C.F.R. § 385.711(d)(2) (2017).

⁷⁵ Trial Staff Brief Opposing Exceptions at 25-26 (noting that the refund calculation corrects a computational error in the Initial Decision, which is explained in Trial Staff's brief on exceptions).

⁷⁶ The Court of Appeals for the District of Columbia Circuit has held that, in certain circumstances, the Commission has "authority to propose modifications to a utility's [FPA section 205] proposal *if the utility consents to the modifications.*" *NRG Power Mktg., LLC v. FERC*, 862 F.3d 108, 114-15 (D.C. Cir. 2017).

⁷⁷ We note that, in *Midcontinent Indep. Sys. Operator, Inc.*, 156 FERC ¶ 61,205, at P 81 (2016), the Commission directed MISO to suspend refunds of previously allocated

28. We find that MISO failed to meet its burden to show that the negotiated fixed-cost compensation is just and reasonable and consistent with the Tariff. As required by the Tariff, compensation for the Original SSR Agreement must be limited to Wisconsin Electric's going-forward costs,⁷⁸ and the record shows that the negotiated amount was not shown to be a reasonable estimate of Wisconsin Electric's going-forward costs. In fact, the negotiated amount greatly exceeded Wisconsin Electric's actual going-forward costs.⁷⁹ Because the negotiated compensation was not shown to be just and reasonable, we find that it is reasonable for the Presiding Judge to base the fixed-cost component on Wisconsin Electric's actual costs.

29. We also find that, contrary to Wisconsin Electric's assertions, the Presiding Judge's decision to base the fixed-cost component on Wisconsin Electric's actual costs is not inconsistent with the negotiated approach to SSR compensation outlined in the Tariff. The Commission previously determined that MISO's negotiated approach would "provide compensation *only* for an SSR [Unit]'s going-forward costs and [would] consider cost-based factors . . . when negotiating compensation."⁸⁰ In this proceeding, Wisconsin Electric's negotiated fixed-cost compensation was not shown to be just and reasonable and was in fact substantially more than its actual going-forward costs. Wisconsin Electric attempts to make a distinction between a negotiated rate approach and a cost-of-service rate approach, but the Tariff in effect for the Original SSR Agreement

Presque Isle SSR costs under Rate Schedule 43G until the Commission issued an order on this Initial Decision finalizing the amount of Presque Isle SSR costs that will be allocated among benefitting load-serving entities. The Commission also directed MISO, within 45 days of the Commission order on this Initial Decision, to file a detailed refund report describing how MISO intends to effectuate the payment of refunds to those load-serving entities that were overcharged under an unjust and unreasonable cost allocation methodology approach formerly used for the Presque Isle Units and adjusting to account for resettlements of Presque Isle SSR costs that have already been made according to the refund reports filed in Docket No. ER14-2952-005. Accordingly, MISO must file such a refund report within 45 days of the date of this order.

⁷⁸ MISO, FERC Electric Tariff, Module C, § 38.2.7.e(ii) (30.0.0) ("The SSR Agreement will provide compensation *only* for going forward costs (i.e., the costs that will be incurred by an SSR Unit owner or operator to remain in-service that are in excess of the costs the SSR Unit would have incurred had it been retired or suspended.)) (emphasis added).

⁷⁹ See Initial Decision, 156 FERC ¶ 63,013 at P 40 (noting that Wisconsin Electric was ultimately compensated nearly 9 times more than the costs it actually incurred).

⁸⁰ 2012 SSR Order, 140 FERC ¶ 61,237 at P 140.

explicitly restricts SSR compensation to the resource's going-forward costs. The Tariff allows flexibility for MISO and the resource owner to reach an appropriate level of compensation (i.e., negotiate the SSR compensation), but the Tariff in effect for the Original SSR Agreement also clearly states that compensation shall be limited to the resource's going-forward costs and subject to Commission review through a section 205 filing. In this case, the Commission preliminarily found that the negotiated compensation for the Presque Isle Units' going-forward costs provided for in the section 205 filing made for the Original SSR Agreement was not shown to be just and reasonable.⁸¹ Therefore, the negotiated compensation was set for hearing and settlement judge procedures.⁸²

30. Furthermore, the Commission has an express statutory responsibility to ensure that jurisdictional rates are just and reasonable.⁸³ The fact that MISO and Wisconsin Electric came to an agreement on the negotiated rate does not require the Commission to accept the rate especially where it has been shown to exceed the resource's going-forward costs,

⁸¹ Original SSR Agreement Order, 148 FERC ¶ 61,071 at P 89.

⁸² *Id.*

⁸³ 16 U.S.C. § 824d(a) (2012) (“All rates and charges . . . subject to the jurisdiction of the Commission . . . shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.”).

contrary to the Tariff.⁸⁴ Moreover, we find no merit in the argument that a three-year historical average was an acceptable approach to determining the fixed-cost component in other SSR Agreements and thus must be applied here; the just and reasonable approach in one case depends on the particular factual circumstances present in that case, and will not necessarily be the just and reasonable approach in another.⁸⁵ Further, we note that the Tariff neither prevents nor requires the use of a three-year average of historical costs to determine the appropriate compensation under an SSR Agreement. MISO is also not prevented from using a three-year average of historical costs as a basis to determine SSR compensation in the future. But in any case, SSR compensation must not exceed a resource's going-forward costs or a full cost-of-service, depending on the Tariff language in effect at the time.⁸⁶ In other words, the compensation paid to Wisconsin Electric under the SSR Agreements was not rejected because it used a three-year simple average of historical costs to calculate SSR compensation, but because those estimates were shown to far exceed the SSR compensation that is prescribed under the Tariff.

31. We reject the Michigan Aligned Parties' argument that the Presiding Judge erred in using a long-term cost of capital to calculate Wisconsin Electric's carrying cost of inventory. The Commission treats fuel inventory as part of working capital which is placed in rate base and earns a return predicated on the weighted cost of long-term capital.⁸⁷ Accordingly, we affirm the Presiding Judge's adoption of the economic cost of capital proposed by Trial Staff to compute carrying costs rather than the Michigan Aligned Parties' proposal.

32. As mentioned above, we find that the fixed-cost compensation component under the Original SSR Agreement calculated by the Presiding Judge must be adjusted further. We agree with the Michigan Commission, the Michigan Aligned Parties, and Trial Staff

⁸⁴ *Florida Power and Light Co.*, 98 FERC ¶ 61,325 (2002) (denying rehearing request regarding executed interconnection and operation agreement accepted subject to condition with directives to make revisions to the agreement).

⁸⁵ We also note that compensation under other SSR Agreements was either accepted outright by the Commission or was set for hearing and later settled. In other words, this proceeding is the first time that SSR costs have been fully-litigated before an Administrative Law Judge.

⁸⁶ *See supra* note 5.

⁸⁷ *See Southern California Edison Co.*, 53 FERC ¶ 61,408, at 62,418-62,419 (1990) ("The cost of a reasonable fuel inventory level is placed in rate base, along with other working capital components, to allow the utility to earn a return on its investment.").

that the Presiding Judge miscalculated the adjustment to the fixed-cost compensation attributable to the skeleton work crew. The Michigan Commission's larger adjustment should have further reduced the fixed-cost compensation over the compensation calculated by Trial Staff. Therefore, after subtracting the difference between Trial Staff's skeleton work crew calculation of \$2,469,658 and the Michigan Commission's skeleton work crew calculation of \$2,649,101, which is \$179,443, from Trial Staff's proposed fixed-cost compensation of \$23,903,931, the appropriate fixed-cost compensation under the Original SSR Agreement is \$23,724,488.⁸⁸

2. Variable-Cost Component

a. Initial Decision

33. The Presiding Judge found that the variable-cost component to compensation under the Original SSR Agreement of \$15,825,341 is just and reasonable, including some \$663,466 of disputed variable costs.⁸⁹ The Michigan Aligned Parties argued that MISO did not carry its burden to prove that \$663,466 of variable costs associated with the Original SSR Agreement should be recovered because, the Michigan Aligned Parties alleged, MISO did not properly file the correct and complete version of the Original SSR Agreement with its direct testimony on August 26, 2015. The Presiding Judge determined that the late-filed direct testimony from MISO witness, Mr. Weissenborn, outlining the component's methodology and calculations, aligns with the explanation of variable-cost compensation under the Original SSR Agreement.⁹⁰ The Presiding Judge accepted Mr. Weissenborn's testimony as late-filed direct testimony and provided participants the opportunity to file additional answering and cross-answering testimony to address Mr. Weissenborn's testimony. The Presiding Judge further stated that no parties availed themselves of that opportunity and, therefore, the Presiding Judge dismissed the Michigan Aligned Parties' contention on that issue.⁹¹

⁸⁸ As discussed in more detail below, the fixed-cost compensation total listed here excludes compensation for capital expenditures that Wisconsin Electric must refund pursuant to the Clawback Provision. This amount should be further reduced by the Original SSR Agreement's share of refunds due under the Clawback Provision for the expensed generator turbine overhaul repair (which is \$738,530), which is calculated below. *See infra* PP 51-60, 67-69.

⁸⁹ Initial Decision, 156 FERC ¶ 63,013 at PP 51, 54.

⁹⁰ *Id.* P 53 (citing Ex. WEC-5 at 23:20–25:7; Ex. MID-1 at 9:7–10:3, 11:6–8, 12:1–13:19, 14:5–15:23; Ex. MID-2 at 20, 39–41).

⁹¹ *Id.* PP 52-54.

b. Commission Determination

34. We affirm the Presiding Judge’s finding that the variable-cost component to compensation under the Original SSR Agreement of \$15,825,341 is just and reasonable. MISO met its burden to show the justness and reasonableness of this cost component and no party submitted exceptions regarding this issue. The variable-cost component covers inputs such as fuel and environmental operations costs that are dependent on the amount of generation provided by the generator, and Mr. Weissenborn’s testimony sufficiently supports the level of variable-cost compensation under the Original SSR Agreement.

3. Clawback Provision⁹²

a. Initial Decision

35. The Presiding Judge stated that Wisconsin Electric returned the Presque Isle Units to non-SSR service on February 1, 2015 and, therefore, refunds of certain capital expenditures incurred under the Original SSR Agreement and the Replacement SSR Agreement are required under the Clawback Provision in section 38.2.7.e(i) of the Tariff, which describes a requirement to refund certain SSR compensation in the event that a suspension or retirement SSR Unit returns to service.⁹³ Specifically, section 38.2.7.e(i) requires the owner or operator of the SSR Unit to:

refund to the Transmission Provider with interest all costs, less depreciation, for repairs and capital expenditures that were needed to continue operation of the Generation Resource or SCU and to meet applicable regulations and other requirements (including environmental) while the Generation Resource or SCU was subject to an SSR Agreement if the owner or operator: (1) rescinds its decision to Suspend or to Retire the unit while it is designated a SSR, (2) returns a unit to service following its previous designation as an SSR Unit and later retirement of the unit; or (3) returns a unit to service on schedule (i.e. returns to service consistent with an

⁹² We note that, although the “Clawback Provision” section of the order is located under the “Original SSR Agreement” heading, the discussion and determination also apply to the Replacement SSR Agreement.

⁹³ Initial Decision, 156 FERC ¶ 63,013 at PP 58-61 (citing 2012 SSR Order, 140 FERC ¶ 61,237 at P 138; *Ameren*, 148 FERC ¶ 61,057 at PP 7, 12, 44; *Midwest Indep. Transmission Sys. Operator, Inc.*, 153 FERC ¶ 61,313 (2015)).

Attachment Y Notice to Suspend operations) from the designation as an SSR Unit.

The Presiding Judge found that Wisconsin Electric must refund to MISO \$9,541,745 in capital expenditures made under the Original SSR Agreement that were needed to continue the operation of the Presque Isle Units pursuant to the Clawback Provision.⁹⁴ The Presiding Judge also found that Wisconsin Electric must refund to MISO all capital costs received under the Replacement SSR Agreement, as adjusted pursuant to paragraph 87 of the Initial Decision, that were needed to continue the operation of the Presque Isle Units pursuant to the Clawback Provision.⁹⁵ The Presiding Judge disagreed with MISO's and Wisconsin Electric's interpretation of section 38.2.7.e of the Tariff that costs must have been expended for *both* continued operation of the generation resource *and* to meet applicable regulations and other requirements (including environmental) in order for refunds to be warranted under the provision. Instead, the Presiding Judge determined that MISO's and Wisconsin Electric's interpretation of section 38.2.7.e of the Tariff ignored relevant regulatory history, and he found that the Commission intended to include all capital costs under the Clawback Provision, not just costs for environmental compliance. The Presiding Judge also agreed with the Michigan Commission that holding SSR customers responsible for 100 percent of major capital expenditures now benefitting system-wide customers is contrary to cost-causation principles. The Presiding Judge noted that basic Commission policy states that allocation of costs must be roughly commensurate with benefits received.⁹⁶

36. The Presiding Judge rejected MISO's and Wisconsin Electric's argument that a disjunctive "or" should have been used (i.e., continued operation of the generation resource *or* to meet applicable regulations and other requirements (including environmental)) if only one of the elements listed had to be satisfied in order for refunds to be warranted under the provision. The Presiding Judge stated that an "or" could have been used instead of an "and" but that the regulatory history shows, as stated above, that the Commission intended to make all capital expenditure subject to clawback, and that under the principles of *contra proferentem*, ambiguity is construed against the drafting party (i.e., MISO). Additionally, the Presiding Judge noted that MISO's and Wisconsin Electric's arguments fail to consider the use of the word "and" as a coordinating

⁹⁴ *Id.* P 73.

⁹⁵ *Id.* PP 87, 91-94. We note that the Presiding Judge did not provide a specific dollar amount for capital expenditures required to be refunded pursuant to the Clawback Provision for the Replacement SSR Agreement.

⁹⁶ *Id.* P 62 (citing *Ill. Commerce Comm'n v. FERC*, 576 F.3d 470, 476-77 (7th Cir. 2009)).

conjunction, which associates a list of equivalent elements that are not interdependent or co-required.⁹⁷ The Presiding Judge concluded that all capital costs, not just costs for environmental compliance, are subject to refund under the Clawback Provision.

37. The Presiding Judge disagreed with the Michigan Commission's and the Michigan Aligned Parties' assertion that Wisconsin Electric is required to refund maintenance expenses in addition to capitalized costs of repairs because the Clawback Provision phrase "all costs" includes an expansive interpretation of "repair."⁹⁸ Instead, the Presiding Judge agreed with Trial Staff's arguments that the history of the MISO SSR Tariff provisions shows that "repairs" was intended to be limited to capital repairs and that reading "repairs" to include non-capital repairs contradicts the Commission's application of the term "depreciation" to those costs, as expenses are not depreciated.⁹⁹ Given this, the Presiding Judge did not provide for any refunds under either the Original SSR Agreement or the Replacement SSR Agreement for \$2,395,301 in total costs for generator turbine overhaul, which were expensed and not capitalized under both SSR Agreements.¹⁰⁰

b. Briefs on Exceptions

38. Wisconsin Electric contends that the Presiding Judge erred in finding that Wisconsin Electric must refund \$9,541,745 in capital expenditures made under the Original SSR Agreement pursuant to the Clawback Provision, as the Original SSR Agreement was entered into because of a suspension of operations that necessarily presupposed a return to service.¹⁰¹ Wisconsin Electric argues that the Initial Decision

⁹⁷ *Id.* PP 63-66 (citing William Strunk, Jr. & E.B. White, *The Elements of Style* 91 (Longman, 4th ed. 2000)).

⁹⁸ *Id.* PP 70, 73.

⁹⁹ *See id.* PP 71-73 (citing Trial Staff Initial Br. at 15 (citing 2012 SSR Order, 140 FERC ¶ 61,237 at PP 115-116)).

¹⁰⁰ *Id.* PP 68-73, 91-94 (agreeing with Trial Staff that only capitalized costs of repairs should be refunded and rejecting the Michigan Commission's and the Michigan Aligned Parties' position that expenses repairs, including \$2,395,301 incurred for a generator turbine overhaul, should be refunded pursuant to the Clawback Provision). Specifically, \$738,530 was expensed under the Original SSR Agreement and \$1,656,771 was expensed under Replacement SSR Agreement for costs associated with the generator turbine overhaul. *See* Ex. PSC-21.

¹⁰¹ Wisconsin Electric Brief on Exceptions at 20-22. We note that Wisconsin Electric makes this argument with regard to the Original SSR Agreement and not the

fails to recognize that the Clawback Provision does not apply to suspension SSR Agreements because suspension SSR Agreements presume the return of the SSR Unit to service following the conclusion of the suspension period. Therefore, Wisconsin Electric argues that it would be nonsensical to include environmental capital costs in suspension SSR compensation only to have those amounts refunded once the units comes out of suspension and return to service, and as such, Wisconsin Electric argues that the fixed-cost component of the Original SSR Agreement never included environmental capital costs, and no refunds are due under that agreement.¹⁰²

39. Wisconsin Electric also argues that the Initial Decision is incorrect in determining that the Clawback Provision applies to all capital costs, instead of only environmental capital costs.¹⁰³ According to Wisconsin Electric, the plain meaning of the Clawback Provision is that all elements preceding and following the word “and” are required before refunds are warranted (i.e., costs must have been expended for *both* continued operation of the Presque Isle Units *and* to meet applicable regulations and other requirements (including environmental)).

40. The Michigan Commission and the Michigan Aligned Parties argue that the Presiding Judge erred in disallowing refunds for the expensed generator turbine overhaul by interpreting the meaning of the words “costs . . . for repairs” in the Clawback Provision to include only the costs of repairs that have been capitalized.¹⁰⁴ The Michigan Commission and the Michigan Aligned Parties argue that the Clawback Provision separately identifies “all costs . . . for repairs” and “capital expenditures” and, therefore, the Presiding Judge’s decision to interpret “repairs” as including only “depreciable, capital repairs” fails to give meaning to the word “repairs” because the Clawback Provision already requires clawback of capitalized repairs under the term “capitalized expenditures.”¹⁰⁵ The Michigan Commission and the Michigan Aligned Parties argue that the Presiding Judge’s interpretation reads “repairs” out of the

Replacement SSR Agreement, as the Replacement SSR Agreement was entered into because Wisconsin Electric subsequently sought to retire the Presque Isle Units.

¹⁰² *Id.*

¹⁰³ *Id.* at 21-22.

¹⁰⁴ Michigan Commission Brief on Exceptions at 7 (citing MISO, FERC Electric Tariff, Module C, § 38.2.7.e(i) (39.0.0) (“[A]ll costs, less depreciation, for repairs and capital expenditures”)); Michigan Aligned Parties Brief on Exceptions at 8-9, 15-21.

¹⁰⁵ Michigan Commission Brief on Exceptions at 7 (citing Initial Decision, 156 FERC ¶ 63,013 at P 73); Michigan Aligned Parties Brief on Exceptions at 15.

Clawback Provision, which is contrary to the basic principle of avoiding interpretations of statutes that fail to give meaning to express provisions and render other provisions superfluous.¹⁰⁶ Regarding the Presiding Judge’s acceptance of Trial Staff’s position that the term “depreciation” in the Clawback Provision acts as a precondition to the clawback of costs of repairs, the Michigan Commission argues that the term should be interpreted as “applicable depreciation” rather than a limitation of the refund of “costs . . . for repairs.”¹⁰⁷ The Michigan Commission also disagrees with the determination that the inclusion of only capitalized repairs is consistent with the regulatory history of the Clawback Provision and argues that, in fact, the regulatory history shows that the Commission did not intend to limit refunds to only capitalized repairs.¹⁰⁸ The Michigan Commission also contends that the Presiding Judge’s interpretation is contrary to the underlying intent and purpose of the Clawback Provision, which is to fairly apportion responsibility for costs that benefit both SSR and system-wide customers.

41. The Michigan Commission and the Michigan Aligned Parties argue that charging SSR customers for the total \$2,395,301 cost of the expensed generator turbine overhaul repairs that were incurred to provide service under the limited terms of the Original and Replacement SSR Agreements, but that upon return to regular utility service will benefit system customers for a minimum of seven years, allocates an unjust and unreasonable amount of costs to SSR customers and defeats the intent and purpose of the Clawback Provision.¹⁰⁹ The Michigan Commission and the Michigan Aligned Parties argue that the generator turbine overhaul is a long-term repair that benefits not only SSR customers but also future system-wide utility customers. In fact, the Michigan Aligned

¹⁰⁶ Michigan Commission Brief on Exceptions at 8 (citing *Ratzlaf, et al., v. United States*, 510 U.S. 135, 140-141 (1994)); Michigan Aligned Parties Brief on Exceptions at 8, 15 (citing 2A Sutherland Statutes and Statutory Construction § 46.6 (7th Ed. 2015) (citing *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995))).

¹⁰⁷ Michigan Commission Brief on Exceptions at 9.

¹⁰⁸ *Id.* at 10. The Michigan Commission argues that, contrary to the Presiding Judge’s conclusion, the Commission did not adopt the identical language requested by a 2012 intervenor cited in the Initial Decision. Instead, the Michigan Commission argues, the intervenor requested the Commission to allow MISO to recover “capital costs . . . of repairs” and the language approved by the Commission did not include the requested “capital costs of repairs” language. *Id.* (citing Initial Decision, 156 FERC ¶ 63,013 at P 72).

¹⁰⁹ *Id.* at 7-10 (citing Tr. 587 (Wolter) (stating that Wisconsin Electric schedules a maintenance outage to conduct a generator turbine overhaul repair approximately every seven to nine years); Michigan Aligned Parties Brief on Exceptions at 9, 17-19.

Parties contend that the benefits of this generator turbine overhaul will last for seven to nine years until the next periodically scheduled overhaul occurs and that the overhaul barely benefited the SSR customers because the Presque Isle Unit No. 6 turbine was shut down during the period of the overhaul and it was just returning to service when the Replacement SSR Agreement terminated effective February 1, 2015.¹¹⁰ The Michigan Commission also points out that Trial Staff witness Mr. Rattey stated that future customers benefit from major maintenance that utilities schedule every seven to nine years.¹¹¹ Therefore, the Michigan Aligned Parties argue, a more nuanced, fact-specific application of the Clawback Provision is required so the generator turbine overhaul costs are captured under the Clawback Provision even though the costs were not capitalized.¹¹² The Michigan Aligned Parties contend that the Tariff should be construed to permit clawback of certain non-capitalized repairs where clawback would be consistent with the purpose and intent of the Tariff provision. The Michigan Commission concludes that Wisconsin Electric should refund to MISO the \$2,395,301 cost for major repairs related to the generator turbine overhaul (specifically, \$738,530 should be refunded under the Original SSR Agreement and \$1,656,771 should be refunded under the Replacement SSR Agreement).¹¹³

42. Last, the Michigan Aligned Parties also argue that cost-causation principles support the application of the Clawback Provision to major repairs, such as the generator turbine overhaul. They argue that, although the Initial Decision recognized that “[b]asic Commission policy states that allocation of costs must be roughly commensurate with benefits received,”¹¹⁴ it did not apply this principle with regard to major repairs because 100 percent of those costs were applied to SSR customers even though utility customers have received the benefits of the repairs since the Presque Isle Units returned to service. The Michigan Aligned Parties contend that cost-causation principles demand that those utility customers receiving the benefits should pay for the major repairs.

¹¹⁰ Michigan Aligned Parties Brief on Exceptions at 18-19.

¹¹¹ Michigan Commission Brief on Exceptions at 11 (citing Tr. 788-89, 791:17-20 (Rattey)).

¹¹² Michigan Aligned Parties Brief on Exceptions at 9, 17.

¹¹³ Michigan Commission Brief on Exceptions at 11-12.

¹¹⁴ Michigan Aligned Parties Brief on Exceptions at 19-20 (citing Initial Decision, 156 FERC ¶ 63,013 at P 20 (citing *Ill. Commerce Comm’n v. FERC*, 576 F.3d 470, 476-77 (7th Cir. 2009))).

c. Briefs Opposing Exceptions

43. The Michigan Commission argues that Wisconsin Electric is incorrect in claiming that the Presiding Judge erred by finding that \$9,514,745 of capital expenditures recovered under the Original SSR Agreement must be refunded pursuant to the Clawback Provision.¹¹⁵ The Michigan Commission refutes Wisconsin Electric's position that compensation under the Original SSR Agreement never included amounts for environmental costs and that no refunds of such costs are due because, by definition, suspension SSR Units are destined to return to service, and it would be nonsensical to include costs in suspension SSR compensation only to have to refund those amounts once the unit comes out of suspension and returns to service. The Michigan Commission, the Michigan Aligned Parties, and Trial Staff object to Wisconsin Electric's argument that the Clawback Provision does not apply to a suspension SSR Agreement, such as the Original SSR Agreement.¹¹⁶ The Michigan Aligned Parties and Trial Staff contend that the Clawback Provision expressly applies to suspension SSR Agreements.¹¹⁷ The Michigan Commission also argues that Wisconsin Electric's position that the Clawback Provision does not apply to any suspension SSR Agreement is a new argument that was never presented to the Presiding Judge.¹¹⁸ Trial Staff argues that Wisconsin Electric's argument is factually and logically flawed because Wisconsin Electric negotiated for and actually did recover capital costs through the Original SSR Agreement. Trial Staff argues that these capital costs must be refunded under the Clawback Provision.¹¹⁹ Additionally, the Michigan Commission argues that the Presiding Judge's interpretation is consistent with cost-causation principles. According to the Michigan Commission, the capital expenditures incurred by Wisconsin Electric during the suspension period were needed to continue operation of the Presque Isle Units and therefore were properly allocated 100 percent to the SSR customers during the suspension period. The Michigan Commission

¹¹⁵ Michigan Commission Brief Opposing Exceptions at 23-26.

¹¹⁶ *Id.* at 23-24; Michigan Aligned Parties Brief Opposing Exceptions at 49; Trial Staff Brief Opposing Exceptions at 12-13, 17.

¹¹⁷ Michigan Aligned Parties Brief Opposing Exceptions at 49 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 153 FERC ¶ 61,313 at P 1 (approving tariff revisions effective September 24, 2012)); Trial Staff Brief Opposing Exceptions at 12-13, 17 (citing MISO, FERC Electric Tariff, Module C § 38.2.7.e(i) (39.0.0) ("if the owner or operator: (1) rescinds its decision to *Suspend* or to *Retire* the unit while it is designated a SSR." (emphasis added))).

¹¹⁸ Michigan Commission Brief Opposing Exceptions at 23-24.

¹¹⁹ Trial Staff Brief Opposing Exceptions at 17.

argues that the refund obligation under the Clawback Provision did not arise until Wisconsin Electric announced that it was terminating the Replacement SSR Agreement and returning the units to full service, and at that point, the system-wide customers began benefitting from the capitalized items installed during the suspension period.¹²⁰

44. The Michigan Commission also disagrees with Wisconsin Electric's claim that the Presiding Judge applied a faulty rationale in finding that *all* capital expenditures, and not just those needed for *both* continuation of operation and to meet applicable regulations and other requirements (including environmental), under both the Original SSR Agreement and the Replacement SSR Agreement should be refunded.¹²¹ The Michigan Commission argues that, to the contrary, the Presiding Judge's rationale is consistent with the plain language of section 38.2.7.e of the MISO Tariff and with cost-causation principles by allocating cost responsibility for capital expenditures to the various customers that benefit from such expenditures. The Michigan Commission contends that Wisconsin Electric's position that the Clawback Provision applies only to environmental costs is incorrect and that the Presiding Judge correctly determined that the contested "and" in the Clawback Provision links independent, equivalent ideas, not a group of required elements.

45. The Michigan Aligned Parties and Trial Staff argue that the Presiding Judge properly found that \$9,541,745 of costs recovered by Wisconsin Electric under the Original SSR Agreement, which included all capital costs (and not just those capital costs required for environmental compliance) should be refunded pursuant to the Clawback Provision.¹²² Trial Staff argues that regulatory history, Commission policy, and case law addressing statutory interpretation all support the application of the Clawback Provision to all capital expenditures incurred during an SSR period. Trial Staff argues that Wisconsin Electric's position contradicts the Commission orders requiring MISO to establish the Clawback Provision where the Commission, responding to arguments from MISO and protestors regarding recovery of capital costs (both capital costs for environmental regulatory and non-environmental capital costs), directed MISO to ensure that "SSRs are able to fully recover the capital costs associated with their continued operation . . . including costs to comply with environmental regulations" and to

¹²⁰ Michigan Commission Brief Opposing Exceptions at 24-25.

¹²¹ *Id.* at 25.

¹²² Michigan Aligned Parties Brief Opposing Exceptions at 48-49, 55-57 (noting that Michigan Aligned Parties' brief on exceptions took issue with other aspects of the Initial Decision's interpretation of the Clawback Provision, such as limiting clawback to only capitalized repairs and denying clawback of major repairs); Trial Staff Brief Opposing Exceptions at 11-23.

“implement a refund provision that requires SSRs that later return to service to refund . . . repairs or capital expenditures needed to meet the applicable environmental regulations.”¹²³ Trial Staff contends that MISO’s compliance filing following the 2012 SSR Order proposed a refund provision solely for environmental capital costs.¹²⁴ Trial Staff states that, in a further order, the Commission required an additional compliance filing based on a new concern that MISO had “not addressed whether [SSR Unit owners] should be required to refund additional costs (e.g., other capital costs associated with their continued operation).”¹²⁵ Trial Staff states that, following this compliance directive, MISO proposed a revised refund provision in September 2014, which ultimately became the Clawback Provision, and MISO explained that “[a]ll expenditures for repairs and capital expenditures on SSR-designated units are subject to refund (with interest, less depreciation),” under the new provision.¹²⁶ Trial Staff also contends that the Presiding Judge was correct to find that the use of the word “and” in the Clawback Provision (when requiring refunds of capital expenditures “that were needed to continue operation . . . *and* to meet applicable regulation and other requirements (including environmental)”) is a coordinating conjunction used to describe two types of capital costs subject to clawback.¹²⁷

46. Wisconsin Electric, on the other hand, contends that there is no ambiguity in the Tariff and that any clawed-back costs must be (1) needed to continue operation of the Generation Resource or SCU and (2) needed to meet applicable regulations and other requirements (including environmental). Wisconsin Electric argues that the only expenditures that meet those requirements amount to \$4,073,032, and the Commission should make this finding.¹²⁸

47. Trial Staff disagrees with the Michigan Commission’s and the Michigan Aligned Parties’ arguments that the Presiding Judge erred in finding that only depreciable, capital

¹²³ *Id.* at 14 (citing 2012 SSR Order, 140 FERC ¶ 61,237 at P 121).

¹²⁴ *Id.* at 15 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 148 FERC ¶ 61,056, at P 7 (2014)).

¹²⁵ *Id.* (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 148 FERC ¶ 61,056 at P 44).

¹²⁶ *Id.* (citing MISO, Compliance Filing Transmittal Letter, Docket No. ER12-2302, at 6 (filed Sept. 19, 2014)).

¹²⁷ Trial Staff Brief Opposing Exceptions at 17-19.

¹²⁸ Wisconsin Electric Brief Opposing Exceptions at 8-9.

repair costs are subject to clawback, and that an additional \$2,395,301 of generator turbine overhaul repair expenses should be refunded.¹²⁹ Trial Staff argues that the Michigan Commission's and the Michigan Aligned Parties' expansive interpretation is contrary to the terms and history of the Clawback Provision. Trial Staff also argues that the record does not support a finding that the disputed generator turbine overhaul repair costs represent capital costs. In response to the Michigan Commission's and the Michigan Aligned Parties' argument that the Clawback Provision separately identifies all costs for "repairs" and "capital expenditures" and therefore repairs should be read to include both capital and non-capital costs, Trial Staff contends that interpretation ignores context because the Clawback Provision provides that "*all costs, less depreciation, for repairs and capital expenditures . . .*" are subject to clawback.¹³⁰ Trial Staff argues that a repair is only capitalized, and thus depreciated, if it constitutes a "substantial addition by extending the useful life, operating capacity, or efficiency" of the property being repaired and, accordingly, the term "repairs" in the Clawback Provision only extends to capital repairs because only capitalized repair costs are depreciated.¹³¹ Trial Staff contends that any other reading would contradict the phrase "less depreciation."

48. Regarding the Michigan Commission's and the Michigan Aligned Parties' argument that a canon of statutory interpretation against surplus language requires the \$2,395,301 in generator turbine overhaul repairs to be clawed back, Trial Staff argues that the U.S. Supreme Court has stated that the preference for avoiding surplusage is not absolute,¹³² and that, where text is ambiguous, courts will look to legislative history to determine the drafter's intent. Trial Staff argues that the Commission made clear in the 2012 SSR Order that the Clawback Provision only applies to capital costs when requiring "MISO to continue to allow SSRs to recover *capital costs . . . of repairs or capital expenditures . . .*"¹³³ Trial Staff points out that both repairs and capital expenditures were presented as types of capital costs that the intervenors wanted to ensure were

¹²⁹ Trial Staff Brief Opposing Exceptions at 19-23.

¹³⁰ *Id.* at 20 (citing Ex. PSC-18 at 12 (emphasis added)).

¹³¹ *Id.* (citing *Northern Natural Gas Co.*, 121 FERC ¶ 61,002, at PP 20-24 (2007)).

¹³² *Id.* at 21 (citing *Lamie v. U.S. Trustee*, 540 U.S. 526, 536 (2004) ("[P]reference for avoiding surplusage constructions is not absolute . . . [w]here there are two ways to read the text . . . applying the rule against surplusage is, absent other indications, inappropriate.")).

¹³³ *Id.* at 21 (citing 2012 SSR Order, 140 FERC ¶ 61,237 at P 121 (emphasis added)).

recoverable, albeit subject to clawback, and the Commission used this language in instructing MISO to establish a refund provision.

49. In response to the Michigan Commission's and the Michigan Aligned Parties' argument that cost-causation principles support a finding that certain repair costs, such as the \$2,395,301 generator turbine overhaul expense, should be clawed-back, Trial Staff argues that the Clawback Provision follows the Commission's Uniform System of Accounts and ratemaking precedent by allocating costs by adding capital expenditures to rate base, which are then recovered through depreciation, and allowing more rapid recovery of expense items. Moreover, Trial Staff argues, repairs are only booked to plant accounts (capitalized and depreciated) where "the primary aim of [the expenditure] is to make the property affected more useful, more efficient, of greater durability, or of greater capacity."¹³⁴ Trial Staff contends that, otherwise, costs of repairs are included in expense accounts, and no record evidence was introduced during the hearing to prove that the \$2,395,301 for generator turbine overhaul had any of the above effects that would require its booking to plant accounts. Therefore, Trial Staff contends, the Presiding Judge's findings are correct, and he properly allocates costs between current and future customers.¹³⁵

50. Last, Wisconsin Electric also argues that the Michigan Aligned Parties and the Michigan Commission incorrectly assert that the Presiding Judge erred in failing to give meaning to the word "repairs" in the Clawback Provision by limiting the provision to only capitalized repairs.¹³⁶ Regarding the term "repairs," Wisconsin Electric argues that the Presiding Judge correctly followed Trial Staff's argument that reading "repairs" to include non-capital repairs contradicts the Commission's application of the term "depreciation" to those costs since expenses are not depreciated, and argues that the Commission should avoid creative interpretations designed to achieve a contrived result.¹³⁷

¹³⁴ *Id.* at 23 (citing 18 C.F.R. pt. 101, Operating Expense Instruction No. 2, Item 8 (2016); 18 pt. 101, Electric Plant Instruction No. 10(C)(3) (2016); *Northern Natural Gas Co.*, 121 FERC ¶ 61,002 at PP 20-24).

¹³⁵ *Id.* at 21-22.

¹³⁶ Wisconsin Electric Brief Opposing Exceptions at 7-9.

¹³⁷ *Id.*

d. Commission Determination

51. We affirm the Presiding Judge’s finding that all capital costs, not just capital costs to meet applicable regulations and other requirements (including environmental), are subject to refund under the Clawback Provision.

52. An early iteration of the Clawback Provision only required refunds of costs for repairs or capital expenditures needed to meet applicable environmental regulations, but the Commission questioned whether this went far enough, asking “whether [SSR Unit owners] should be required to refund additional costs (e.g., other capital costs associated with their continued operation).”¹³⁸ On compliance, MISO eliminated the language expressly limiting the clawback obligation to environmental costs and added the language that expanded the situations where refunds would be required: “The [resource owner] must refund . . . costs . . . that were needed to continue operation of the [unit] and to meet applicable regulations and other requirements (including environmental) while the [unit] was subject to an SSR Agreement”¹³⁹ MISO explained that the meaning of the revised Clawback Provision is that “[a]ll expenditures for repairs and capital expenditures on SSR-designated units are subject to refund (with interest, less depreciation).”¹⁴⁰ We find that this regulatory history shows that the compliance filings made by MISO expanded the types of costs subject to refund under the Clawback Provision, and the Commission accepted those revisions.¹⁴¹ We also find that this Tariff language applies to both the Original and the Replacement SSR Agreements. Accordingly, we affirm the Presiding Judge’s finding that \$9,514,745 of capital expenditures collected under the Original SSR Agreement must be refunded pursuant to the Clawback Provision. We also affirm the Presiding Judge’s finding that all capital expenditures collected under the Replacement SSR Agreement must be refunded pursuant to the Clawback Provision.

53. Regarding Wisconsin Electric’s contention that the Clawback Provision does not apply to suspension SSR Agreements such as the Original SSR Agreement, we agree

¹³⁸ *Midwest Indep. Transmission Sys. Operator, Inc.*, 148 FERC ¶ 61,056 at P 44.

¹³⁹ See MISO, Compliance Filing Transmittal Letter, Docket No. ER12-2302-003, at 6 (filed Sept. 19, 2014); see also MISO, FERC Electric Tariff, Module C, § 38.2.7.e(i) (39.0.0).

¹⁴⁰ MISO, Compliance Filing Transmittal Letter, Docket No. ER12-2302-003, at 6 (filed Sept. 19, 2014).

¹⁴¹ *Midwest Indep. Transmission Sys. Operator, Inc.*, 153 FERC ¶ 61,313, at ordering para. (D) (2015) (accepting MISO’s proposed tariff revisions, subject to condition).

with the Michigan Commission that Wisconsin Electric raises this argument for the first time in its brief on exceptions and, therefore, we need not address it.¹⁴² With this said, we do agree with the Michigan Aligned Parties and Trial Staff that suspension SSR Agreements are explicitly referenced in the Clawback Provision.¹⁴³

54. We reverse the Presiding Judge’s finding that only costs classified as capital expenditures are subject to refund under the Clawback Provision (i.e., excluding non-capitalized repairs). The Clawback Provision requires that an SSR owner must refund “with interest all costs, less depreciation, for repairs and capital expenditures that were needed to continue operation of the Generation Resource or SCU and to meet applicable regulations and other requirements (including environmental) while the Generation Resource or SCU was subject to an SSR Agreement.”¹⁴⁴ We find that if the Commission’s intent was to exclude non-capitalized repairs from being refunded, there would have been no need to include the word “repairs” in the provision, as the refund of capitalized repairs is already captured by the more general term of “capital expenditures.” To accept the Presiding Judge’s interpretation would render the term “repairs” meaningless, and we find that the correct reading of the Clawback Provision necessitates giving meaning to the term “repairs,” for the following reasons.

55. First, the regulatory history shows that the Commission was concerned that an SSR Agreement could be used by a generation resource to recover the costs for significant upgrades from load-serving entities in MISO, and then rescind its Attachment Y Notice, or otherwise return to service, without having to reimburse those

¹⁴² See, e.g., *Bluegrass Generation Co., L.L.C.*, 118 FERC ¶ 61,214, at P 95, *reh'g denied*, 121 FERC ¶ 61,018 (2007) (finding that an argument was improperly raised where the party raised the argument for the first time in its brief on exceptions).

¹⁴³ See MISO, FERC Electric Tariff, Module C, § 38.2.7.e(i) (39.0.0) (“The owner or operator of a Generation Resource . . . must refund . . .with interest all costs, less depreciation, for repairs and capital expenditures that were needed to continue operation of the Generation Resource or SCU and to meet applicable regulations and other requirements (including environmental) while the Generation Resource . . . was subject to an SSR Agreement if the owner or operator: (1) *rescinds its decision to Suspend* or to Retire the unit while it is designated a SSR, (2) returns a unit to service following its previous designation as an SSR Unit and later retirement of the unit; or (3) *returns a unit to service on schedule (i.e. returns to service consistent with an Attachment Y Notice to Suspend operations) from the designation as an SSR Unit.*”) (emphasis added).

¹⁴⁴ MISO, FERC Electric Tariff, Module C, § 38.2.7.e(i) (39.0.0).

upgrade costs.¹⁴⁵ Though the Commission uses the terms “capital improvements” and “capital expenditures” in the excerpts from the orders provided above, it also refers in the

¹⁴⁵ See 2012 SSR Order, 140 FERC ¶ 61,237 at P 137 (“[W]e understand MISO’s concern that SSR Agreements could be used to make significant capital improvements to resources that will ultimately retire or to allow a resource owner to inappropriately recover the cost of long-term capital expenditures from load-serving entities in MISO. For example, an SSR eligible for waiver from an environmental regulatory requirement could instead make a costly capital improvement and seek recovery under an SSR Agreement; or an SSR could recover the cost of significant upgrades required by environmental regulations under an SSR Agreement and then return to service by rescinding their Attachment Y Notice.”); *Midwest Indep. Transmission Sys. Operator, Inc.*, 148 FERC ¶ 61,056 at P 44 (“[B]y referring only to resources that rescind a decision to retire or suspend operations, MISO’s proposal fails to address the treatment of suspended SSRs that later return to service *on schedule* and without rescinding a decision to suspend operations (e.g., resources that return to service consistent with an initial Attachment Y Notice to suspend operations). We are concerned that this could allow SSR Agreements to be used to allow resource owners to inappropriately recover the cost of long-term capital expenditures from load-serving entities in MISO, as explained in the [2012] SSR Order.”).

2012 SSR Order to “significant upgrades,”¹⁴⁶ and it is also clear from the context of the discussion in these two orders that the Commission’s concern is ensuring that costs incurred under an SSR Agreement for upgrades that provide significant benefits after the end of SSR service are assigned to those who benefit from those upgrades. Moreover, as noted above, the Clawback Provision itself includes repairs and not just capital expenditures. On balance, we find that it is a reasonable interpretation of the Clawback Provision that certain repair costs, in addition to capital expenditures, should be refunded when an SSR Unit returns to service if the record indicates that those repair costs provide significant benefits to customers beyond the term of the SSR Agreement. Any other interpretation of the Clawback Provision would potentially allow SSR owners to recover the total cost for repair expenses that provide significant benefits beyond the term of the SSR Agreement from SSR customers simply because the SSR owner chose not to capitalize those expenses. With this said, we note that repairs incurred by an SSR owner that do not produce significant benefits after the end of SSR service would not be subject to refund under the Clawback Provision.¹⁴⁷

56. Our interpretation of the Clawback Provision is supported by the Commission’s previous determination in the *Ameren* case that a non-capitalized generator turbine overhaul repair would be subject to the Clawback Provision if the SSR returned to regular utility service. In its Edwards Year 2 SSR Agreement in Docket No. ER14-1210 for SSR service provided by the Edwards Unit 1 SSR addressed in the *Ameren* order, Illinois Power Company proposed to expense a \$4.7 million generator turbine overhaul. The Commission in *Ameren* did not object to Illinois Power Company’s classification of this generator turbine overhaul repair as a non-capitalized expense when it set that SSR’s rates for hearing and settlement judge procedures, even though that classification was protested.¹⁴⁸ However, later in the *Ameren* order, the Commission grappled, like in the instant case, with the issue of whether any refunds should be provided for this non-

¹⁴⁶ *Id.* P 137 (“For example, . . . an SSR could recover the cost of significant upgrades required by environmental regulations under an SSR Agreement and then return to service by rescinding their Attachment Y Notice.”).

¹⁴⁷ *See id.* (discussing the Commission’s concern that an SSR Agreement could be used to recover the costs for significant upgrades without having to refund those costs if the generation resource returned to service).

¹⁴⁸ *Ameren*, 148 FERC ¶ 61,057 at PP 204, 213 (declining to prevent an SSR owner from expensing a generator turbine overhaul repair that the SSR owner argued could not be treated as capital because the SSR Unit would be retired as soon as it is no longer needed for SSR service and therefore there would be no opportunity to recover depreciation).

capitalized generator turbine overhaul should the Edwards Unit 1 SSR return to regular utility service.¹⁴⁹

57. Specifically, the Illinois Commerce Commission (Illinois Commission) protested the following language at Section 3B of the SSR Agreement: “Participant may request that MISO terminate this Agreement if the Participant agrees in writing to continue to operate the Unit without an SSR Agreement until the alternative(s) identified by MISO have been implemented to maintain the reliability of the Transmission System.” The Illinois Commission stated that it appeared that this language would permit Illinois Power Company to install major plant upgrades such as the generator turbine overhaul project, recover those costs from captive ratepayers and then terminate the SSR Agreement in order to participate in the electricity markets, at least until “the alternative(s) identified by MISO have been implemented to maintain the reliability of the Transmission System.” The Illinois Commission recommended that the Commission either direct MISO to delete the quoted sentence, or alternatively, require that, if Illinois Power Company terminates the SSR Agreement after installing significant capital equipment and returns to market operations, then the amounts paid by ratepayers toward such capital costs shall be refunded.¹⁵⁰ In response to the Illinois Commission’s concerns, the Commission found that if Edwards Unit 1 were to continue operating after its designation as an SSR ends, the 2012 SSR Order required MISO to provide Tariff revisions addressing the treatment of SSR Units that later return to service, including to ensure that such resources refund with interest all costs, less depreciation, of repairs or capital expenditures needed to meet the applicable environmental regulations.¹⁵¹

58. Additionally, we note that the alternative outcome here could lead to perverse incentives. For example, if the Commission were to accept the interpretation of the Presiding Judge, a generator that is needed to operate as an SSR Unit would be allowed to charge captive customers for significant repairs needed to continue operation under an SSR Agreement and escape any requirement to refund those costs if it later returns to regular utility service simply by characterizing those repair costs as non-capital. In the instant case, Wisconsin Electric chose to expense the generator turbine overhaul repair, even though the record indicates that this repair provides benefits for seven to nine years, which results in significant benefits to customers beyond the terms of the Original and Replacement SSR Agreements. Moreover, SSR Agreements are limited under the Tariff

¹⁴⁹ *Id.* P 213.

¹⁵⁰ *Id.* P 174.

¹⁵¹ *Id.* P 213 (citing 2012 SSR Order, 140 FERC ¶ 61,237 at P 138). *See also Midwest Indep. Transmission Sys. Operator, Inc.*, 148 FERC ¶ 61,056 at P 44.

to one-year terms except in exigent circumstances,¹⁵² and therefore, it is highly likely that SSR Unit owners will expense all significant repair costs. Accordingly, if the Clawback Provision were read to only require refunds of capitalized costs, most, if not all, significant repair costs incurred by an SSR to continue service under an SSR Agreement would not be refundable if it later returned to regular utility service, simply because those costs were expensed due to the one-year term of SSR Agreements, rendering the Clawback Provision virtually meaningless. Therefore, we find that the decision of an SSR owner to capitalize repair costs incurred under an SSR Agreement cannot be the determining factor as to whether those costs are subject to refund under the Clawback Provision. Instead, a more fact-specific inquiry, focusing on whether a repair provides significant benefits to other customers beyond the term of an SSR Agreement should the SSR return to regular utility service, is necessary to determine which non-capitalized repair costs, in addition to capital costs, are subject to the Clawback Provision.

59. Trial Staff argues that development of the Clawback Provision centered on capital costs, both for repairs and capital expenditures, but as discussed above, we find that interpretation of the regulatory history is too narrow. Similarly, Trial Staff's interpretation that the inclusion of the term "less depreciation" in the Clawback Provision means that only capital expenditures are subject to refund under the Clawback Provision is also too restrictive. Trial Staff's arguments ignore the main intent of the provision to prevent the inequitable recovery from SSR customers for repairs that provide significant benefits beyond the term of the SSR Agreement should the SSR later return to regular utility service. Moreover, as discussed above, this interpretation gives no effect to the term "repairs" in the Clawback Provision.

60. Consequently, we find that the \$2,395,301 of generator turbine overhaul costs, which Wisconsin Electric classified as a non-capitalized expense, is a repair that is subject to the Clawback Provision and must be refunded. There is sufficient record evidence showing that the generator turbine overhaul costs will provide significant benefits after the end of SSR service and, therefore, those costs are subject to the

¹⁵² See 2012 SSR Order, 140 FERC ¶ 61,237 at P 106 ("[A]n SSR Agreement must not exceed a one-year term except in exigent circumstances.").

Clawback Provision.¹⁵³ Additionally, we find that the refund for the generator turbine overhaul pursuant to the Clawback Provision should be pro-rated to account for the SSR customers that benefited from the generator turbine overhaul, as discussed below. According to the record, the generator turbine overhaul repair is scheduled every seven to nine years,¹⁵⁴ and we find that it is reasonable to pro-rate the cost for the repair over the average of seven to nine years (i.e., eight years). Wisconsin Electric incurred costs for the generator turbine overhaul repair starting in September 2014 and ending in December 2014. Therefore, we approximate the in-service date of the turbine at issue to be January 1, 2015. Since the Replacement SSR Agreement was terminated effective January 31, 2015, SSR customers under the Replacement SSR Agreement enjoyed the benefits of the generator turbine overhaul costs for one month. Accordingly, after pro-ration, Wisconsin Electric must refund \$2,370,350 of generator turbine overhaul costs pursuant to the Clawback Provision.¹⁵⁵ Further, since the generator turbine overhaul costs spanned both the Original and Replacement SSR Agreements, we find that \$738,530 of those costs are attributable to the Original SSR Agreement and \$1,631,820 are attributable to the Replacement SSR Agreement.¹⁵⁶

¹⁵³ We note that there is not sufficient record evidence to find that any other repairs would provide significant benefits after the end of SSR service, and therefore, no other repair costs incurred by Wisconsin Electric are subject to refund under the Clawback Provision.

¹⁵⁴ *See* Tr. 587 (Wolter) (stating that Wisconsin Electric schedules a maintenance outage to conduct a generator turbine overhaul repair approximately every seven to nine years).

¹⁵⁵ $\$2,395,310$ (generator turbine overhaul costs) / 96 months (8-year useful life) = $\$24,951$ (monthly pro-ration amount). $\$2,395,301 - \$24,951 = \$2,370,350$ (generator turbine overhaul costs pro-rated for one month of service under the Replacement SSR Agreement).

¹⁵⁶ *See* Ex. PSC-21. The generator turbine overhaul cost attributable to the Original SSR Agreement is calculated by adding the costs from September 2014 and half of October 2014 (which is \$738,530) and the cost attributable to the Replacement SSR Agreement is calculated by adding the costs from half of October 2014 and November – December 2014 and then deducting the amount for pro-ration ($\$1,656,771$ (total cost for generator turbine overhaul cost under Replacement SSR Agreement) - $\$24,951$ (monthly pro-ration amount) = $\$1,631,820$). The amount for pro-ration is deducted only from the Replacement SSR Agreement costs because SSR customers received benefits from the repair during the term of the Replacement SSR Agreement.

4. Refunds

a. Initial Decision

61. As discussed above, the Presiding Judge found that Wisconsin Electric must refund \$9,541,745 in capital expenditures made under the Original SSR Agreement pursuant to the Clawback Provision in section 38.2.7.e of the Tariff. The Presiding Judge also found that the total refund Wisconsin Electric owes for the fixed-cost compensation under the Original SSR Agreement, including the amount to be refunded pursuant to the Clawback Provision, is \$12,915,698 plus interest. The Presiding Judge stated that this refund amount is the difference between Wisconsin Electric's as-filed claim of \$36,999,072 for fixed-cost compensation and the Presiding Judge's finding of the appropriate amount of fixed-cost compensation of \$24,083,374.¹⁵⁷

b. Briefs on Exceptions

62. MISO argues that the Initial Decision is inconsistent in regard to its determination of refunds under the Original SSR Agreement by combining the adjustments to fixed-cost compensation and the Clawback Provision refund amounts. MISO states that the Initial Decision finds a "total refund . . . inclusive of clawback" of \$12,915,698, and separately finds that \$9,541,745 must be refunded pursuant to the Clawback Provision. MISO contends that permitted fixed-cost compensation and the Clawback Provision refunds must be separately and clearly stated.¹⁵⁸

63. MISO also argues that the timing of the refund obligation is not clearly outlined in the Initial Decision, which it argues is necessary for calculating interest.¹⁵⁹

c. Briefs Opposing Exceptions

64. The Michigan Commission rejects as without merit MISO's allegation that the Presiding Judge erred by failing to clearly identify permitted fixed-cost compensation and the Clawback Provision portions of the total refund.¹⁶⁰ The Michigan Commission

¹⁵⁷ Initial Decision, 156 FERC ¶ 63,013 at P 77, n.180. As noted above, this amount was calculated incorrectly by the Presiding Judge and should actually be \$23,724,488.

¹⁵⁸ MISO Brief on Exceptions at 8-9.

¹⁵⁹ *Id.* at 10-11.

¹⁶⁰ Michigan Commission Brief Opposing Exceptions at 26-28.

argues that the Presiding Judge clearly identified all of his recommended adjustments to MISO's as-filed SSR compensation for the Original SSR Agreement. The Michigan Commission argues that the net clawback amount is easily calculated by subtracting the Presiding Judge's elimination of \$1,401,215 MATS capital expenditures incurred prior to the commencement of the Replacement SSR period from the total capital costs of \$4,585,158, which results in a net clawback amount of \$3,182,943. Consequently, the Michigan Commission argues, MISO's exception to the Initial Decision should be rejected.¹⁶¹

65. Trial Staff argues, in response to MISO's claim that it is unclear how interest should be computed on refunds ordered by the Commission, that interest should be computed in accordance with section 35.19a of the Commission's regulations.¹⁶² Trial Staff argues that interest should accrue from the time Wisconsin Electric received the amounts in excess of the compliance levels until the time refunds of those amounts were made.¹⁶³

66. The Michigan Aligned Parties argue that the Initial Decision provided clear guidance on the amount of refunds ordered under the Original SSR Agreement, contrary to MISO's argument that the Initial Decision was ambiguous regarding the calculation of refunds.¹⁶⁴ The Michigan Aligned Parties argue that the Initial Decision provides sufficient instruction for calculating refunds for the Original SSR Agreement. They also contend that MISO knows when payments were made and what the payments covered because it has the ability to determine the amount it paid for a specific amount of energy at a specific point in time and that is all the information that MISO requires in order to calculate interest.

d. Commission Determination

67. We reject MISO's argument that the Presiding Judge did not provide clear guidance regarding refunds. We agree with the Michigan Commission that the direction provided in the Initial Decision is sufficient to calculate the appropriate costs and refunds for the Original SSR Agreement. We find that the appropriate fixed-cost compensation under the Original SSR Agreement, after correcting the Presiding Judge's miscalculation

¹⁶¹ *Id.* (citing Initial Decision, 156 FERC ¶ 63,013 at PP 84, 97 (subtracting the MATS adjustment, ¶ 87 of the Initial Decision, from Trial Staff's clawback adjustment, ¶ 94 of the Initial Decision)).

¹⁶² 18 C.F.R. § 35.19a (2017).

¹⁶³ Trial Staff Brief Opposing Exceptions at 24.

¹⁶⁴ Michigan Aligned Parties Brief Opposing Exceptions at 57-58.

of skeleton work crew costs, is \$23,724,488, which must be further reduced by the Original SSR Agreement's share of the expensed generator turbine overhaul refund (which is \$738,530).

68. Accordingly, the total refund to be paid by Wisconsin Electric to MISO under the Original SSR Agreement is \$14,013,114, which is calculated by subtracting the Original SSR Agreement's share of the expensed generator turbine overhaul refund (which is \$738,530) from the \$23,724,488 allowed by the Presiding Judge for fixed-cost compensation (as adjusted for his skeleton work crew miscalculation), and then subtracting that reduced amount from the total compensation collected by Wisconsin under the Original SSR Agreement (\$36,999,072).¹⁶⁵ Interest should be computed in accordance with section 35.19a of the Commission's regulations.¹⁶⁶

69. Regarding the timing of the refunds, we agree with Trial Staff that interest should accrue from the time Wisconsin Electric received the excess compensation until the date that refunds are made.

B. Replacement SSR Agreement

1. Fixed-Cost Component

a. Initial Decision

70. The Presiding Judge found that MISO has not carried its burden of proof regarding the justness and reasonableness of the fixed-cost component of compensation under the Replacement SSR Agreement because of an excessive economic cost of capital and certain ineligible capital expenditures.¹⁶⁷ The Presiding Judge noted that during the term of the Replacement SSR Agreement, the Tariff no longer required MISO to negotiate using going-forward costs and instead the negotiated compensation was to be based on a cost-of-service approach.¹⁶⁸ The Presiding Judge rejected MISO's and Wisconsin Electric's argument that the fixed-cost component of compensation under the Replacement SSR Agreement is just and reasonable because it was negotiated at arm's

¹⁶⁵ The calculation of the refund is as follows: \$36,999,072 (amount collected by Wisconsin Electric) - (\$23,724,488 (adjusted fixed-cost compensation) - \$738,530 (refund for expensed turbine repair under the Clawback Provision)) = \$14,013,114.

¹⁶⁶ 18 C.F.R. § 35.19a (2017).

¹⁶⁷ Initial Decision, 156 FERC ¶ 63,013 at PP 78, 87.

¹⁶⁸ *Id.* P 79 (citing *Ameren*, 148 FERC ¶ 61,057 at P 87).

length in the normal course of business, it is consistent with the Tariff and Commission precedent, and because the true-up provision included in the Replacement SSR Agreement provides a transparent process to ensure reasonable results.¹⁶⁹ Instead, the Presiding Judge agreed with Trial Staff, the Michigan Commission, and the Michigan Aligned Parties that the economic cost of capital used in Wisconsin Electric's calculations is unjust and unreasonable. The Presiding Judge determined that the 10.4 percent ROE used by Wisconsin Electric in the proposed economic cost of capital (1) is outdated and based on a 2009 Wisconsin Public Service Commission order, to which the Commission is not bound; and (2) the ROE was sanctioned for use in Wisconsin, whereas the assets involved in the proceeding are located in Michigan. The Presiding Judge also determined that certain other inputs to the economic cost of capital are unsupported such as cost of preferred stock and cost of long-term debt.¹⁷⁰ The Presiding Judge found that the economic cost of capital used in the fixed-cost component should be 9.68 percent.¹⁷¹

71. The Presiding Judge also determined that certain MATS compliance costs in the fixed-cost component are unjust and unreasonable. The Presiding Judge found that Wisconsin Electric changed a date on a consulting services invoice (MATS Invoice) to one day after the Replacement SSR Agreement became effective, which appears to have been done so the MATS costs could be recoverable under the Replacement SSR Agreement since the costs were not recoverable under the Original SSR Agreement.

72. The Presiding Judge also found that the inclusion of costs associated with powder activated carbon in the fixed-cost component under the Replacement SSR Agreement is unjust and unreasonable. The Presiding Judge determined that the costs associated with powder activated carbon should only be included in the fixed-cost component if they were incurred upon installation of the MATS equipment, and the Presiding Judge found that there is no evidence in the record that these costs were actually incurred during the retirement period because the MATS modifications were not yet in service during the retirement period. The Presiding Judge concluded that, if the modifications were not yet in service, then the costs were not needed to maintain operation of the Presque Isle Units during the Replacement SSR Agreement term.¹⁷²

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* P 82 (citing Ex. S-7 at 42:2–3, 42:18–19, 44:8–45:4).

¹⁷¹ *Id.*

¹⁷² *Id.* P 86 (citing Ex. WEC-5 at 9:20-22; Ex. MAP-1 at 77:3-8).

73. The Presiding Judge found that he was unable to determine the just and reasonable fixed-cost component to compensation because “the record is void of work papers in Microsoft® Excel format.”¹⁷³ Instead, the Presiding Judge provided guidelines to determine the recalculations that would produce the appropriate fixed-cost component. The Presiding Judge found that the following modifications should be used to determine the fixed costs: (1) Return on Capital and Carrying Cost of Inventory should be assessed using the 9.68 percent economic cost of capital; (2) capital costs should be recalculated to exclude powder activated carbon; and (3) other elements, e.g., depreciation, must be recalculated because the preceding modifications impact other elements that make up the fixed-cost compensation.¹⁷⁴

b. Briefs on Exceptions

74. Wisconsin Electric argues that the Initial Decision incorrectly interpreted *Ameren* in finding that, during the Replacement SSR Agreement, the Tariff no longer required MISO to negotiate using going-forward costs, but rather, the negotiated compensation was to be based on a cost-of-service approach.¹⁷⁵ Wisconsin Electric states that *Ameren* established that the SSR Unit owner can be fully compensated up to its cost of service. Wisconsin Electric argues that the precedent does not require that compensation under an SSR Agreement be equal to the SSR Unit owner’s full cost-of-service, nor does it require that the full cost-of-service was the amount to be included as SSR compensation.

75. Wisconsin Electric reiterates its arguments made above regarding the Initial Decision’s error in requiring a cost-of-service showing and the use of actual costs.

76. Trial Staff argues that the Presiding Judge erred in determining that powder activated carbon costs should be excluded from the fixed-cost compensation under the Replacement SSR Agreement. Trial Staff states that it does not take a position whether these costs should be excluded from cost recovery generally, but argues that Wisconsin Electric recovered the powder activated carbon costs through its variable-cost compensation, not through its fixed-cost compensation under the Replacement SSR Agreement.¹⁷⁶ Therefore, if these costs are disallowed, Trial Staff believes they should be deducted from variable-cost compensation not fixed-cost compensation.

¹⁷³ *Id.* P 87.

¹⁷⁴ *Id.*

¹⁷⁵ Wisconsin Electric Brief on Exceptions at 22.

¹⁷⁶ Trial Staff Brief on Exceptions at 6 (citing Ex. PSC-09 at 1 (noting that the “costs for powder activated carbon for mercury control” were “recovered in fuel” and not

c. **Briefs Opposing Exceptions**

77. The Michigan Aligned Parties and the Michigan Commission argue that, contrary to Wisconsin Electric's contention, the Initial Decision did not impose a cost-of-service approach for the Replacement SSR Agreement.¹⁷⁷ The Michigan Commission contends that Wisconsin Electric mischaracterizes the Initial Decision by claiming that the Presiding Judge erred in finding that the Commission required MISO and Wisconsin Electric to negotiate the Replacement SSR Agreement compensation based on a cost-of-service approach because the Presiding Judge made no such finding. The Michigan Commission argues that Wisconsin Electric appears to be interpreting the Presiding Judge's holding to mean that the *Ameren* decision mandates cost-of-service pricing, but the Michigan Commission argues that the Presiding Judge's use of the phrase "cost-of-service approach" to describe *Ameren* must be read in context. The Michigan Commission argues that the Presiding Judge did not intend to suggest that *Ameren* mandates recovery of the SSR owner's full cost-of-service; instead, *Ameren* expressly allows negotiation of an SSR Unit's compensation up to its full cost-of-service.¹⁷⁸ The Michigan Aligned Parties argue that Wisconsin Electric's summary of *Ameren* is not inaccurate, but nothing in the Initial Decision suggests that the Presiding Judge found that *Ameren* requires that SSR compensation be equal to the generation owner's full cost-of-service, as Wisconsin Electric alleges.¹⁷⁹

78. Trial Staff states that the appropriate fixed-cost compensation under the Replacement SSR Agreement is \$21,429,797, which is \$21,326,309 plus \$103,488 for powder activated carbon costs that were inappropriately deducted from fixed-cost compensation, instead of variable-cost compensation, when the Presiding Judge determined to disallow recovery of power activated carbon costs under the Replacement SSR Agreement.¹⁸⁰

included in the actual fixed-cost true up)).

¹⁷⁷ Michigan Aligned Parties Brief Opposing Exceptions at 49-50; Michigan Commission Brief Opposing Exceptions at 22.

¹⁷⁸ Michigan Commission Brief Opposing Exceptions at 22 (citing *Ameren*, 148 FERC ¶ 61,057 at P 87).

¹⁷⁹ Michigan Aligned Parties Brief Opposing Exceptions at 50.

¹⁸⁰ Trial Staff Brief Opposing Exceptions at 26-27.

d. Commission Determination

79. We affirm the Presiding Judge's determination that MISO has not carried its burden of proof regarding the justness and reasonableness of the fixed-cost component of compensation under the Replacement SSR Agreement due to an excessive economic cost of capital and certain ineligible capital expenditures.

80. The Tariff in effect during the Replacement SSR Agreement requires that the SSR Unit owner be compensated "only for costs incurred by an SSR Unit owner or operator that do not exceed the full cost-of-service (including the fixed cost of existing plant)."¹⁸¹ We agree with the Presiding Judge that MISO failed to support the reasonableness of its proposed 11.5 percent economic cost of capital, and find that since the proposed 11.5 percent economic cost of capital was not shown to be just and reasonable, the 9.68 percent economic cost of capital (based on an updated Discounted Cash Flow analysis) adopted by the Presiding Judge is just and reasonable. We also agree with the Presiding Judge that certain MATS compliance costs related to the altered MATS Invoice, discussed further below, and powder activated carbon costs, were not incurred during the Replacement SSR Agreement and therefore these costs are not recoverable under the Replacement SSR Agreement.

81. We reject attempts to misconstrue the Tariff as *allowing* the use of, rather than *limiting* the rate to, full cost-of-service. We disagree with MISO's and Wisconsin Electric's argument that the negotiated nature of the fixed-cost component and the true-up provision ensures a reasonable result and determine that adjustments to the negotiated compensation are required to produce a just and reasonable outcome. We note that, although the true-up provision helps to protect customers, other aspects of the negotiated rate (e.g., 11.53 percent economic cost of capital and disallowed costs) render the rate unjust and unreasonable notwithstanding the true-up provision.

82. The Presiding Judge was unable to determine the just and reasonable fixed-cost component to compensation under the Replacement SSR Agreement because "the record is void of work papers in Microsoft® Excel format,"¹⁸² and instead provided guidelines to calculate the fixed-cost compensation. The Presiding Judge found that adjustments to the fixed-cost component under the Replacement SSR Agreement should be calculated as follows:

[Wisconsin Electric's] actual costs should be used to determine the fixed costs with the following modifications. Return on Capital and Carrying Cost of Inventory should be assessed using the 9.68 percent

¹⁸¹ MISO, FERC Electric Tariff, Module C, § 38.2.7.e(ii) (39.0.0).

¹⁸² Initial Decision, 156 FERC ¶ 63,013 at P 87.

economic cost of capital. Capital costs should be recalculated to exclude the \$1,401,231 of ineligible MATS-compliance capital costs. Finally, Total Non-Fuel O&M should be recalculated to exclude powder activated carbon. Because these modifications impact other elements that make up the fixed-cost compensation, these other elements, e.g., depreciation, must be recalculated.¹⁸³

83. We affirm the Presiding Judge's findings regarding the calculation of the fixed-cost component under the Replacement SSR Agreement, with the exception of the finding to exclude powder activated carbon costs from the fixed-cost component of compensation. We agree with Trial Staff that the record shows that Wisconsin Electric recovered the powder activated carbon costs in fuel costs and, therefore, those costs should be deducted from the variable-cost component.¹⁸⁴

84. Wisconsin Electric collected \$28,295,750 for fixed-cost compensation under the Replacement SSR Agreement.¹⁸⁵ Based on Ms. Wolter's testimony, MISO acknowledged that Wisconsin Electric over-collected \$1,380,604 in fixed costs and, therefore, that amount should be deducted pursuant to the true-up from the total amount collected: $\$28,295,750 - \$1,380,604 = \$26,915,146$.¹⁸⁶ According to the Presiding Judge's findings, \$1,401,231 of ineligible MATS-compliance costs must be excluded.¹⁸⁷ The Presiding Judge also determined that certain capital costs incurred under the Replacement SSR Agreement must be refunded under the Clawback Provision.¹⁸⁸ Trial Staff calculated that, after true-up, Wisconsin Electric recovered \$4,586,666 in capital expenditures.¹⁸⁹ After deducting depreciation (\$2,493) and the amount of ineligible MATS-compliance costs that the Presiding Judge separately identified from the total capital expenditures, the net amount to be subtracted pursuant to the Clawback Provision

¹⁸³ *Id.*

¹⁸⁴ *See* Ex. PSC-9 (stating that the "total actual costs incurred from October 15, 2014, through January 31, 2015, [for powder activated carbon] were \$103,488").

¹⁸⁵ Initial Decision, 156 FERC ¶ 63,013 at P 9.

¹⁸⁶ *Id.* P 80.

¹⁸⁷ *Id.* P 87.

¹⁸⁸ *Id.* P 94.

¹⁸⁹ *Id.* P 91.

is \$3,182,943.¹⁹⁰ Finally, the Presiding Judge determined that “Return on Capital and Carrying Cost of Inventory should be assessed using the 9.68 percent economic cost of capital,” which Trial Staff calculated as \$901,175.¹⁹¹

85. Accordingly, the appropriate fixed-cost compensation under the Replacement SSR Agreement is \$21,429,797 based on the Presiding Judge’s determinations.¹⁹² As discussed above, this amount should be further reduced by the Replacement SSR Agreement’s share of refunds due under the Clawback Provision for the expensed generator turbine overhaul repair (which is \$1,631,820).

2. Variable-Cost Component

a. Initial Decision

86. The Presiding Judge found that MISO’s variable-cost component to compensation under the Replacement SSR Agreement is just and reasonable.¹⁹³ The Presiding Judge determined that MISO witness Mr. Weissenborn’s testimony outlining the variable-cost component’s methodology and calculations is consistent with the explanation of variable-cost compensation under the Replacement SSR Agreement. The Presiding Judge also determined that the variable-cost compensation is based on actual costs incurred ensuring that Wisconsin Electric does not receive more than its cost-of-service. Mr. Weissenborn calculated the variable-cost component to be \$1,327,124, and the Presiding Judge stated that Wisconsin Electric concurs with the proposed variable-cost component and no other participant contested the proposed variable-cost component.¹⁹⁴ The Presiding Judge

¹⁹⁰ \$4,586,666 (total capital expenditures, after true-up) – \$2,493 (depreciation) - \$1,401,231 (separately identified ineligible MATS-compliance costs) = \$3,182,943. *See id.* PP 87, 91, 94.

¹⁹¹ *See id.* PP 91, 95. Trial Staff’s recommended refund inclusive of changes to the capital structure (\$5,485,349) less Trial Staff’s Clawback Provision adjustment (\$4,584,170) equals the amount attributable to Trial Staff’s ROE adjustment (\$901,175). *Id.*

¹⁹² This is calculated as follows: \$28,295,750 (amount collected by Wisconsin Electric) - \$1,380,604 (true up adjustment) - \$1,401,231 (ineligible MATS-compliance costs) - \$3,182,943 (refund for capital expenditures pursuant to the Clawback Provision) - \$901,175 (ROE adjustment) = \$21,429,797.

¹⁹³ *Id.* PP 88-90.

¹⁹⁴ *Id.* P 89 (citing MISO Initial Brief at 13; Ex. MID-4 (PIPP SSR Variable Compensation Recalculation Results); Wisconsin Electric Initial Brief at 16-17;

determined that Wisconsin Electric is owed \$1,327,124 under the Replacement SSR Agreement.

b. Briefs on Exceptions

87. As stated above, Trial Staff argues that the Presiding Judge erred in determining that powder activated carbon costs should be excluded from the fixed-cost compensation under the Replacement SSR Agreement. Trial Staff states that it does not take a position whether these costs should be excluded from cost recovery, but argues that Wisconsin Electric recovered the powder activated carbon costs through its variable-cost compensation, not through its fixed-cost compensation under the Replacement SSR Agreement.¹⁹⁵

c. Commission Determination

88. We affirm the Presiding Judge's finding that MISO's variable-cost component to compensation under the Replacement SSR Agreement is just and reasonable, with one exception. We agree with the Presiding Judge that Mr. Weissenborn's testimony outlining the variable-cost component's methodology and calculations is consistent with the explanation of variable-cost compensation under the Replacement SSR Agreement, but as stated above, we find that Trial Staff is correct that the powder activated carbon costs the Presiding Judge disallowed¹⁹⁶ should be deducted from the variable-cost component, not from the fixed-cost component. Therefore, we find that \$103,488¹⁹⁷ in powder activated carbon costs should be deducted from the variable-cost component paid to Wisconsin Electric: $\$1,327,124 - \$103,488 = \$1,223,636$.

89. As discussed further below, MISO has already paid the variable-cost compensation of \$1,327,124 to Wisconsin Electric. Therefore, \$103,488 of the variable-cost compensation already paid to Wisconsin Electric must be refunded to account for the powder activated carbon costs disallowed by the Presiding Judge.

Michigan Commission Initial Brief at 19; Trial Staff Initial Brief at 17; Michigan Aligned Parties Initial Brief at 16).

¹⁹⁵ Trial Staff Brief on Exceptions at 6.

¹⁹⁶ Initial Decision, 156 FERC ¶ 63,013 at P 87 (“Total Non-Fuel O&M should be recalculated to exclude powder activated carbon.”).

¹⁹⁷ See Ex. PSC-9 at 1 (stating that the “total actual costs incurred from October 15, 2014, through January 31, 2015, [for powder activated carbon] were \$103,488”).

3. Refunds

a. Initial Decision

90. The Presiding Judge determined that based on the rationale regarding the fixed-cost component to compensation derived in paragraph 87 of the Initial Decision (excerpted in paragraph 82 of this order), the refund Wisconsin Electric owes for the fixed-cost component under the Replacement SSR Agreement, inclusive of clawback, requires recalculating. The Presiding Judge did not provide a numerical calculation for the refund amount under the Replacement SSR Agreement. Instead, the Presiding Judge stated that the correct refund amount can be determined by first calculating the difference between the result from paragraph 87 of the Initial Decision and Wisconsin Electric's actual compensation received (\$28,295,750), and then summing that difference with the capital costs refunded as prescribed under the Clawback Provision (outlined in paragraph 94 of the Initial Decision), plus interest. The Presiding Judge concluded that the total refund Wisconsin Electric owes under the Replacement SSR Agreement is the amount derived from the aforementioned difference in fixed-cost compensation less the variable-cost component (\$1,327,124), plus interest.¹⁹⁸

b. Briefs on Exceptions

91. Wisconsin Electric reiterates its position that the Presiding Judge erred in finding that all capital costs, not just costs for environmental compliance, are subject to the Clawback Provision. Wisconsin Electric argues that the Commission can only adopt the Presiding Judge's interpretation of the Clawback Provision if it predetermines that the result reached by applying the plain meaning of the Tariff provision is unjust and unreasonable.¹⁹⁹

92. MISO, the Michigan Commission, and Trial Staff argue that the Initial Decision errs by including the variable-cost compensation in the formula for the calculation of the total refund under the Replacement SSR Agreement.²⁰⁰ MISO argues that the Presiding Judge determined that the variable-cost component was appropriate and, therefore, it should not be a factor in the determination of refunds. MISO, the Michigan Commission,

¹⁹⁸ Errata to Initial Decision, Docket No. ER14-1242-006, *et al.*, at 1-2 (August 2, 2016). *See also* Initial Decision, 156 FERC ¶ 63,013 at P 96.

¹⁹⁹ Wisconsin Electric Brief on Exceptions at 27.

²⁰⁰ MISO Brief on Exceptions at 4-5; Michigan Commission Brief on Exceptions at 14; Trial Staff Brief on Exceptions at 5.

and Trial Staff contend that the variable-cost component (\$1,327,124) has already been charged and credited, and therefore no further adjustment is necessary.²⁰¹

93. MISO also argues that the Initial Decision fails to state financial matters in a manner that can be implemented by MISO in its role as Tariff Administrator.²⁰² MISO argues that the Initial Decision does not state the numerical refund amount to be paid under the Replacement SSR Agreement and instead states guidelines for computing the total refund amount. MISO contends that it should not be burdened with the task of responding to the likely protests related to whether the guidelines in the Initial Decision have been followed. MISO also argues that timing of the refund obligation is not clearly outlined in the Initial Decision.

94. Wisconsin Electric notes that an Errata to the Initial Decision was issued on August 2, 2016 to clarify the calculation of amounts to be refunded under the Clawback Provision. Wisconsin Electric contends that the amount to be refunded under the Clawback Provision is only \$367,980 and argues that the Initial Decision should not be sustained to the extent the Initial Decision, as corrected by the Errata, renders a different result.²⁰³

95. Wisconsin Electric argues that the Presiding Judge's inability to calculate the amount of fixed-cost compensation under the Replacement SSR Agreement is due to the fact that the Initial Decision set out to calculate an amount for SSR compensation rather than simply evaluating, based on the record and Commission precedent, whether the SSR compensation was just and reasonable.²⁰⁴

c. Briefs Opposing Exceptions

96. Trial Staff argues that the Presiding Judge properly found that all capital costs, less depreciation, recovered under the Replacement SSR Agreement should be refunded pursuant to Clawback Provision.²⁰⁵

²⁰¹ MISO Brief on Exceptions at 4-5; Michigan Commission Brief on Exceptions at 14; Trial Staff on Exceptions at 5.

²⁰² MISO Brief on Exceptions at 9-11.

²⁰³ Wisconsin Electric Brief on Exceptions at 28.

²⁰⁴ *Id.*

²⁰⁵ Trial Staff Brief Opposing Exceptions at 11-23.

97. As stated above, Trial Staff contends that Rule 711(d)(2) of the Commission's Rules of Practice and Procedure provides that a participant waives its objections to any part of an initial decision if it does not object in its brief on exceptions.²⁰⁶ Trial Staff argues that Wisconsin Electric did not except to the Initial Decision's adoption of Trial Staff's cost of capital recommendations or the adoption of the Michigan Aligned Parties' proposal to exclude powder activated carbon costs. Trial Staff also notes that Wisconsin Electric acknowledges that a true-up adjustment of \$1,380,604 needs to be made. Trial Staff agrees with the Michigan Commission's calculated refund under the Replacement SSR Agreement of \$6,969,441, which excludes the variable-cost component allowed in the Initial Decision (\$6,865,953²⁰⁷ for fixed-cost compensation and \$103,488 for variable-cost compensation related to the powder activated carbon costs for a total refund of \$6,969,441). Trial Staff argues the Commission must order Wisconsin Electric to refund all capital expenditures (less depreciation) recovered under the Replacement SSR Agreement and reject Wisconsin Electric's arguments that it owes a lesser amount.²⁰⁸

d. Commission Determination

98. We agree with Trial Staff that Rule 711(d)(2) of the Commission's Rules of Practice and Procedure provides that a participant waives its objections to any part of an initial decision if it does not object in its brief on exceptions. We also agree that Wisconsin Electric did not specifically object to the Presiding Judge's adoption of Trial Staff's cost of capital recommendations or the adoption of the Michigan Aligned Parties' proposal to exclude powder activated carbon costs. The Commission's regulations provide that Wisconsin Electric has waived its objection to the Presiding Judge's holdings. We nevertheless also find that Wisconsin Electric's assertions related to these holdings also fail on the merits, as discussed below.

99. We agree with MISO, the Michigan Commission, and Trial Staff that the variable-cost compensation component has already been paid to Wisconsin Electric by MISO and, therefore, it should not be deducted from the amount to be refunded by Wisconsin Electric under the Replacement SSR Agreement. As discussed above, we find that powder activated carbon costs of \$103,488 should be deducted from the variable-cost component that was already paid to Wisconsin Electric. Therefore, we direct Wisconsin

²⁰⁶ 18 C.F.R. § 385.711(d)(2) (2017).

²⁰⁷ Trial Staff calculates this number by subtracting their calculation of allowable fixed-cost compensation from the fixed-cost compensation collected by Wisconsin Electric: \$28,295,750 - \$21,429,797 = \$6,865,953.

²⁰⁸ Trial Staff Brief Opposing Exceptions at 26-27.

Electric to refund \$103,488 for powder activated carbon costs, which was part of the variable-cost component received by Wisconsin Electric.

100. As stated above, the total amount collected by Wisconsin Electric under the Replacement SSR Agreement was \$28,295,750 and the appropriate fixed-cost compensation under the Replacement SSR Agreement is \$21,429,797. The amount already paid to Wisconsin Electric for the variable-cost component need not be included in the refund calculation but \$103,488 of the powder activated carbon costs must be refunded. An additional amount of \$1,631,820 must be refunded under the Clawback Provision for the expensed generator turbine overhaul costs attributable to the Replacement SSR Agreement as found above. Therefore, the total refund owed by Wisconsin Electric under the Replacement SSR Agreement is approximately \$8,601,261.²⁰⁹ Additionally, as stated above, interest should accrue from the time Wisconsin Electric received the excess compensation until the date that refunds are made.

101. As noted above, the Commission directed MISO, in a previous order, to suspend refunds of previously allocated Presque Isle SSR costs under Rate Schedule 43G until the Commission issued an order on this Initial Decision finalizing the amount of Presque Isle SSR costs that will be allocated among benefitting load-serving entities. The Commission also directed MISO, within 45 days of the Commission order on this Initial Decision, to file a detailed refund report describing how MISO intends to effectuate the payment of refunds to those load-serving entities that were overcharged under an unjust and unreasonable cost allocation methodology approach formerly used for the Presque Isle Units and adjusting to account for resettlements of Presque Isle SSR costs that have already been made according to the refund reports filed in Docket No. ER14-2952-005.²¹⁰ To be clear, MISO should first distribute the refunds due from Wisconsin Electric pursuant to this order on Initial Decision. In the detailed refund report to be filed within 45 days of this order, MISO should calculate the refunds to those load-serving entities that were overcharged, due pursuant to the Commission's order on cost allocation,²¹¹ accounting for resettlements of costs.

²⁰⁹ The refund is calculated as follows: \$28,295,750 (amount collected by Wisconsin Electric) - (\$21,429,797 (adjusted fixed-cost compensation) - \$103,488

(disallowed powder activated carbon costs) - \$1,631,820 (refund for expensed turbine repair under the Clawback Provision)) = \$8,601,261.

²¹⁰ See *Midcontinent Indep. Sys. Operator, Inc.*, 156 FERC ¶ 61,205 at P 81.

²¹¹ See *id.* P 77; see also *Midcontinent Indep. Sys. Operator, Inc.*, 155 FERC ¶ 61,134, at P 53 (2016).

C. Other Matters**1. MISO's Errata Filing**

102. As stated above, on October 4, 2016, MISO filed a motion for leave to make an errata filing to its brief opposing exceptions. The Michigan Aligned Parties, the Michigan Commission, and Trial Staff each filed an answer in opposition to MISO's motion to leave to file the errata. MISO's changes to its brief opposing exceptions are not minor alterations typical of an errata filing. Instead, the changes are substantive and the filing should be characterized as a late-filed brief opposing exceptions. Because of its lateness, we do not consider the brief part of the record in this proceeding.²¹² Therefore, we deny MISO's request for leave to make an errata filing to its brief opposing exceptions and find the answers filed in opposition moot.

2. Policy Considerations**a. Briefs on Exceptions**

103. Wisconsin Electric argues that the Presiding Judge erred in shifting the FPA section 205 burden in this proceeding from MISO to Wisconsin Electric. Wisconsin Electric contends that it is the applicant that should bear the burden of persuasion but the Initial Decision places the risk and burden of refund on Wisconsin Electric. Wisconsin Electric argues that the Initial Decision would have Wisconsin Electric shoulder the burden of persuasion in this matter in the face of MISO not doing so, and to apply a different standard now, after the fact, deprives Wisconsin Electric of fair notice. Wisconsin Electric argues that if the Commission determines that MISO did not carry its burden, the Commission must determine a means by which MISO is held accountable without undue burden or risk falling on Wisconsin Electric.²¹³

b. Briefs Opposing Exceptions

104. The Michigan Aligned Parties argue that Wisconsin Electric's stated exceptions must be rejected as moot because Wisconsin Electric failed to take exception to the Initial Decision's threshold determination that MISO did not carry its burden of proof under either the Original SSR Agreement or the Replacement SSR Agreement of demonstrating that the negotiated fixed-cost compensation was just and reasonable.²¹⁴ The Michigan

²¹² See 18 C.F.R. § 385.711(a)(1)(i) (2017).

²¹³ Wisconsin Electric Brief on Exceptions at 10-11.

²¹⁴ Michigan Aligned Parties Brief Opposing Exceptions at 16-19.

Aligned Parties contend that Wisconsin Electric’s “policy consideration” arguments and “cost compensation” arguments do not qualify as exceptions pursuant to Rule 711(b)(2)(ii) of the Commission’s regulations, but further, these arguments fail to address the threshold issue of whether MISO carried its burden of proof and therefore Wisconsin Electric’s stated exceptions must be rejected as moot. The Michigan Aligned Parties argue that Rule 711(b)(2)(ii) of the Commission’s regulations requires that briefs on exceptions specifically enumerate the exceptions asserted,²¹⁵ and that Wisconsin Electric failed to comply with the regulation.²¹⁶

105. Although the Michigan Aligned Parties do not believe Wisconsin Electric’s “policy considerations” to be proper exceptions, they rebut these arguments on the merits.²¹⁷ They argue that Wisconsin Electric’s reliance on *Hope* and *Bluefield* precedent, regarding its argument that rates are confiscatory when they do not fairly compensate providers of jurisdictional services, is misplaced because nowhere in the Initial Decision is Wisconsin Electric denied recovery of its actual costs. The Michigan Aligned Parties contend that no reading of *Hope* or *Bluefield* supports a requirement that utilities be permitted to recover more than their actual costs, be permitted to recover otherwise unrecoverable costs based upon unlawful manipulation of documents, or be permitted to retain revenues which a lawfully filed and effective tariff requires to be refunded.²¹⁸ The Michigan Aligned Parties contend that limiting Wisconsin Electric’s compensation to recovery of its actual costs and denying recovery of almost 900% of its actual costs is not confiscatory and does not violate Wisconsin Electric’s rights under the FPA as construed by *Hope* and *Bluefield*.²¹⁹

106. Trial Staff argues that Wisconsin Electric’s claim that the Presiding Judge effectively shifted the section 205 burden from MISO to Wisconsin Electric is meritless.²²⁰ Trial Staff contends that Wisconsin Electric concedes in its brief on exceptions that the MISO Tariff placed “the risk and burden of refund” on the utility, which Trial Staff argues is expected since Wisconsin Electric is the entity that received

²¹⁵ *Id.* at 19-20 (citing 18 C.F.R. § 385.711(b)(2)(ii) (2017) (“Any brief on exceptions must include . . . A list of numbered exceptions[.]”)).

²¹⁶ *Id.* at 19-20, 35-36.

²¹⁷ *Id.* at 21-35.

²¹⁸ *Id.* at 21.

²¹⁹ *Id.* at 21-22.

²²⁰ Trial Staff Brief Opposing Exceptions at 10-11.

the revenue under the SSR Agreements. Trial Staff also argues that at the time the Original SSR Agreement was filed, the only testimony in support of the agreement was filed by Wisconsin Electric, not MISO. Trial Staff argues that the Presiding Judge permitted testimony to be filed by both MISO and Wisconsin Electric in support of the compensation under the two SSR Agreements and, contrary to Wisconsin Electric's claim, did not shift any burden.

107. The Michigan Commission also takes issue with Wisconsin Electric's allegation that MISO did not carry its burden of proof and that the Commission must determine a means by which MISO is held accountable without undue burden or risk falling on

Wisconsin Electric.²²¹ The Michigan Commission argues that Wisconsin Electric's allegation is surprising considering that Wisconsin Electric provided misleading information to MISO to support use of the three-year historical average capital expenditures of \$13.5 million in the Original SSR Agreement.²²² Moreover, the Michigan Commission argues that, by agreeing to join MISO as a Transmission Owner, Wisconsin Electric agreed that MISO will make filings under section 205 of the FPA. The Michigan Commission does not dispute that MISO has the burden of proof in such filings, but argues that Wisconsin Electric was provided the full opportunity to provide MISO with information to support meeting such a burden. The Michigan Commission also argues that Wisconsin Electric fails to identify any provision of its membership agreement with MISO that holds MISO accountable by failing to meet its burden of proof.²²³

108. MISO also objects to Wisconsin Electric's argument that the Commission must determine a means by which MISO is held accountable without undue burden or risk falling on Wisconsin Electric as a result of the Presiding Judge's determination that the burden of proof was not carried in this proceeding.²²⁴ MISO argues that Wisconsin Electric is too late to raise the issue of MISO's financial responsibility for the remedy the

²²¹ Michigan Commission Brief Opposing Exceptions at 5-6 (citing Wisconsin Electric Brief on Exceptions at 11).

²²² *Id.* The Michigan Commission states that Wisconsin Electric provided MISO with a capital budget purporting to show that Wisconsin Electric's budgeted capital expenditures for 2014 were \$21.2 million while neglecting to inform MISO that the actual 2014 budget approved by Wisconsin Electric's Board of Directors included zero capital expenditures for Presque Isle. *Id.* (citing Ex. WEC-5 at 5:19-23; Ex. PSC-1 at 15).

²²³ *Id.*

²²⁴ MISO Brief Opposing Exceptions at 2-6.

Commission determines in this proceeding. MISO contends that all parties submitted a Joint Statement of Issues, Stipulated Facts, and Contested Facts on March 28, 2016, which stipulates that Wisconsin Electric is the party that will pay refunds and that MISO will be the party that returns the amounts to ratepayers. MISO argues that permitting Wisconsin Electric to renege on its pre-hearing agreement would be extremely prejudicial to MISO at this stage and, therefore, Wisconsin Electric's argument should be rejected. MISO contends that Wisconsin Electric is the entity that received compensation under the two SSR Agreements and any refunded amounts to arrive at just and reasonable compensation must necessarily come from Wisconsin Electric. MISO argues that Wisconsin Electric was permitted to fully participate in this proceeding and that Wisconsin Electric cites no precedent for assigning another party to a proceeding financial responsibility of the party in interest. MISO also argues that it is not responsible for the actions committed by Wisconsin Electric that resulted in lower compensation than initially negotiated. MISO contends that the reduced capital spending that created the disparity in the Initial Decision, as noted by Wisconsin Electric's witness, resulted from imprudent reductions in capital spending and that Wisconsin Electric should be held responsible for the financial consequences of its own actions.²²⁵ MISO adds that Wisconsin Electric encourages the Commission to consider a cost allocation issue that was not set for hearing and not stated as an issue, and which constitutes a collateral attack on the Commission's orders on the subject of cost allocation.²²⁶

109. The Michigan Aligned Parties also contend that the Initial Decision did not impermissibly shift the burden of proof, as Wisconsin Electric claims.²²⁷ The Michigan Aligned Parties argue that the Initial Decision repeatedly recognizes that MISO had the burden of proof and that, during the hearing, the Presiding Judge repeatedly referred, without objection, to MISO having the burden of proof. The Michigan Aligned Parties point out that Wisconsin Electric's counsel stated during the hearing that "[t]o be clear, MISO has the burden" and that "[w]e believe MISO has the burden, but they are [Wisconsin Electric's] costs and compensation."²²⁸ The Michigan Aligned Parties also note that Wisconsin Electric was well aware at the commencement of the proceeding that the only evidence to support the proposed SSR compensation was from Wisconsin Electric's employees and Wisconsin Electric registered no objection to that reality. The Michigan Aligned Parties argue that these historical facts show that it is disingenuous for Wisconsin Electric to assert that it was unaware that MISO had the burden of proof or

²²⁵ *Id.* at 5 (citing Ex. WEC-5 at 21:2-6).

²²⁶ *Id.*

²²⁷ Michigan Aligned Parties Brief Opposing Exceptions at 27-29.

²²⁸ *Id.* at 28 (citing Tr. 733:6-7, 142:10-11 (Wisconsin Electric Counsel)).

that, as a practical matter, Wisconsin Electric, not MISO, was discharging that burden. The Michigan Aligned Parties suggest that Wisconsin Electric could have responded to these issues in its rebuttal testimony or objected to the introduction of evidence of Wisconsin Electric's actual costs. They also argue that Wisconsin Electric has not suggested what other actual costs Wisconsin Electric might have submitted to support a higher level of SSR compensation once the determination was made to use actual costs in lieu of the negotiated projected costs.²²⁹

110. The Michigan Aligned Parties argue that Wisconsin Electric's request for relief from failure by MISO to carry the burden of proof should be rejected because the hearing was conducted under section 205 of the FPA, the two SSR Agreements were suspended and allowed to go into effect, and the agreements were subject to refund.²³⁰ The Michigan Aligned Parties argue that no other steps are necessary in order to permit full refund of amounts collected (ultimately by Wisconsin Electric) in excess of just and reasonable compensation. They argue that Wisconsin Electric has not provided any rationale for ignoring the burdens its proposal would impose on those who actually paid the excessive SSR costs to which Wisconsin Electric believes it is entitled.

111. The Michigan Commission also disagrees with Wisconsin Electric's argument regarding fair notice.²³¹ The Michigan Commission argues that Wisconsin Electric claims it did not have fair notice that MISO would be required to provide additional support for the SSR compensation, but Wisconsin Electric does not provide some other method to determine the justness and reasonableness of the compensation. Instead, the Michigan Commission contends, Wisconsin Electric merely argues that the method used by the Presiding Judge—comparison to actual costs, and Wisconsin Electric's approved budget for capital expenditures during the same time period—is inappropriate.²³²

c. Commission Determination

112. As an initial matter, we agree with the Michigan Aligned Parties that the Commission's regulations, Rule 711(b)(2)(ii), require that briefs on exceptions specifically enumerate the exceptions asserted and Wisconsin Electric fails to specifically enumerate all of its purported objections to the Initial Decision. Wisconsin Electric failed

²²⁹ *Id.* at 29.

²³⁰ *Id.* at 29-30.

²³¹ Michigan Commission Brief Opposing Exceptions at 10-11.

²³² *Id.* at 10.

to follow the Commission's regulations. Wisconsin Electric's arguments nevertheless also fail on the merits, as discussed below.

113. We reject Wisconsin Electric's characterization of this proceeding as retroactively implementing a new standard for SSR compensation without providing fair notice. As discussed in this order, the Tariff limited compensation to either going-forward costs or full cost-of-service and the SSR compensation was subject to a section 205 filing to show that the negotiated amount was just and reasonable. The Presiding Judge did not deviate from the existing standard for SSR compensation in this proceeding.

114. We also reject Wisconsin Electric's argument that the Presiding Judge erred in shifting the FPA section 205 burden in this proceeding from MISO to Wisconsin Electric and its request that the Commission determine a means by which MISO is held accountable. Wisconsin Electric had notice that MISO regularly makes section 205 filings on behalf of its members and Wisconsin Electric should have been aware that MISO would bear the burden of proof for those filings. However, to the extent that MISO's rates are based on the costs of the members, the members must ultimately substantiate those costs in order to ensure that MISO's rates are just and reasonable. As the Michigan Commission argues, and we agree, although MISO has the burden of proof in such filings, Wisconsin Electric was provided the full opportunity to support meeting that burden.

115. Last, we agree with MISO that MISO should not be held responsible for the lower than expected compensation for Wisconsin Electric. MISO is correct that all parties submitted a Joint Statement of Issues, Stipulated Facts, and Contested Facts that stipulates that Wisconsin Electric is the party that will pay refunds and that MISO will be the party that returns the amounts to ratepayers. Moreover, it is Wisconsin Electric that collected unjust and unreasonable rates under the Original and Replacement SSR Agreements, which were set for hearing subject to refund, and therefore, it is Wisconsin Electric that must bear the responsibility for refunding those amounts to the customers that paid them.

3. Alleged Manipulation

a. Initial Decision

116. As stated above, the Presiding Judge determined that certain MATS compliance costs in the fixed-cost component of the Replacement SSR Agreement are unjust and unreasonable. The Presiding Judge found that Wisconsin Electric changed a date in the MATS Invoice to one day after the Replacement SSR Agreement became effective, which appears to have been done so the MATS costs could be recoverable under the Replacement SSR Agreement since the costs were not recoverable under the Original

SSR Agreement. The Presiding Judge described the act of changing the date on the invoice as “manipulation.”²³³

b. Briefs on Exceptions

117. The Michigan Aligned Parties argue that Wisconsin Electric’s manipulation of its records in a failed attempt to recover non-recoverable MATS compliance costs under the Replacement SSR Agreement warrants further investigation by the Office of Enforcement.²³⁴ The Michigan Aligned Parties explain that MISO advised Wisconsin Electric in November 2013 that MATS compliance costs would not be recoverable under a suspension SSR Agreement, such as the Original SSR Agreement.²³⁵ The Michigan Aligned Parties contend that Wisconsin Electric was also advised at that time that MATS compliance costs would be recoverable under a retirement agreement, such as the Replacement SSR Agreement. The Michigan Aligned Parties argue that during the suspension period of the Presque Isle Units (i.e., during the term of the Original SSR Agreement), Wisconsin Electric incurred \$1,401,231 of MATS compliance costs, and because these costs were incurred during the suspension period they were not recoverable under the Original SSR Agreement. The Michigan Aligned Parties argue that the record indicates that in order to instead recover these costs under the Replacement SSR Agreement, Wisconsin Electric manipulated its books and records, destroyed corporate documents, requested that the date on a major MATS Invoice be changed, and relied on inapplicable accounting principles.²³⁶ The Michigan Aligned Parties argue that, in discovery, Wisconsin Electric provided an agreement with the consulting firm Kuttner LLC and an invoice from Kuttner LLC dated October 16, 2014 (referred to in this order as MATS Invoice) for recovery of \$592,245 in MATS compliance costs that were recovered under the Replacement SSR Agreement. The Michigan Aligned Parties argue that, because the agreement with Kuttner LLC and the invoice were both dated after October 15, 2014 (i.e., the date the term of the Replacement SSR Agreement began), Wisconsin Electric treated the cost as recoverable under the Replacement SSR Agreement. The Michigan Aligned Parties contend that additional investigation and depositions revealed that agreement with Kuttner LLC was originally dated October 9,

²³³ Initial Decision, 156 FERC ¶ 63,013 at P 85.

²³⁴ Michigan Aligned Parties Brief on Exceptions at 24-29.

²³⁵ *Id.* at 24-25. As stated above, the Original SSR Agreement was a suspension agreement, whereas the Replacement SSR Agreement was a retirement agreement.

²³⁶ *Id.* at 24-26 (citing Ex. MAP-81 at 44-49; Ex. MAP-82 at 17:13-18:19, 27:21-28:14, 20:16-21:24; Ex. MAP-61 at 5; Ex. MAP-71; Ex. MAP-72; Ex. MAP-73; Ex. MAP-76; Tr. 488:4-14, 489:4-12 (Wolter)).

2014 and the MATS Invoice was dated October 10, 2014 in the amount of \$592,245. The Michigan Aligned Parties state that a Wisconsin Electric employee, Ms. Lyon, sent an email to Mr. Rahman, a Vice President at Kuttner LLC, asking for the October 10, 2014 MATS Invoice to be resubmitted with the date October 16, 2014. The Michigan Aligned Parties contends that Ms. Lyon also said that she would delete the October 10, 2014 MATS Invoice from Wisconsin Electric's system and send Mr. Rahman a new signature page for the agreement. The Michigan Aligned Parties also contend that Ms. Lyon stated that she had been advised that "[w]e need the dates on the agreement to be later than October 15, 2014."²³⁷

118. Wisconsin Electric argues that the Presiding Judge erred in focusing on deposition testimony over live witness testimony in his determination that certain environmental compliance costs incurred under the Replacement SSR Agreement should be refunded pursuant to the Clawback Provision.²³⁸ Wisconsin Electric contends that the Initial Decision gives undue weight to the change in date associated with the MATS Invoice and argues that Wisconsin Electric made clear on the record that the MATS compliance costs at issue are not recoverable either under the Original SSR Agreement or under the Replacement SSR Agreement because the Presque Isle Units returned to service, which triggered the Clawback Provision. Wisconsin Electric contends that the MATS Invoice was made subject to receipt of regulatory approvals. Wisconsin Electric states that the associated agreement was sent on October 8, 2014 and the MATS Invoice was sent on October 9, 2014, but both the agreement and the MATS Invoice were subject to authorization by MISO and Commission acceptance of the Replacement SSR Agreement. Wisconsin Electric argues that any work the consultant would have performed prior to receipt of regulatory approvals would have been performed at the risk of the consultant because the work was not authorized until such regulatory approvals were received. Wisconsin Electric states that its procurement department made an independent decision, without consultation with the legal department, to request that the consultant reissue the MATS Invoice dated after the receipt of regulatory approvals, but Wisconsin Electric argues that such an internal operating failure does not constitute manipulation because work could not begin nor invoice paid until the Replacement SSR Agreement was accepted by the Commission.

²³⁷ Michigan Aligned Parties Brief on Exceptions at 26-27 (citing Ex. MAP-61 at 1; Ex. MAP-73; Ex. MAP-75 at 2; Ex. MAP-81 at 44-48).

²³⁸ Wisconsin Electric Brief on Exceptions at 23-26.

c. Briefs Opposing Exceptions

119. Wisconsin Electric refutes the Michigan Aligned Parties' recommendation that the Commission should refer Wisconsin Electric to the Office of Enforcement.²³⁹ Wisconsin Electric argues that, although the Commission has not incorporated a specific intent standard into the anti-manipulation rule, the Commission has held that its anti-manipulation rule²⁴⁰ "is not intended to regulate negligent practices or corporate mismanagement, but rather to deter or punish fraud in wholesale electricity markets" and that any violation of the anti-manipulation rule requires a showing of scienter.²⁴¹ Wisconsin Electric concludes that, in order to establish a violation of the Commission's anti-manipulation rule, knowing, intentional, or reckless misconduct is required. Wisconsin Electric argues that, contrary to the allegations made by the Michigan Aligned Parties, Wisconsin Electric has not acted to defraud or perform deceit on any parties.

120. Wisconsin Electric argues that, contrary to the findings in the Initial Decision and to the Michigan Aligned Parties' assertions, Wisconsin Electric's request for reissuance of the MATS Invoice does not reflect deception or manipulation.²⁴² Wisconsin Electric argues that the request to reissue the MATS Invoice and Wisconsin Electric's deferred accounting practices do not amount to manipulation when both are adequately explained and placed in context in the record of the proceeding. Wisconsin Electric contends that it has been clear through the proceeding that it had negotiated to include MATS costs in the Replacement SSR Agreement and that those costs were not included in the Original SSR Agreement. Wisconsin Electric reiterates the argument made in its brief on exceptions that the contract with the consultant who reissued the MATS Invoice establishes that the original and reissued invoices were associated with a full notice to proceed that was subject to MISO and other regulatory approvals. Wisconsin Electric also argues that suspension SSR Agreements by definition do not include recovery of environmental compliance costs and it understood this fact as it operated the Presque Isle Units during the Original SSR Agreement. Wisconsin Electric states that it also determined that it would retire the Presque Isle Units and would terminate the Original SSR Agreement and had negotiated the Replacement SSR Agreement to reflect this change and the inclusion of environmental costs. Wisconsin Electric contends that it had the option to include

²³⁹ Wisconsin Electric Brief Opposing Exceptions at 9-16.

²⁴⁰ 18 C.F.R § 1c.1; 1c.2 (2017).

²⁴¹ Wisconsin Electric Brief Opposing Exceptions at 10 (citing *Prohibition of Energy Market Regulation*, Order No. 670, FERC Stats. & Regs. ¶ 31,202, at PP 49, 52 (2006)).

²⁴² *Id.* at 11-15.

environmental compliance costs in the Original SSR Agreement following the *Ameren* decision, but did not do so because of the limited time between August 2014 (the month following the *Ameren* decision) and October 2014 (the early termination date of the Original SSR Agreement).

121. Wisconsin Electric adds that witness Ms. Lyon explained that vendors are regularly asked to correct and re-issue invoices and that witness Ms. Wolter explained that, from an accounting perspective, deferred cost accounting is regularly used in the context of regulatory accounting and cost recovery.²⁴³ Wisconsin Electric contends that it has been and continues to be prepared to refund some \$4.07 million in MATS compliance costs incurred as those costs became excludable when the Replacement SSR Agreement was terminated and the Presque Isle Units returned to service, and that it understood that those costs were not recoverable under the Original SSR Agreement. Wisconsin Electric argues that the Commission's rules recognize deferred accounting and Part 101 of the Commission's regulations includes twelve potential deferred debit accounts and nine potential deferred credit accounts for recording such items. Wisconsin Electric explains that it is in this context that Ms. Wolter acknowledged that approximately \$1.4 million in MATS compliance costs were incurred prior to the October 15, 2014 effective date. Wisconsin Electric states that using deferred accounting simply meant to defer or delay recognizing certain revenues or expenses on the income statement until a later, more appropriate time. Wisconsin Electric contends that using deferred accounting placed the \$1.4 million into the Replacement SSR Agreement period for recovery purposes, but upon termination of the Replacement SSR Agreement all of the costs are now refunded.²⁴⁴

122. Wisconsin Electric also argues that it has made clear from early in the proceedings that the MATS compliance costs it incurred are not recoverable under the SSR Agreements due to Wisconsin Electric's decision to terminate the Replacement SSR Agreement and return the Presque Isle Units to service. Wisconsin Electric contends that any attempt to manipulate the costs would necessitate the continuation of the Replacement SSR Agreement for the benefits of any manipulation to be realized. Wisconsin Electric argues that its decision to terminate the Replacement SSR Agreement further evidences that Wisconsin Electric did not engage in manipulation or fraud.²⁴⁵

²⁴³ *Id.* at 14 (citing Ex. MAP-82, 33:11-34:4; Ex. MAP-71; Ex. MAP-72; Ex. MAP-81 at 140-141, 155; Ex. WED-5 at 3:14-15; Tr. 622:2-17 (Wolter); Tr. 675:10-20 (Robinson)).

²⁴⁴ *Id.* at 14-15.

²⁴⁵ *Id.* at 16.

123. The Michigan Aligned Parties argue that Wisconsin Electric’s objections to the Initial Decision’s finding regarding manipulative conduct lack support in the record.²⁴⁶ They argue that Wisconsin Electric’s explanations for the conduct, which are unsupported by record evidence, cannot change the facts in the record, and the inferences drawn by the Presiding Judge from those facts were reasonable. The Michigan Aligned Parties argue that, in its brief on exceptions, Wisconsin Electric makes post-hoc rationalizations amounting to self-serving speculation and incorrectly suggests that the Presiding Judge impermissibly gave greater weight to deposition testimony than live testimony even though the live witness had no first-hand knowledge of the events addressed in the deposition testimony. The Michigan Aligned Parties review the record evidence concerning the alleged manipulation and argue that the record supports the Presiding Judge’s finding of improper manipulation.²⁴⁷ They contend that Wisconsin Electric attempts to argue that there was no irregularity in the conduct because final approval was not obtained until after October 15, 2014, but that the record shows final approval of the project occurred on October 3, 2014. The Michigan Aligned Parties contend that Wisconsin Electric’s budgetary guidelines provided that the MATS project only required approval from the “Senior Project Team” and Wisconsin Electric provided an email stating that the MATS project was approved by the “Senior Project Team” on October 3, 2014. The Michigan Aligned Parties also argue that, although the affected \$1.4 million would have been subject to clawback in any event, at the time, Wisconsin Electric employees engaged in manipulative conduct and they did not know that the decision to suspend or retire the Presque Isle Units would be revoked months later. The Michigan Aligned Parties argue that just because the scheme was unsuccessful does not render the scheme lawful after the fact.²⁴⁸

d. Commission Determination

124. We make no findings at this time regarding whether Wisconsin Electric committed fraud or engaged in manipulation when a date was changed on an invoice for MATS compliance related costs, but we have referred the matter to the Commission’s Office of Enforcement for further examination and inquiry as may be appropriate.

The Commission orders:

(A) The Initial Decision is hereby affirmed in part and reversed in part, as discussed in the body of this order.

²⁴⁶ Michigan Aligned Parties Brief Opposing Exceptions at 50-55.

²⁴⁷ *Id.* at 52-54.

²⁴⁸ *Id.* at 55 (citing Ex. MAP-78, 79).

(B) Wisconsin Electric is hereby directed to refund SSR compensation under the Original SSR Agreement and the Replacement SSR Agreement to MISO, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.