

148 FERC ¶ 61,030
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Acting Chairman;
Philip D. Moeller, John R. Norris,
and Tony Clark.

The Empire District Electric Company

Docket No. EL14-73-000

ORDER ON FORMULA RATE PROTOCOLS

(Issued July 17, 2014)

1. In this order, pursuant to section 206 of the Federal Power Act (FPA)¹ we direct The Empire District Electric Company (Empire) to file revisions to the formula rate protocols under the Empire Open Access Transmission, Energy and Operating Reserve Markets Tariff (Empire Tariff), and Southwest Power Pool, Inc.'s (SPP's) Open Access Transmission Tariff (SPP Tariff),² or show cause why it should not be required to do so.

I. Background and Summary

2. The Commission is responsible for ensuring that the rates, terms and conditions of service for wholesale sales and transmission of electric energy in interstate commerce are just, reasonable, and not unduly discriminatory or preferential. It has been the Commission's policy to permit utilities to establish rates through formulas. We recognize that the integrity and transparency of formula rates and particularly formula rate protocols are critically important in ensuring just and reasonable rates, and especially so given that more utilities are using formula rates to recover the cost of their transmission investments.

3. Regarding formula rates, the Commission has stated that "the formula itself is the rate, not the particular components of the formula."³ Thus, periodic adjustments, typically performed on an annual basis, "made in accordance with the Commission-

¹ 16 U.S.C. § 824e (2012).

² Empire's formula rate protocols are included in the Empire Tariff, and as part of the SPP Tariff. Revisions to Empire's formula rate and formula rate protocols section of the SPP Tariff are filed by SPP on Empire's behalf.

³ *Ocean State Power II*, 69 FERC ¶ 61,146, at 61,544 (1994).

approved formula do not constitute changes in the rate itself and accordingly do not require section 205 filings.”⁴ Because the formula rates for transmission service presently on file with the Commission do not typically require transmission owners to make a section 205 filing to update their annual transmission revenue requirement, safeguards need to be in place to ensure that the input data is the correct data, that calculations are performed consistent with the formula, that the costs to be recovered in the formula rate are reasonable and were prudently incurred, and that the rates are just and reasonable.⁵ The safeguard that has often been employed is formula rate protocols.

4. The reason for including formula rate protocols in formula rates for transmission service is to provide the parties paying such rates specific procedures for notice and review of, and challenges to, the transmission owner’s annual updates. Such formula rate protocols, in order to fulfill this purpose, should afford adequate transparency to affected customers, state regulators or other interested parties, as well as provide mechanisms for resolving potential disputes; they can be an important tool in ensuring just and reasonable rates.

5. The Commission has recently addressed formula rate protocols in a particular region. On May 17, 2012, the Commission instituted an investigation, pursuant to section 206 of the FPA, to determine whether the formula rate protocols under Attachment O of the Midcontinent Independent System Operator, Inc.’s (MISO) Open Access Transmission, Energy and Operating Reserve Markets Tariff (MISO Tariff) were sufficient to ensure just and reasonable rates.⁶ In that order, the Commission identified three areas of concern: (1) scope of participation (i.e., who can participate in the information exchange); (2) the transparency of the information exchange (i.e., what

⁴ *Id.* at 61,545 (citing 16 U.S.C. § 824d (2012); *see also Ala. Power Co. v. FERC*, 993 F.2d 1557, 1567-68 (D.C. Cir. 1993)).

⁵ While a party that challenges the transmission owner’s projected costs must do more than make unsubstantiated allegations, *see Interstate Power & Light Co. v. ITC Midwest, LLC*, 135 FERC ¶ 61,162, at P 18 (2011), the transmission owner bears the ultimate burden of demonstrating the justness and reasonableness of the charge resulting from its application of the formula. *Va. Elec. & Power Co.*, 123 FERC ¶ 61,098, at P 47 (2008); *Am. Elec. Power Co., Inc.*, 124 FERC ¶ 61,306, at P 36 (2008).

⁶ *Midwest Indep. Transmission Sys. Operator, Inc.*, 139 FERC ¶ 61,127 (2012), *order on investigation*, 143 FERC ¶ 61,149 (2013) (MISO Investigation Order), *order on reh’g*, 146 FERC ¶ 61,209 (2014), *order on compliance*, 146 FERC ¶ 61,212 (2014) (MISO Compliance Order). In order to address whether MISO’s *pro forma* formula rate protocols and the formula rate protocols of individual transmission owners were sufficient to ensure just and reasonable rates, the Commission established paper hearing procedures.

information is exchanged); and (3) the ability of customers to challenge transmission owners' implementation of the formula rate as a result of the information exchange (i.e., how the parties may resolve their potential disputes).⁷

6. After receiving comments from parties to the proceeding, on May 16, 2013, the Commission found that the formula rate protocols under the Tariff were insufficient to ensure just and reasonable rates, and therefore, directed MISO and its transmission owners to file revised formula rate protocols to address the Commission's concerns about the scope of participation, the transparency of the information exchange, and the ability of customers to challenge transmission owners' implementation of the formula rate as a result of the information exchange.⁸ On March 20, 2014, the Commission conditionally accepted, subject to further compliance, MISO's proposed Tariff revisions made in compliance with the MISO Investigation Order.⁹ Among the requirements addressing the transparency of the information exchange, in the MISO Investigation Order, the Commission directed MISO to include a provision in the formula rate protocols that transmission owners make annual informational filings of their formula rate updates with the Commission.¹⁰

7. The Commission has undertaken a review of the transmission formula rates and formula rate protocols of jurisdictional public utilities to identify utilities that currently are not required to make annual informational filings of their formula rate updates with the Commission, and identified Empire as one such utility.¹¹ The Commission has also

⁷ 139 FERC ¶ 61,127 at P 8.

⁸ MISO Investigation Order, 143 FERC ¶ 61,149.

⁹ MISO Compliance Order, 146 FERC ¶ 61,212. The Commission also separately evaluated the compliance filings of two MISO transmission owners. *See Midcontinent Indep. Sys. Operator, Inc.*, 146 FERC ¶ 61,210 (2014) (evaluating the compliance filing of Southern Indiana Electric & Gas Company); *Midcontinent Indep. Sys. Operator, Inc.*, 146 FERC ¶ 61,211 (2014) (evaluating the compliance filing of Northern Indiana Public Service Company).

¹⁰ MISO Investigation Order, 143 FERC ¶ 61,149 at P 92.

¹¹ In orders being issued concurrently, the Commission also directs the filing of formula rate protocols or revisions to the existing formula rate protocols of several other public utilities: *Black Hills Power Inc.*, 148 FERC ¶ 61,035 (2014); *UNS Electric, Inc.*, 148 FERC ¶ 61,032 (2014); *Kansas City Power and Light and KCP&L Greater Missouri Operations Company*, 148 FERC ¶ 61,034 (2014), *Louisville Gas and Electric Company and Kentucky Utilities Company*, 148 FERC ¶ 61,031 (2014); *Westar Energy, Inc.*, 148 FERC ¶ 61,033 (2014).

undertaken an analysis of the Empire formula rate protocols using the standards established in the MISO Investigation Order and MISO Compliance Order to determine if the Empire formula rate protocols meet the other requirements established in those orders. As further discussed below, based on that analysis, we find that the Empire formula rate protocols are deficient in the three areas of concern identified above, and thus appear to be unjust and unreasonable. Therefore, as discussed below, pursuant to section 206 of the FPA we direct Empire to file revisions to the formula rate protocols to conform to the requirements of the MISO Investigation Order and MISO Compliance Order or show cause why it should not be required to do so.¹²

II. Discussion

A. Overview of the Empire Formula Rate Protocols

8. The Empire formula rate protocols provide that by June 1, Empire will recalculate the annual transmission revenue requirement for the impending rate year,¹³ based upon Empire's FERC Form No. 1 to the extent described in the formula rate (Annual Update).¹⁴ Empire will then post the Annual Update on the SPP Open Access Same-Time Information System (OASIS) website. This posting will also include "a populated rate formula template in fully functional spreadsheets showing the calculation of [the] Annual Update" with sufficiently detailed supporting worksheets and documentation for data used to develop the formula rate and are not otherwise available directly from Empire's FERC Form No. 1.¹⁵ Empire will provide notice of this posting via e-mail to "SPP transmission customers taking Network Integration Transmission Service and/or Point-to-Point Transmission Service on the [E]mpire facilities operated by SPP and affected state public utility commissions (together 'Interested Parties')." ¹⁶ Empire will

¹² Concurrently with the issuance of this order, the Commission will post on its website general guidance for formula rate updates which will aid utilities in the preparation of their annual updates and annual update informational filings in order to avoid common deficiencies.

¹³ The impending rate year is July 1 through June 30 of the following calendar year.

¹⁴ Empire District Electric Company, Docket No. ER12-1813-003, Attachment H-2, Transmission Formula Rate Implementation Protocols (Empire Attachment H-2) (filed December 18, 2013; amended February 14, 2014). The Commission accepted Empire's protocols in an unpublished letter order issued on May 12, 2014.

¹⁵ Empire Attachment H-2, §§ 1.3(b), I.4(b).

¹⁶ *Id.* § I.3(d).

host an annual meeting no later than June 15 each year to explain and answer Interested Parties' questions and will provide at least 15 calendar days' notice of said meeting to Interested Parties. Following the annual meeting, Empire will modify the Annual Update "to reflect any changes that it and the Interested Parties . . . agree upon as a result of the [a]nnual [m]eeting," posting such modifications no later than June 30.¹⁷

9. The Empire formula rate protocols also contain information exchange and challenge procedures to which Interested Parties may avail themselves. To this end, Interested Parties have 90 days from the annual meeting to serve information requests on Empire following the Annual Update.¹⁸ Empire will make a good faith effort to respond to these requests within 15 business days. Should a dispute arise surrounding an information request, Empire or an Interested Party may petition FERC to appoint a discovery master who may issue orders to resolve disputes. Should any issues remain unresolved during or following the information exchange period, Interested Parties have until the later of: (1) 105 calendar days from the annual meeting date; or (2) 15 calendar days from Empire's last response to an information request (Notice Date), to "review the implementation of the Formula Rate and to notify Empire in writing of any specific challenges to the Annual Update" (Issues).¹⁹ After 30 days from the Notice Date, if Empire and the Interested Party cannot resolve any Issue, a representative from each party will make a good faith effort to resolve any outstanding issues. If, after 50 days from the Notice Date, Empire and the Interested Party cannot resolve an Issue, any Interested Party may file a formal challenge pursuant to section 206 or section 306 of the FPA.

B. Analysis of Empire's Formula Rate Protocols and Findings

10. Based on our examination, we find that Empire's formula rate protocols do not meet the standards identified in MISO Investigation Order and MISO Compliance Order. Specifically, we identify three areas of concern with the Empire formula rate protocols. The areas of concern are categorized as follows: (1) scope of participation (i.e., who can participate in the information exchange); (2) the transparency of the information exchange (i.e., what is exchanged); and (3) the ability to challenge the transmission owners' implementation of the formula rate as a result of the information exchange (i.e., how the parties may resolve their potential dispute). Because the Empire formula rate protocols are deficient in the three identified areas, as further discussed below we direct Empire, pursuant to section 206 of the FPA, to file revisions to its formula rate protocols within 60 days or show cause why it should not be required to do so.

¹⁷ *Id.* § II.1.

¹⁸ *Id.* § II.2.

¹⁹ *Id.* § II.5.

1. Scope of Participation

11. In the MISO Investigation Order, the Commission found that the MISO formula rate protocols inappropriately limited the ability of certain interested parties to obtain information and participate in review processes. As a result, the Commission directed MISO and the transmission owners to revise the formula rate protocols to include all interested parties in information exchange and review processes, including but not exclusive to customers under the MISO Tariff, state utility regulatory commissions, consumer advocacy agencies, and state attorneys general.²⁰ In the MISO Compliance Order, the Commission accepted MISO's proposed definition of interested parties.²¹

12. Similarly, Empire's formula rate protocols limit the ability of certain interested parties to obtain information about annual updates from transmission owners.²² While the Empire protocols clearly provide that SPP transmission customers taking transmission service on the Empire facilities operated by SPP and affected state public utility commissions may participate in information exchange and challenge procedures, it is important that other parties be allowed to participate.

13. Based on the analysis above, we find that the protocol language that limits the participation of interested parties in the review of the implementation of the formula rate and of the costs that would flow through the formula rates appears to be unjust and unreasonable. We also find that, to assist the Commission in performing its duty to ensure just and reasonable rates, Empire should provide the Commission all such information reasonably necessary to review and evaluate the implementation of the formula rate and the costs that would flow through the formula rate. Therefore, to afford adequate opportunity for participation and access to information, we direct the Empire to revise its formula rate protocols to provide all interested parties and the Commission with access to information about the annual updates as provided by the MISO Investigation Order and the MISO Compliance Order, or show cause why it should not be required to do so.

²⁰ MISO Investigation Order, 143 FERC ¶ 61,149 at P 34.

²¹ MISO Compliance Order, 146 FERC ¶ 61,212 at P 18 (finding MISO's definition of interested parties as "all interested parties in information exchange and review processes, including but not exclusive to customers under the [MISO] Tariff, state utility regulatory commissions, consumer advocacy agencies, and state attorney[s] general" just and reasonable).

²² See MISO Investigation Order, 143 FERC ¶ 61,149 at P 34 (where the Commission similarly found that "the MISO formula rate protocols...inappropriately limit the ability of certain interested parties to obtain information and participate in review processes and are, thus, unjust and unreasonable").

2. Transparency

14. In the MISO Investigation Order, the Commission found that MISO's formula rate protocols provided insufficient transparency with respect to information about the transmission owners' costs and revenue requirements. The Commission found that the protocols must be revised to provide interested parties with the information necessary to understand and evaluate the implementation of the formula rate for either the correctness of inputs and calculations, or the reasonableness of the costs to be recovered in the formula rate.²³ The Commission required transmission owners to annually post their revenue requirements and relevant information on both MISO's website and OASIS, and to hold an annual meeting open to all interested parties to review and discuss the posted information. The Commission stated that the annual update should include underlying data and calculations supporting all inputs that are not supported in the FERC Form No. 1 and provide information about the transmission owner's implementation of the formula rate in sufficient detail and with sufficient explanation to demonstrate that each input to the formula rate is consistent with the requirements of the formula rate, without forcing interested parties to make extensive data requests to understand the transmission owner's implementation of the formula and verify its correctness. The Commission further required transmission owners to disclose any accounting changes during the rate period that affect the inputs into the formula rate or the resulting charges, including accounting associated with any reorganization or merger transaction.²⁴

15. The Commission also provided that, following the annual update, interested parties must be afforded the opportunity to review the information posted and submit reasonable information and document requests to the transmission owner, provided the requests are relevant to the implementation of the formula rate. They must also be allowed the opportunity to request further information regarding the transmission owner's accounting practices to the extent the accounting impacts items included in the determination of the annual revenue requirement, and to obtain upon request information on procurement methods and cost control methodologies used by the transmission owner.²⁵ Further, the Commission required that transmission owners make a good faith effort to respond to information requests within a set, reasonable period of time.²⁶

16. Additionally, the Commission required that transmission owners make annual informational filings of their formula rate updates with the Commission. The

²³ MISO Investigation Order, 143 FERC ¶ 61,149 at P 82.

²⁴ *Id.* PP 86-88.

²⁵ *Id.* PP 89-90.

²⁶ *Id.* P 91.

Commission stated that the informational filing must be made following the information exchange period and must include any corrections or adjustments made during that period. The Commission also required that the informational filing note any aspects of the formula rate or its inputs that are the subject of an ongoing dispute under the challenge procedures. The Commission found that the MISO formula rate protocols must specifically provide that the informational filing include the information that is reasonably necessary to determine: (1) that input data under the formula rate is properly recorded in any underlying workpapers; (2) that the transmission owner has properly applied the formula rate and the procedures in the protocols; (3) the accuracy of data and the consistency with the formula rate of the actual revenue requirement and rates (including any true-up adjustment) under review; (4) the extent of accounting changes that affect formula rate inputs; and (5) the reasonableness of projected costs included in the projected capital addition expenditures (for forward-looking formula rates).²⁷

17. In the MISO Compliance Order, the Commission conditionally accepted MISO's compliance filing subject to further revisions. In particular, among other things, the Commission required MISO to: (1) provide electronic notice of the annual update/true-up postings; (2) propose a process for transmission owners with transmission projects that utilize a regional cost sharing methodology to coordinate and hold joint meetings; and (3) ensure that the forward-looking protocols apply to the projected revenue requirement, in addition to the true-up revenue requirements. In addition, the Commission required revisions to the provision relating to mergers and reorganizations, so as to not limit its applicability to mergers or reorganizations that required the submission of a filing under sections 203 or 205 of the FPA.²⁸

18. Based on our analysis, we find that the Empire formula rate protocols do not provide all interested parties the information necessary to understand and evaluate the implementation of the formula rate for either the correctness of inputs and calculations or the reasonableness and prudence of the costs to be recovered in the formula rate, which would form the basis of any potential challenge.²⁹ In the MISO Investigation Order, the Commission found that "[t]o be just and reasonable, we find that MISO's protocols for both historical and forward-looking formula rates must require transmission owners to post their revenue requirements and relevant information, on both MISO's website and OASIS."³⁰ Here, the Empire formula rate protocols provide that Empire will post its

²⁷ *Id.* P 92.

²⁸ MISO Compliance Order, 146 FERC ¶ 61,212 at PP 59-73.

²⁹ The Commission has previously noted its authority to order refunds for imprudent costs charged to customers through an existing formula rate. *See Yankee Atomic Elec. Co.*, 60 FERC ¶ 61,316, at 62,096-97 (1992).

³⁰ *See* MISO Investigation Order, 143 FERC ¶ 61,149 at P 86.

Annual Update on the SPP OASIS website, but the protocols do not require posting on the SPP website.

19. In addition, Empire's protocols provide for electronic notification of its annual updates to only SPP network and point-to-point transmission customers and affected state commissions, but it does not provide electronic notice to other interested parties. In the MISO Compliance Order, the Commission directed MISO to provide notification of those postings through an email "exploder" list.³¹ We will also require Empire to notify any interested party, through an email distribution list, of its postings related to the annual updates and, if appropriate, true-up adjustments.

20. We similarly find that Empire's formula rate protocols do not explicitly include a provision that allows interested parties to obtain upon request information on procurement methods and cost control methodologies used by Empire in order to facilitate interested parties' analysis of whether Empire's costs were prudently incurred. The Commission has found that interested parties must be allowed to obtain upon request information on procurement methods and cost control methodologies used by transmission owners in order to facilitate interested parties' analysis of whether transmission owners' costs were prudently incurred.³²

21. Furthermore, Empire's protocols do not provide a commitment by Empire to endeavor to coordinate with other transmission owners in SPP to hold a joint meeting to discuss transmission projects which utilize regional cost allocation.³³ In the MISO Compliance Order, the Commission noted that absent such a provision, an interested party would otherwise have to "separately participat[e] in each transmission owner's annual meeting," and that joint meetings "ease the burden of both transmission customers and owners by limiting the number of annual meetings necessary."³⁴

22. Empire's formula rate protocols currently do not provide a requirement to make annual informational filings with the Commission. In the MISO Investigation Order, the Commission directed MISO to include a requirement that transmission owners make annual informational filings of their formula rate updates with the Commission.³⁵

³¹ MISO Compliance Order, 146 FERC ¶ 61,212 at P 59.

³² MISO Investigation Order, 143 FERC ¶ 61,149 at PP 89-90.

³³ The Commission acknowledges that other SPP transmission owners' formula rate protocols may not require such efforts. In such instances, cooperation of such SPP transmission owners would be necessary for Empire to provide for joint meetings.

³⁴ *Id.* P 59.

³⁵ *Id.* P 92.

Therefore, to allow the Commission to perform its duty to ensure just and reasonable rates, information such as the annual updates, true-up adjustments, and data and workpapers sufficiently detailed to support such information must be filed with the Commission in the form of an annual informational filing.³⁶

23. Based on the analysis above, we find that Empire's protocols appear to be unjust and unreasonable. Therefore, we direct Empire to revise its formula rate protocols to provide interested parties the information necessary to understand and evaluate the implementation of the formula rate for both the correctness of inputs and calculations, and the reasonableness and prudence of the costs to be recovered in the formula rate as provided by the MISO Investigation Order and MISO Compliance Order,³⁷ or show cause why it should not be required to do so.

3. Challenge Procedures

24. In the MISO Investigation Order, the Commission found that the MISO formula rate protocols were insufficient in setting forth the specific challenge procedures. In order to ensure that transmission owners implement their annual updates in accordance with their Commission-approved formula rates, the Commission held that interested parties must be afforded the ability to challenge a transmission owner's annual update and resolve related disputes through straightforward and defined procedures.³⁸ In particular, the Commission stated that the MISO formula rate protocols must set out a procedure through which interested parties can informally challenge transmission owners' proposed inputs.³⁹ At a minimum, the Commission required such procedures to permit interested parties to raise informal challenges for a reasonable period of time after transmission owners initially post their annual updates.⁴⁰ Where applicable, the Commission added that transmission owners must appoint senior representatives to work with interested parties to resolve informal challenges.⁴¹ Furthermore, if, after a reasonable period of time, the parties are unable to resolve their dispute informally, interested parties must be permitted to raise a formal challenge with the Commission, in

³⁶ *Id.* P 92.

³⁷ MISO Investigation Order, 143 FERC ¶ 61,149 at PP 81-92; MISO Compliance Order, 146 FERC ¶ 61,212 at PP 58-73.

³⁸ MISO Investigation Order, 143 FERC ¶ 61,149 at P 118.

³⁹ *Id.* P 119.

⁴⁰ *Id.*

⁴¹ *Id.*

which the transmission owner would bear the burden of demonstrating the correctness of its update or true-up.⁴²

25. In the MISO Compliance Order, the Commission conditionally accepted MISO's compliance filing subject to further revisions. Specifically, the Commission required, among other things: (1) additional revisions to MISO's proposed deadline for interested parties' submission of informal challenges in order to ensure an opportunity to evaluate all responses to information requests; (2) modification of the proposed six-issue limitation on challenges to ensure that all parties have the opportunity to raise issues as discussed in the order;⁴³ and (3) modifications to ensure that interested entities are not precluded from exercising their statutory rights.⁴⁴

26. Based on our analysis, we find that the Empire formula rate protocols regarding challenge procedures do not fully provide the ability to challenge a transmission owner's annual update and resolve related disputes through straightforward and defined procedures, as provided by the MISO Investigation Order. At a minimum, the Commission required such procedures to permit interested parties to raise informal challenges for a reasonable period of time after annual updates are posted, in order to avoid the financial and informational burden associated with filing a formal challenge or with filing a complaint with the Commission pursuant to section 206. If, after a reasonable period of time, the parties are unable to resolve their dispute informally, interested parties must be permitted to raise a formal challenge with the Commission, in which the transmission owner would bear the burden of demonstrating the correctness of

⁴² *Id.* P 120.

⁴³ The Commission directed the MISO transmission owners to modify section IV.D of their protocols to allow interested parties to raise all issues:

that may be necessary to determine: (1) the extent or effect of an accounting change; (2) whether the annual true-up fails to include data properly recorded in accordance with the protocols; (3) the proper application of the formula rate and procedures in the proposed protocols; (4) the accuracy of data and consistency with the formula rate of the calculations shown in the annual true-up; (5) the prudence of actual costs and expenditures; and (6) the effect of any change to the underlying Uniform System of Accounts or applicable form; or any other information that may reasonably have substantive effect on the calculation of the charge pursuant to the formula.

MISO Compliance Order, 146 FERC ¶ 61,212 at P 107.

⁴⁴ *Id.* PP 103-117.

its update or true-up.⁴⁵ Such formal challenges are distinct from, and in addition to, the ability to file complaints pursuant to section 206 of the FPA.⁴⁶ Here, Empire's protocols include provisions for informal and formal challenges, but require that formal challenges be complaints filed pursuant to section 206 of the FPA.

27. In addition, while the Empire formula rate protocols provide that an Interested Party may file a formal challenge, the protocols require interested parties to file such challenges pursuant to section 206 or 306 of the FPA. That is inconsistent with the informal and formal challenge procedures set forth in the MISO Investigation Order and MISO Compliance Order, discussed above.⁴⁷

28. Based on our analysis above, we find that Empire's protocols appear to be unjust and unreasonable. Therefore, we direct Empire to revise its formula rate protocols to provide specific procedures for challenges, as described above, sufficient to ensure that transmission customers pay just and reasonable rates as provided by the MISO Investigation Order and MISO Compliance Order,⁴⁸ or show cause why it should not be required to do so.

C. Compliance Filing

29. Based on our analysis above, we find that the Empire formula rate protocols on file with the Commission appear to be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Therefore, we find that it is appropriate to institute an investigation in this proceeding, Docket No. EL14-73-000, with respect to Empire's formula rate protocols. We will direct Empire to file revisions to the formula rate protocols within 60 days, or show cause why it should not be required to do so.

30. In cases where, as here, the Commission institutes a section 206 investigation on its own motion, section 206(b) of the FPA requires that the Commission establish a refund effective date that is no earlier than the date of publication of the notice of the Commission's initiation of its investigation in the *Federal Register*, and no later than

⁴⁵ MISO Investigation Order, 143 FERC ¶ 61,149 at P 120.

⁴⁶ MISO Compliance Order, 146 FERC ¶ 61,212 at P 109; *Midcontinent Independent System Operator, Inc.*, 146 FERC ¶ 61,210 (2014) at 53.

⁴⁷ MISO Compliance Order, 146 FERC ¶ 61,212 at P 103; MISO Investigation Order, 143 FERC ¶ 61,149 at PP 119-120.

⁴⁸ See MISO Investigation Order, 143 FERC ¶ 61,149 at PP 103-123; MISO Compliance Order, 146 FERC ¶ 61,212 at PP 103-117.

five months after the publication date.⁴⁹ Consistent with our general policy of providing maximum protection to customers, we will set the refund effective date at the earliest date possible, which will be the date the notice of the initiation of the investigation in Docket No. EL14-73-000 is published in the *Federal Register*.⁵⁰

31. Section 206(b) of the FPA also requires that, if no final decision is rendered by the conclusion of the 180-day period commencing upon initiation of the section 206 proceeding, the Commission shall state the reason why it has failed to render such a decision and state its best estimate as to when it reasonably expects to make such a decision.⁵¹

32. Any entity desiring to participate in Docket No. EL14-73-000, must file a notice of intervention or a motion to intervene, as appropriate, in accordance with Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2013), within 30 days of publication of notice in the *Federal Register* of the Commission's initiation of section 206 proceeding in Docket No. EL14-73-000.

The Commission orders:

(A) Pursuant to section 206 of the Federal Power Act, Empire must, within 60 days of the date of this order, submit revised formula rate protocols, or show cause why it should not be required to do so, as discussed in the body of this order.

(B) Any entity desiring to participate in Docket No. EL14-73-000 as ordered above, must file a notice of intervention or a motion to intervene, as appropriate, in accordance with Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2013), within 30 days of publication of notice in the *Federal Register* of the Commission's initiation of section 206 proceeding in Docket No. EL14-73-000.

(C) The Secretary shall promptly publish in the *Federal Register* a notice of the Commission's initiation of section 206 proceeding in Docket No. EL14-73-000.

⁴⁹ 16 U.S.C. § 824e(b) (2012).

⁵⁰ See, e.g., *Seminole Elec. Coop., Inc. v. Fla. Power & Light Co.*, 65 FERC ¶ 61,413, at 63,139 (1993); *Canal Elec. Co.*, 46 FERC ¶ 61,153, at 61,539, *reh'g denied*, 47 FERC ¶ 61,275 (1989). We, however, note that section 206 of the FPA does not require that the Commission order refunds in every instance. *Ameren Servs. Co. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 127 FERC ¶ 61,121, at P 154 (2009).

⁵¹ 16 U.S.C. § 824e(b) (2012).

(D) The refund effective date established pursuant to section 206(b) of the FPA, will be the date of publication in the *Federal Register* of the notice discussed in Ordering Paragraph (C) above.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.