

118 FERC ¶ 61, 212
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Midwest Independent Transmission System
Operator, Inc.

Docket No. ER04-691-078

ORDER ON REHEARING

(Issued March 15, 2007)

1. The Midwest Independent Transmission System Operator, Inc.'s (Midwest ISO) Transmission and Energy Markets Tariff (TEMT) provides generators of electric energy with a real-time revenue sufficiency guarantee (RSG).¹ The real-time RSG credit ensures that any generator scheduled or dispatched by the Midwest ISO after the close of the day-ahead energy market – either through the Reliability Assessment Commitment (RAC) or the real-time energy market – will receive no less than its offer prices for start-up, no-load and incremental energy. RSG credits are most often paid to units scheduled in the RAC or in the real-time market that do not earn sufficient real-time energy revenues to cover start-up and no-load costs. RSG costs are allocated based on the load and resource deviations, virtual offers, exports and imports of market participants withdrawing energy.
2. In an order dated April 25, 2006 (RSG Order),² the Commission rejected the Midwest ISO's proposal to, among other things, remove references to virtual supply from the tariff provisions related to calculating RSG charges.³ The Commission further found

¹ The RSG payment is equal to the product of the market participants load purchased in real time, all virtual supply in the day-ahead energy market, and resource uninstructed deviation quantities times the per-unit RSG charge. TEMT Module C, section 40.3.3.a.ii, Second Revised Sheet Nos. 577-78.

² *Midwest Independent Transmission System Operator, Inc.*, 115 FERC ¶ 61,108 (2005) (RSG Order), *reh'g granted in part and denied in part*, 117 FERC ¶ 61,113 (2006) (RSG Rehearing Order).

³ RSG Order at P 48-49.

that because the Midwest ISO had not been including virtual supply offers in its RSG calculations, it had violated its tariff and must make appropriate refunds.⁴ On rehearing, the Commission was persuaded to change course and exercise its equitable discretion not to require refunds related to virtual supply offers.⁵

Requests for Rehearing

3. Eight parties filed requests for rehearing of the RSG Rehearing Order: Ameren Services Company (Ameren); DC Energy Midwest, LLC (DC Energy); E.ON U.S. LLC (E.ON); Epic Merchant Energy, LP, SESCO Enterprises LLC and Black Oak Energy, LLC (collectively, Financial Marketers); Strategic Energy, LLC (Strategic Energy); Wisconsin Electric Power Company (WEPCO); WPS Energy Services, Inc. (WPS Energy); and Xcel Energy Services, Inc. (Xcel). Xcel also filed a request for clarification.

4. Edison Mission Energy, Edison Mission Marketing & Trading, Inc. and Midwest Generation EME, LLC (collectively, Edison Mission) filed an answer to the requests for rehearing, as did E.ON. Ameren and Madison Gas & Electric Company (MGE) filed answers to Edison Mission's answer.

Discussion

A. Procedural Matters

1. Answers to Requests for Rehearing

5. Answers to requests for rehearing are prohibited under Rule 713(d)(1) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d)(1) (2006). Accordingly, we will reject Edison Mission's and E.ON's answers to the requests for rehearing, as well as Ameren's and MGE's answers to Edison Mission's answer.

2. Strategic Energy's Motion to Intervene

a. Request for Rehearing

6. Strategic Energy seeks rehearing of the Commission's denial of its motion to intervene out of time. Strategic Energy argues that its motion showed that: (1) Strategic

⁴ *Id.* at P 26-27.

⁵ RSG Rehearing Order at P 92-95.

Energy was harmed by the issuance of the RSG Order, and (2) it did not intervene sooner because it thought the Midwest ISO's original filing merely clarified existing practices.

7. Strategic Energy states that it reasonably believed the Midwest ISO's original filing in this proceeding proposed a clarification, not a change, to the Midwest ISO's operating scheme. As a retail access supplier, Strategic Energy cannot recover costs via state regulatory processes; therefore, the sudden application of RSG costs to virtual supply offers and the related refund liability would have drastically impacted its finances. Strategic Energy notes that it was not on notice of this potential change until after the RSG Order issued. It adds that the Midwest ISO's Motion to Stay changed the scope of this proceeding by showing that the gap between the tariff language and the language of the relevant Business Practice Manual translated into \$250 million.

8. Strategic Energy notes that no other party can represent its interests, and that it pledged to accept the existing record and not to disrupt the proceeding. Citing Commission precedent and "common equity," Strategic Energy argues that the Commission has granted late motions to intervene under less compelling circumstances in the past.⁶ As such, Strategic Energy argues that it has shown extraordinary cause to justify its intervention out of time.

9. If Strategic Energy's late motion to intervene is granted, then it requests rehearing or clarification of: (1) the Commission's decision not to permit netting of virtual supply offers and physical withdrawals at the same CP Node prior to assessing RSG charges; and (2) the Commission's intent as to how RSG should be applied prospectively between financial-only market participants and those participating in financial markets as well as serving load.

b. Discussion

10. We will deny Strategic Energy's request for rehearing. As Strategic Energy acknowledges, when "late intervention is sought after the issuance of a dispositive order, the prejudice to other parties and burden upon the Commission of granting the late intervention may be substantial. Thus, movants bear a higher burden to demonstrate

⁶ In support of its argument, Strategic Energy cites *Duke Energy Hinds, LLC et al. v. Entergy Services, Inc.*, 117 FERC ¶ 61,210 (2006) (*Duke Hinds*); *Northwest Pipeline Corporation*, 46 FERC ¶ 61,247 (1989); and *National Fuel Gas Supply Corp.*, 81 FERC ¶ 61,097 (1997).

good cause for the granting of such later intervention.”⁷ As further discussed below, Strategic Energy has not met this higher burden of justifying its late intervention. We decline to treat its request for rehearing as a motion for reconsideration, as the Commission did in *National Fuel Gas Supply Corp.*, which Strategic Energy cites in support of its motion.⁸ *National Fuel* is inapposite because it concerned a late-filed request for rehearing by an entity that was already a party to the proceeding,⁹ whereas Strategic Energy’s request for rehearing was timely filed by a non-party.

11. Strategic Energy maintains that it understood the Midwest ISO’s initial filing in this proceeding to have been made for the purposes of clarifying the TEMT, but the language of that filing indicated that the Midwest ISO wanted to “*amend and clarify*” certain provisions of the real-time RSG procedures.¹⁰ It makes clear that the TEMT “provides, in part, that a Market Participant’s RSG charges shall be based upon . . . all Virtual Supply Offers for the Market Participant in the Day-Ahead Energy Market,” yet the Midwest ISO had “avoided burdening Virtual Supply Offer transactions with RSG charges.”¹¹ This language should have alerted Strategic Energy to the fact that the Midwest ISO’s business practices did not align with the TEMT. Moreover, the draft tariff sheets incorporated in the filing make abundantly clear that the Midwest ISO did not seek a clarification of its TEMT, but a substantive change. We therefore find unpersuasive Strategic Energy’s argument that it did not perceive the original filing to affect its interests. By contrast, in *Duke Hinds*¹² the Commission permitted two entities

⁷ E.g., RSG Rehearing Order at P 7; *Midwest Independent Transmission System Operator, Inc.*, 102 FERC ¶ 61,250 at P 7 (2003).

⁸ 81 FERC ¶ 61,097 at 61,371 & n.5 (1997) (*National Fuel*).

⁹ *National Fuel Gas Supply Corp.*, 80 FERC ¶ 61,211 at 61,834-35 (1997) (granting party status to the entity that later filed its request for rehearing out of time).

¹⁰ Midwest ISO Transmittal Letter at 1, Docket No. ER04-691-065 (Oct. 27, 2005) (emphasis added).

¹¹ *Id.* at 3.

¹² 117 FERC ¶ 61,210 (2006).

to intervene out of time when the Commission made the outcome of their (previously unrelated) case subject to the outcome of *Duke Hinds*. Those entities could not have foreseen a need to intervene in *Duke Hinds* before the deadline passed.¹³

12. Similarly, we are not persuaded that the Midwest ISO's Motion to Stay changed the scope of the proceeding. The Motion to Stay, as we will further discuss below, estimated of the total amount at stake in this proceeding, not the total dollar impact on Strategic Energy. We find it more pertinent that the Midwest ISO initially argued that the Commission should not impose refunds because, *inter alia*, about five percent of the market participants could have significant liability resulting from the imposition of such charges.¹⁴ Strategic Energy should have known the nature and volume of its transactions, including virtual trades, in the Midwest ISO's energy markets, and therefore reasonably been able to infer whether the Midwest ISO's tariff filing could expose it to potential refund liability.

13. Finally, we disagree that the Commission should grant Strategic Energy's intervention under the precedent of *Northwest Pipeline Corporation*.¹⁵ *Northwest Pipeline Corporation* concerned a natural gas transportation customer that "was not aware of the potential impact of the [general rate increase] filing in the proceeding until Northwest notified [it] of how it was going to interpret" the Commission's initial order on that filing.¹⁶ By contrast, the Midwest ISO's filing affirmatively indicated that the Midwest ISO had been improperly applying the TEMT, and that there were potential refund repercussions for virtual market participants. Moreover, the customer in *Northwest Pipeline Corporation* was the only one in a particular category, and it argued that other entities could not adequately represent its interests.¹⁷ As substantive issues Strategic Energy raises are discussed in other parties' requests for rehearing, we find that Strategic Energy's interests will be adequately represented here.

¹³ *Id.* P 15-16, 18.

¹⁴ RSG Order at P 13-14.

¹⁵ 46 FERC ¶ 61,247 (1989).

¹⁶ *Id.* at 61,725.

¹⁷ *Id.*

B. Physical Withdrawals of Energy**1. Background**

14. Section 40.3.3.a.ii of the TEMT describes the components of the RSG charge:

On any Day when a Market Participant actually withdraws any Energy the Market Participant shall be charged a Real-Time revenue sufficiency charge. The Market Participant's Real-Time revenue sufficiency guarantee charge for that Hour shall equal the product of: (i) the Market Participant's total Load purchased in the Real-Time Energy Market during the Operating Day (in MWh), all Virtual Supply for the Market Participant in the Day-Ahead Energy Market, and Resource Uninstructed Deviation quantities (MWh), and (ii) the per-unit Real-Time revenue sufficiency guarantee charge.¹⁸

The Midwest ISO stated that, since its energy markets opened in 2005, notwithstanding the above-quoted language, it had not considered virtual supply offers in the RSG charge calculation. It explained that virtual supply offers do not include actual energy deliveries; thus, they were not considered to be a generation resource that could be physically committed for reliability purposes in the RAC process. In the RSG Order, the Commission disagreed, finding that under the above-quoted section 40.3.3.a.ii, the RSG charge applied to virtual supply offers.

15. On rehearing, the Commission responded to parties' requests for clarification as to whether any market participant that made virtual transactions must pay RSG costs, or whether section 40.3.3.a.ii applies only to those market participants that made actual withdrawals of energy. The Commission found that the tariff assesses RSG costs to virtual supply offers only on those days that the market participant makes a physical withdrawal of energy at a pricing node.

2. Requests for Rehearing

16. WPS Energy asserts that it participates in physical markets to serve load and would now be assessed RSG on its virtual activity due to its physical activity, but entities engaging solely in financial transactions pay no RSG. WPS Energy believes that the Commission failed to limit a withdrawal of energy to a withdrawal at a particular commercial price node associated with a physical delivery. WPS Energy states that if the

¹⁸ TEMT, Module C, section 40.3.3.a.ii, Second Revised Sheet Nos. 577-78.

Commission is going to assess RSG on market participants who withdraw energy on a day, the Commission needs to define withdrawal of energy as a withdrawal at a particular point to support physical activity, thereby establishing a link between the virtual supply offer and the physical withdrawal. WPS Energy seeks clarification that it was the Commission's intention that RSG charges on virtual supply offers should be assessed to the extent that such offers cause costs of unit commitment to increase.

17. DC Energy requests clarification that the Commission did not instruct Midwest ISO to prospectively assess RSG charges to that subset of market participants whose virtual supply offers do not result in the actual withdrawal of energy. It notes that some parties on the Midwest ISO Market Subcommittee believe the RSG Rehearing Order requires the Midwest ISO to assess such charges. DC Energy believes the Commission made two judgments in the RSG Order: (1) reviewed and affirmed its ruling in the RSG Order that virtual supply offers are subject to RSG charges; and (2) interpreted the TEMT as only applying RSG charges to the virtual supply offers of market participants which actually withdraw energy. DC Energy states that the RSG Rehearing Order affirms the RSG Order's conclusion that RSG charges do not apply to the virtual supply offers of market participants that do not physically withdraw energy from the Midwest ISO market. DC Energy requests clarification that the Commission's conclusion that virtual offers can cause RSG costs – whether the offers are made by financial traders or other market participants – does not change the Commission's conclusion that RSG charges may only be prospectively assessed to market participants whose virtual supply offers actually result in the withdrawal of energy. According to DC Energy, the Commission's statement that it finds no basis upon which to differentiate among virtual supply offers could be interpreted to mean that all virtual supply offers, regardless of whether they result in the actual withdrawal of energy, may be assessed RSG charges. DC Energy believes that this conclusion would conflict with the Commission's finding that virtual supply should be assessed RSG costs only on those days the market participant withdraws energy.

18. DC Energy also notes that after declining to require refunds and rebilling of RSG charges, the Commission stated: “[h]owever, we will prospectively allocate RSG charges to virtual transactions consistent with the TEMT, as described elsewhere in this order, to prevent future inequity.”¹⁹ DC Energy believes the phrase “consistent with the TEMT” includes the description of the actual energy withdrawal requirement.²⁰ Moreover, DC Energy believes that the Commission was not requiring a modification of the TEMT's

¹⁹ DC Energy Request for Rehearing at 8 (quoting RSG Rehearing Order at P 95).

²⁰ *Id.* (quoting RSG Rehearing Order at P 45).

actual energy withdrawal requirement. To hold otherwise, DC Energy states, would mean that the Commission was requiring an amendment to the TEMT that upsets the previously-approved tariff provisions and that forces a result that is the opposite of Midwest ISO's original filing, which commenced this proceeding.

19. If the Commission required the Midwest ISO to amend the TEMT in order to apply RSG charges to virtual supply offers in the absence of actual withdrawals of energy, then DC Energy requests rehearing on the basis that the Commission lacks authority to propose its own rate or terms of service under FPA section 205.²¹ DC Energy states that if the RSG Rehearing Order did not require the Midwest ISO to make such a modification to the TEMT, then rehearing on this issue is not required.

20. Financial Marketers request rehearing of the Commission's finding that virtual supply offers accepted in the day-ahead market can require the commitment of physical resources, leading to the causation of real-time RSG charges.²² Financial Marketers contend that virtual supply offers do not cause real-time RSG charges. Furthermore, Financial Marketers state that the example presented by one market participant was flawed and is not reasonable.

21. Financial Marketers also request that the Commission clarify that it is not prejudging the outcome of the Midwest ISO study regarding virtual supply and RSG cost causation that it ordered. Financial Marketers state that the study must be fully reviewed by participants and the Commission before any conclusion regarding RSG cost causation can be reached.

3. Discussion

22. We note at the outset that the currently-effective tariff assigns RSG costs to market participants that withdraw energy in the real-time energy market, and hence represents a general assignment based on all the physical withdrawals in the real-time energy market of the market participant. None of the relevant tariff provisions specify withdrawal to be withdrawal at a specific commercial price node. We continue to find that the currently-effective tariff is just and reasonable, since it ensures that market

²¹ 16 U.S.C. § 824d(d); *City of Winnfield, Louisiana v. FERC*, 744 F.2d 871, 874 (D.C. Cir. 1984); *Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 9-10 (D.C. Cir. 2002). FPA section 205 provides authority to, and imposes an obligation on, the jurisdictional service provider to file proposed changes to its tariff.

²² Financial Marketers at 2.

participants buying real-time energy pay the full cost of energy, including guarantee costs for generators. While the allocation of guarantee costs, which currently is based on the factors that cause RSG costs to be incurred, arguably could be refined or improved, changes such as those WPS Energy proposes cannot be made to a Commission-approved and effective tariff in the instant section 205 proceeding; they are beyond the scope of this proceeding. Rather, such changes can only be made pursuant to section 206. We note that WPS Energy had the opportunity to challenge the justness and reasonableness of these provisions when the Midwest ISO filed them as part of its TEMT, but it chose not to do so.

23. With respect to prospective allocation of RSG costs, we clarify that the Commission, in the RSG Order and the RSG Rehearing Order, did not direct the Midwest ISO to modify the TEMT in such a way as to apply the RSG charges in the absence of actual withdrawals of energy. Rather, the Commission simply rejected the Midwest ISO's proposal to change its tariff, and accordingly required the Midwest ISO to analyze all virtual supply offers and their impact on unit commitment in allocating RSG costs to virtual supply.²³ Therefore, the Commission is not substituting its rate for the Midwest ISO's, but is requiring analysis to support a refiled section 205 filing.²⁴ As such, DC Energy's request for rehearing is – as it admits – unnecessary.

24. We interpret Financial Marketers' argument to be that the Ameren example cited in the RSG Order is unlikely, and not an argument that under no circumstances can virtual supply offers cause the incurrence of RSG costs. The Ameren example and Hogan testimony both provide a basis for concluding that virtual offers can cause cost shifting to the real-time market, and therefore virtual offers can impact RSG costs. We stand by our reliance on the Ameren analysis, noting that the Midwest ISO describes it as simplified but accurate. We further note that Financial Marketers do not cite any information or analysis that virtual supply offers can never cause RSG costs. Having considered the Midwest ISO compliance filing, discussed in the companion compliance order, we find that filing does not change the conclusions we draw from the record of this proceeding.

²³ RSG Rehearing Order at P 117-19; RSG Order at P 48.

²⁴ The Commission also stated the proposal would not go into effect until approved, and therefore the Commission expects comment and consideration of other proposals.

C. Virtual Supply Offers

1. Background

25. In the RSG Order, the Commission interpreted the currently-effective section 40.3.3.a.ii to mean that the RSG charge applies to virtual supply offers. The Commission notes that the second sentence in this section identifies virtual supply offers as a specific component to be included in the calculation of the charge.²⁵ The Commission relied on this language as the basis for its conclusion in the TEMT II Order that the allocation of real-time charges was reasonable because the proposed billing determinants allocate the uplift costs to those entities that cause higher costs for the region.²⁶ Accordingly, to the extent the Midwest ISO did not charge virtual supply offers for RSG costs, it violated the terms of its tariff. For this reason, the Commission ordered the Midwest ISO to recalculate the rate and make refunds to customers, with interest, to reflect the correct allocation of RSG costs.²⁷

26. In the RSG Rehearing Order, the Commission also determined that RSG costs should only apply to virtual supply offers. The Commission stated that virtual supply offers result in unit commitment and the incurrence of RSG costs irrespective of virtual bid activity.

²⁵ The second sentence of this section states that:

The Market Participant's Real-Time revenue sufficiency guarantee charge for that Hour shall equal the product of: (i) the Market Participant's total Load purchased in the Real-Time Energy Market during the Operating Day (in MWh), *all Virtual Supply for the Market Participant in the Day-Ahead Energy Market*, and Resource Uninstructed Deviation quantities (MWh), and (ii) the per unit Real-Time revenue sufficiency guarantee charge.

TEMT, Module C, section 40.3.3.a.ii, Second Revised Sheet Nos. 577-78 (emphasis added).

²⁶ TEMT II Order, 108 FERC ¶ 61,163 at P 587.

²⁷ 18 C.F.R. § 35.19a (2005).

2. Requests for Rehearing

27. WPS Energy believe that the Midwest ISO should be required to implement an RSG assessment scheme that does not assess RSG charges if a market participant utilizes virtual supply offers as part of a balanced supply and demand position at a distinct trading point. In situations where Midwest ISO determines a virtual supply offer creates a physical withdrawal on the system, WPS Energy maintain that market participants must be allowed to net against other positions, including virtual demand bids, at the same CP Node for purposes of assessing RSG. According to WPS Energy, any combination of actions that do not affect unit commitment should not be assessed RSG.

28. DC Energy believes there are flaws in the Commission's methodology for assessing RSG costs to virtual supply offers based on the RSG costs they cause.²⁸ Specifically, DC Energy finds the formula prescribed by the Commission to be troubling because it suggests that Midwest ISO should resolve RSG costs caused by Virtual Supply Offers by computing how only certain aspects of the energy market might have cleared without Virtual Supply Offers and comparing these results to only certain aspects of the market with Virtual Supply Offers. DC Energy states that there are several problems with this type of calculation: (1) removing Virtual Supply Offers from the market and recalculating prices and dispatch in a simulated day-ahead result would create an artificially unrealistic day-ahead scenario with high overall LMP prices and inflated day-ahead RSG costs; (2) it is not appropriate to ignore the cost impacts on load in the day-ahead market, a highly relevant factor in considering whether a particular RSG cost allocation mechanism would minimize overall market costs; (3) removing Virtual Supply Offers from Midwest ISO markets without removing the Virtual Load Bids from Midwest ISO markets creates an artificial and physically meaningless result; (4) artificially removing all of the Virtual Supply Offers makes it impossible to recreate the operator's judgment call on which resources would or would not have been dispatched; (5) the methodology reflected in the RSG Rehearing Order would unfairly review real-time RSG costs alone; and (6) the requirement to adjust the real-time load so that it is equal to the day-ahead load is problematic since it is impossible to dissociate the outcome of the Real-Time market from the Real-Time decisions of operators and it is impossible to dissociate the actions of operators from the Real-Time expectation of load. DC Energy argues that it is necessary to consider all of these points in developing a cost allocation methodology.

²⁸ RSG Rehearing Order at P 117.

29. DC Energy states that although the Commission determined in the RSG Rehearing Order that RSG charges would not apply to Virtual Supply Offers until further Commission action, the recent actual market data concerning the effects of the RSG Order are directly relevant to clarification and rehearing of the RSG Rehearing Order. Thus far, DC Energy asserts that the Commission has not addressed this evidence. For example, the Midwest ISO, the IMM, DC Energy and other parties provided evidence that, following issuance of the RSG Order, there has been a statistically significant decline in virtual transactions, decreased convergence, and an increase in premiums on day-ahead energy prices.²⁹ In pleadings the Commission rejected, DC Energy asserts that some parties argued that they have forward hedged their load so that they are not subject to the day-ahead premiums. According to DC Energy, this point obfuscates the fact that the energy prices needlessly increased, and the parties that provided forward hedges are subject to the increased energy prices. Moreover, DC Energy affirms that these same parties will reflect the increased energy in their future contracts. DC Energy believes that there is sufficient evidence that RSG charges should not be applied to Virtual Supply Offers and no evidence from which the Commission can determine that there will not be negative impacts associated with imposition of RSG charges.

30. DC Energy claims that in the RSG Rehearing Order, the Commission rejected parties' arguments that for purposes of calculating a market participant's RSG charge, that participant's cleared Virtual Supply Offers should be netted against its cleared Virtual Load Bids. DC Energy disagrees with commenters' conclusion that RSG costs should only apply to virtual supply offers net of virtual bids. According to DC Energy, virtual supply offers result in unit commitment and the incurrence of RSG costs irrespective of virtual bid activity. DC Energy urges the Commission to permit Midwest ISO to analyze this issue in considering next steps in this proceeding. To the extent the Commission is requiring Midwest ISO to modify its tariff pursuant to FPA section 206, DC Energy believes the Commission should permit Midwest ISO and stakeholders to more thoroughly analyze the relationship between Virtual Supply Offers and Virtual Load Bids from cost causation and market impacts perspectives. DC Energy explains that

²⁹ Request for Clarification and Rehearing of Coral Power, L.L.C. and DC Energy Midwest, LLC at 25- 28, Docket No. ER04-691-065 (May 25, 2006); Answer of Coral Power L.L.C. and DC Energy Midwest, LLC In Response to Motion to Lodge of E.ON U.S. LLC and Motion to Lodge and Request for Expedited Action, Docket No. ER04-691-065 (Sept. 26, 2006). DC Energy notes that the information contained in the reports and analyses offered to the Commission after the rehearing deadline passed on the RSG Order was not available prior to that deadline, and DC Energy was diligent in presenting the data in its motion to lodge.

Virtual Supply Offers and Virtual Load Bids are related, and both play a key role in the energy market. Additionally, DC Energy states that Virtual Load Bids play an important role in reducing congestion. Allowing netting of a market participant's Virtual Supply Offers and Virtual Load Bids, asserts DC Energy, will allow more competitive and efficient arbitrage to occur and produce additional market benefits in the form of greater price discovery around congestion constraints, higher convergence, lower day-ahead energy market prices, lower total congestion cost and increased liquidity.

31. DC Energy is further concerned that if the RSG Rehearing Order requires an amendment to the TEMT to impose RSG charges on Virtual Supply Offers, without permitting Midwest ISO to consider and/or examine the issues, then the Commission will have acted under FPA section 206 to require a change in the tariff that is completely inapposite to the prior approved tariff and the amendments Midwest ISO proposed under FPA section 205, without adequately considering the evidence and sustaining the Commission's burden under FPA section 206. In particular, DC Energy argues that the Commission has not considered any of the evidence offered to date on the substantial negative market impacts associated with the application of RSG charges to virtual transactions, nor the factual and policy issues associated with cost causation. If the Commission is directing Midwest ISO to file tariff sheets based on the limited record, DC Energy affirms that the Commission is exceeding its limited authority under FPA section 205. If the Commission intends to proceed under FPA section 206, then DC Energy urges the Commission to consider the complex disputed issues of fact which are material to whether and how to apply RSG charges to virtual transactions.

3. Discussion

32. We see no basis in the currently-effective tariff to allocate RSG costs based on net virtual offers, *i.e.*, virtual supply offers minus virtual bids, at the same commercial price node. Section 40.3.3.a.ii, addressing cost allocation, explicitly excludes an interpretation that modifies supply to be net of bids or that bases the allocation on a supply-demand balance at a particular node. We also repeat the statement in the RSG Rehearing Order that virtual offers result in unit commitment and the incurrence of RSG costs irrespective of virtual bid activity³⁰ and therefore we see no basis to adjust the cost allocation to virtual offers based on virtual bid activity. We thus are asking the Midwest ISO to look

³⁰ RSG Rehearing Order at P 122.

at all virtual supply offers that may result in physical unit commitment and the incurrence of RSG costs in establishing the rate prospectively and that we will review analysis of virtual bids in the order addressing the Midwest ISO compliance filing.³¹

33. Neither the level of the day-ahead LMP nor minimization of overall market costs are relevant to the sole and limited purpose of the analysis, namely to determine the impact of virtual supply offers on real-time RSG costs. Rather, this analysis requires measuring the change in RAC commitment in the real-time market only. While we recognize that some amount of real-time RSG reflects day ahead to real time shifts, that result does not change the fact that virtual supply offers cause real-time RSG costs and need to share in those costs. Since the purpose of the analysis is to determine physical unit commitment, there is no need to adjust virtual demand bids, as stated in the previous paragraph. We consider the results of the analysis valid since they will reflect security-constrained and economic unit commitment, and therefore the analysis will reflect the most important elements of the energy market design. DC Energy provides no basis to assume that operator judgment would overrule these criteria, and therefore impact the analysis significantly.

34. We affirm the conclusion of the RSG Rehearing Order that an assignment of RSG costs to virtual offers should not be fatal to the energy market. Based on the most recent data available, virtual transaction activity remains at the levels characterized as robust by the Midwest ISO in its July, 2006 analysis and cited in the RSG Rehearing Order.³²

35. We emphasize that the Commission is acting under FPA section 205 in this proceeding and is not acting under section 206. As discussed earlier in this order, the Commission is not requiring an amendment to the currently-effective tariff, and therefore is not substituting its rate for the currently-effective rate.

³¹ We note that the companion order on compliance, in its rejection of the Midwest ISO analysis, also found no basis to allocate costs to net virtual offers, *i.e.*, virtual offers minus virtual bids, since neither the Midwest ISO nor commenters provided any data or analysis rebutting the Commission position that virtual offers can cause RSG costs irrespective of virtual bid activity or supporting their claims.

³² December 2006 Operations Report, Midwest ISO, p.9.

D. Allocation of RSG Charges**1. Background**

36. The RSG Order clarified that per the terms of the TEMT, the assignment of RSG costs should be to market participants that withdraw energy in the real-time energy market.³³

37. The Midwest ISO interpreted the currently effective section 40.3.3.a.ii to mean that imports from neighboring regions are withdrawals of energy and therefore should be included in the allocation of RSG charges. The RSG Order disagreed, stating that the phrase “actually withdraws Energy” the TEMT refers to the withdrawal of energy at nodes or sink points and ordered refunds with interest for amounts charged to imports from the start of the energy markets.³⁴

38. Prospectively the Midwest ISO proposed to clarify that four types of market participants should be subject to RSG charges, as follows: (1) those serving load within the Midwest ISO region; (2) those importing energy into the Midwest ISO region; (3) those exporting energy outside the region; and (4) market participants that inject energy.³⁵ The Midwest ISO explains that each of these four categories of market participant transactions are responsible for causing RSG costs and, thus, should bear a proportionate share of the real-time RSG payments made to generation resources. The RSG Order accepted the Midwest ISO proposal, conditional upon revising the calculation to eliminate double-counting of reductions of real-time injections and replacement of those amounts with imports, and the filing of a new tariff proposal that includes virtual supply offers in the RSG charge calculation.³⁶

2. Requests for Rehearing**a. Day-Ahead Virtual Supply Offers**

39. Duke states that the RSG Rehearing Order leaves considerable ambiguity as to the extent to which day-ahead virtual supply offers will be subject to real-time RSG. Duke

³³ RSG Order at P 26.

³⁴ RSG Order at P 77.

³⁵ Midwest ISO October 27, 2005 filing at 4.

³⁶ RSG Order at P 84 - 85.

contends that real-time RSG charges should apply to all day-ahead virtual supply offers that clear the market.

40. Duke states that the RSG Rehearing Order is ambiguous because it describes the class of day-ahead virtual supply offers that should be subject to real-time RSG charges as: (1) “all” such offers, or (2) “accepted” offers and also (3) virtual supply offers by market participants that make withdrawals in real-time. Duke states that the use of “physical withdrawals” which cannot be netted against virtual bids is also confusing.

41. Ultimately Duke proposes that real-time RSG charges be assessed to all virtual supply offers that clear the market. Duke believes this is consistent with the Commission’s objective of assigning RSG charges to RSG cost causation. Furthermore Duke contends that the Commission’s efforts at assigning RSG costs to entities that withdraw energy is misplaced.

b. Virtual Supply Offers by Market Participants That Do Not Withdraw Energy

42. As it contended on rehearing of the RSG Order, Ameren argues that parties that submit virtual supply offers should be assessed RSG costs whether or not they withdraw physical energy in the real-time energy market. Ameren argues that the Commission should grant rehearing of its earlier findings that this result is consistent with the TEMT because it is: (1) inconsistent with cost-causation principles; (2) violative of rate design principles; and (3) unduly discriminatory.

43. Ameren contends that the Commission’s interpretation of section 40.3.3.a.ii of the TEMT ignores the TEMT’s definition of Energy, and rests on the common meaning of the phrase “withdrawing energy.” Ameren states that the TEMT defines “Energy” as “electricity that is Bid or Offered,” and that the term “Offered” specifically includes virtual supply offers. Thus, Ameren says, the “Energy” that is mentioned in section 40.3.3.a.ii includes virtual supply offers, but the Commission instead found that virtual supply offers were “separate and distinct from the actual physical withdrawal of energy in the real-time market.”³⁷ Ameren states that this misreading replaces the defined term “Energy” with a narrower one that includes only actual physical withdrawals. Ameren argues that the presumption of consistent usage suggests that the Commission cannot reasonably conclude that “Energy” has a different meaning in section 40.3.3.a.ii than it does in section 1.81, where it is defined.

³⁷ Ameren Request for Rehearing at 19-20 (quoting RSG Rehearing Order at P 141).

44. Ameren argues that the Commission's effort to narrow the definition of "Energy" apparently was to justify allocating RSG charges only to a subset of virtual supply offers, yet the Commission found that all virtual supply offers can increase RAC and RSG costs. If all virtual supply offers can cause increased RSG costs, Ameren says, it is arbitrary and capricious for the Commission to distort the plain meaning of the TEMT to discriminate among the various kinds of virtual supply offers in allocating RSG charges. Ameren also alleges that it is undue discrimination to single out one kind of virtual transaction notwithstanding a finding that virtual supply offers can increase RAC and RSG costs "whether they are made by financial trader market participants or other market participants with physical load and generation."³⁸ It avers that the Commission offers no reasoned basis for its conflicting statements within the RSG Rehearing Order on cost causation and discrimination – that is, why the Commission limits the application of RSG charges to virtual supply offers associated with physical withdrawals of energy in the real-time market, yet does not distinguish among virtual supply offers with regard to how the TEMT provisions on RSG charges should be modified prospectively.

45. Finally, Ameren contends that the Commission's finding that RSG charges are to be applied only to virtual supply offers submitted by entities that physically withdraw energy creates a mismatch between the megawatt-hours used to develop the rate and those to which the rate is applied. Ameren explains that the currently-effective tariff requires that the RSG charge be developed by dividing the dollars that must be paid to generators as RSG by, among other things, total virtual supply offers to yield a dollar-per-megawatt-hour charge. If fewer than all virtual supply offers are assessed that dollar-per-megawatt-hour charge, then the Midwest ISO will under-recover total RSG costs.

46. Ameren concludes that the Commission must grant rehearing of its interpretation of the currently-effective TEMT because narrowing the body of virtual supply offers subject to RSG charges is arbitrary, capricious, and results in undue discrimination and under-recovery of RSG costs. Ameren contends that with respect to the time from April 1, 2005 to April 25, 2006, the Commission should order refunds for incorrectly allocated RSG charges and direct the Midwest ISO to include all virtual supply transactions in the calculation and allocation of RSG charges and determination of refunds. With regard to the period from April 25, 2006, forward, Ameren urges the Commission to correct its reading of section 40.3.3.a.ii of the currently-effective TEMT so that market participants that make physical withdrawals will not be assessed inappropriately inflated RSG charges and the Midwest ISO will not continue to uplift the shortfall in RSG revenues collected.

³⁸ *Id.* at 21 (citing RSG Rehearing Order at P 111).

47. While Ameren agrees that it is appropriate for the Midwest ISO to assess RSG costs to market participants and transactions in proportion to the amount of RSG they cause, it thinks that the Commission's reading of section 40.3.3.a.ii of the TEMT allocates RSG costs inaccurately.

48. Ameren asks the Commission to clarify that the currently-effective section 40.3.3.a.ii of the TEMT, with the phrase "withdrawing Energy" read as Ameren prefers, would not allocate RSG charges to positive uninstructed generation deviations because such deviations do not cause a shortfall in the real-time market that requires unit commitment under the RAC process (and thus, RSG costs). Because the TEMT applies RSG charges to withdrawals of energy, Ameren argues, the Commission should conclude that the provision is intended to assign RSG costs only to uninstructed deviations that involve generating at a level that is less than the dispatch instruction.

49. Second, Ameren asks the Commission to clarify that offsetting injections and withdrawals of Energy at the same node ensure that no RSG costs will be incurred; therefore, the Midwest ISO must net injections and withdrawals at the same node and not allocate RSG costs to the offsetting transaction.

50. Third, Ameren argues that the currently-effective section 40.3.3.a.ii does not allocate RSG charges to all imports, but only to negative import deviations (scheduled imports in real time that are less than those scheduled in the day-ahead market). Ameren argues that positive import deviations result in more energy in real time than anticipated, do not create shortfalls that require unit commitment under the RAC process, and therefore should not be allocated RSG costs.

51. Fourth, Ameren claims that the Commission misreads the currently-effective TEMT to allocate RSG charges to imports only because of the definition of "resource deviations," and not to allocate RSG charges to imports that withdraw energy in real time. Ameren submits that the correct reading would apply RSG charges only to negative import deviations, which withdraw energy in real time, because any import deviation that results in less Energy appearing in the Midwest ISO footprint in real time than was scheduled in the day-ahead market – and therefore more load appearing in the real-time market than was scheduled – is a withdrawal of energy and should be allocated RSG charges. Ameren urges the Commission to grant rehearing of paragraph 142 of the RSG Rehearing Order to the extent that it directs the Midwest ISO to provide all import deviations refunds with interest.

52. If the Commission is not inclined to accept the currently-effective section 40.3.3.a.ii, with adjustments per Ameren's proposals as discussed above, for prospective

allocation, then Ameren advocates accepting the Midwest ISO's revised formulation of that section (as filed on October 27, 2005), with modifications designed to ensure that RSG costs are allocated only to those transactions that cause them to be incurred.

53. WEPCO notes that all products that affect resource commitment in the day-ahead market affect the real-time market by defining the initial set of committed resources for the real-time market. It states that non-optimal real-time commitments occur due to physical misrepresentations (including virtual bids and virtual offers) between the day-ahead and real-time markets, and that this leads to additional costs that are collected, in part, through real-time RSG charges. WEPCO asks for clarification that the real-time market effects of virtual bids and offers are not resolved in the day-ahead market, but in the real-time market. It advocates that eligibility for RSG charges be based on whether the market participant is actually settling – as opposed to paying for – real-time energy at real-time prices. WEPCO asks the Commission to direct the Midwest ISO to treat all supply and demand equally and for the RSG charge for virtual transactions to be based on the imbalance those transactions cause in the real-time market and to insert the phrase “deviation from Day-Ahead or Real-Time schedule” in place of “withdrawal” or “injection” throughout section 40.3.3.

3. Discussion

54. “Accepted” day-ahead virtual supply offers mean “cleared” offers in day-ahead market. However, statements in the RSG Rehearing Order on the impact of virtual offers on RSG costs and the analysis requirement represent a general analysis framework only and therefore are not all-inclusive statements of which virtual supply offers cause costs to be incurred. We further note that such a determination can only be made based on the requested Midwest ISO analysis to assess the impact of virtual offers on RSG costs. A detailed evaluation of calculation methods is premature until the Midwest ISO completes its analysis, and the Commission evaluates the analysis and the comments.

55. We re-affirm the Commission determination in the RSG Rehearing Order that the phrase “withdraw energy” refers to a physical withdrawal of energy. Contrary to the Ameren position, we do not consider withdrawing energy as equivalent to offering supply.³⁹ These activities are different and are typically considered opposites. Therefore, we find no basis in reading the phrase to infer that an energy withdrawal means a supply of energy.

³⁹ Including variations of adding supply such as positive uninstructed deviations and negative import deviations.

56. More to the point at this stage of this proceeding, the Commission cannot make an independent assessment that a currently-effective tariff is not just and reasonable and therefore refunds are required without a section 206 investigation. Neither the Commission nor any party to this proceeding has undertaken such an investigation here. The Commission's arguments requiring cost causation apply only to a prospective tariff change proposed by the Midwest ISO, under section 205, that the Commission determined was not just and reasonable, and therefore the Commission required the Midwest ISO to resubmit a proposal.

57. As the Commission stated in the RSG Rehearing Order, the Commission is interpreting a currently-effective tariff provision that no party challenged when it was accepted by the Commission. Now that parties dispute its meaning, the Commission has provided an interpretation. The currently-effective tariff provisions assign real-time RSG costs to market participants withdrawing energy in real-time. Energy withdrawn in real-time is physical energy, the only energy sold in the real-time market. Therefore, the RSG charge is assigning additional settlement costs to entities paying a real-time LMP that only reflects partial costs, to ensure these market participants pay the full cost of real-time energy. Necessarily, the Commission is limited by the words in the currently-effective tariff, and it cannot assign costs based simply on its own findings on cost causation. Therefore, the fact that the current tariff interpretation, *i.e.*, cost assignment to market participants withdrawing energy, differs from a possible and yet-to-be-determined formulation in a prospective, yet-to-be-filed tariff amendment that may allocate RSG costs to all virtual supply offers irrespective of whether they withdraw energy, is not illogical or arbitrary.

58. We do not find the calculation of the charge to be arbitrary or unduly discriminatory, since the end-result of the charge does not result in any harm. We agree that the charge is assessed only on market participants withdrawing energy in real-time and payment of the charge may result in less than full recovery of RSG costs since the divisor to the charge includes all virtual supply – not just virtual supply offered by market participants withdrawing energy -- and therefore may result in under-recovery of RSG costs. However, to the extent that RSG costs are not fully recovered in the RSG charge, the unrecovered costs are recovered through uplift charges assessed to all market participants. While the assignment of costs to all market participants differs from the assignment of costs to only those entities causing the costs, the Commission is not, here in this section 205 proceeding, determining which of several possible allocations to implement. Rather, the currently-effective tariff provision – which was not challenged by any parties when accepted – cannot be revised in this proceeding and remains in effect until a section 206 investigation determines the current provision is unjust and unreasonable.

59. We will not require adoption of the Midwest ISO October 27, 2005 proposal with the modifications proposed by Ameren and discussed above. The Commission already ruled on that proposal in the RSG Order and the Midwest ISO has complied. Rather, to the extent Ameren has additional issues to raise on the prospective allocation, it should raise those in the companion compliance proceeding.

60. We do not believe the WEPCO assertions have merit. First, there is no basis to assume that all day-ahead supply and demand cause RSG costs to be incurred. As the record in this proceeding shows, RSG charges are caused by the commitment of additional units in the RAC and real-time markets, and, in turn, this physical unit commitment is caused by a limited set of market activities such as virtual offers, load and resource deviations and exports and imports. Other day-ahead activities such as virtual bids do not affect physical unit commitment and therefore should not be part of the cost allocation for RSG charges.⁴⁰ In contrast, the WEPCO position that RSG charges should be allocated to virtual transactions based on the imbalances they cause would result in an allocation to virtual bids⁴¹ even though there is no basis to assume that virtual bids cause physical unit commitment and therefore result in RSG charges. Second, we also disagree with WEPCO's position that virtual bids and offers will settle their entire day-ahead financial commitment in the real-time physical market. The final settlement for virtual offers and bids are made in the day-ahead market. No further settlement is required in the real-time market. For these reasons, we will not require the changes in the Midwest ISO tariff provisions on RSG charges and credits proposed by WEPCO.

E. Refunds

1. Background

61. The Midwest ISO's original filing in this proceeding sought the Commission's approval to amend section 40.3.3.a.ii of the TEMT to exclude virtual supply transactions from its calculation and allocation of RSG charges. The Midwest ISO indicated that since its Day 2 energy markets opened on April 1, 2005, it had not considered virtual supply offers in either the calculation or allocation of RSG charges because virtual supply offers, which do not involve deliveries of energy, are not a generation resource that can be physically committed for reliability purposes in the RAC process.

⁴⁰ RSG Rehearing Order at P 122.

⁴¹ Since virtual bids only occur in the day-ahead market, we assume that they result in an imbalance, as characterized by WEPCO, since there are no virtual bids in real-time.

62. The Commission found that, as the Midwest ISO had indicated in its filing, the TEMT required the Midwest ISO to include virtual supply offers in the calculation and allocation of RSG costs.⁴² To the extent that the Midwest ISO had been assessing RSG costs to market participants without accounting for virtual supply offers, the Commission found that the Midwest ISO had violated its tariff and required it to make refunds back to the date of energy market start-up.⁴³

63. Numerous parties sought rehearing of the Commission's refund requirement, and they persuaded the Commission to exercise its equitable discretion over remedies and grant rehearing.⁴⁴ The Commission noted that, although the Midwest ISO's Business Practice Manuals – which had contained inaccurate information regarding the RSG calculation – do not take precedence over the tariff, market participants correctly regarded the Business Practices Manuals as coming from a credible source.⁴⁵ The Commission further recalled that it had declined refunds when doing so would produce substantial market uncertainty or undermine confidence in the markets. It found that, here, refunds could render settled market transactions uneconomic, and that that would be unfair and inequitable because market participants cannot revisit their prior economic decisions.

2. Requests for Rehearing

a. Filed Rate Doctrine

64. E.ON argues that the Commission erred in reversing the RSG Order's requirement that the Midwest ISO refund RSG overcharges to market participants who, as a result of the Midwest ISO's failure to abide by the TEMT, paid a disproportionate share of RSG charges. E.ON argues that the Commission's decision violated the filed rate doctrine and constitutes arbitrary and capricious decision-making.

65. E.ON notes that the filed rate doctrine prohibits a regulated entity from charging rates other than those properly filed with the appropriate regulatory authority. Because the TEMT indicated that RSG charges would apply to virtual supply, but the Midwest

⁴² RSG Order at P 26-27.

⁴³ *Id.* P 27.

⁴⁴ RSG Rehearing Order at P 92-93.

⁴⁵ *Id.* P 94.

ISO did not allocate RSG charges this way, E.ON argues that it should be entitled to refunds for the disproportionate amount of RSG charges that it paid. E.ON states that it reasonably relied on the filed rate, and that it should receive refunds so that it is not charged more for the Midwest ISO's service than the rates provided in the TEMT.

66. E.ON complains that although the Commission based its decision in the RSG Rehearing Order on market participants' "reasonable expectation" that they would not be assessed RSG charges for virtual supply transactions, the Commission made no findings as to whether it was reasonable for market participants to rely on a business practices manual that contradicted the Midwest ISO's tariff. E.ON notes that the Commission concluded that there was no need to address this issue (because refunds were not appropriate), yet the record of the docket includes market participants' assertions that they expected RSG costs to be assessed to virtual supply transactions in reliance on the tariff.

67. Next, E.ON argues that the Commission did not consider all relevant facts in this proceeding. Although it noted that some market participants could not revisit their prior economic decisions, the Commission did not consider that market participants such as E.ON, who relied on the Midwest ISO TEMT and existing law, similarly could not revisit their economic decisions. As such, E.ON argues that the Commission's determination on refunds in the RSG Rehearing Order must be reversed.

68. Further, E.ON believes that the Commission's decision to rely on the Midwest ISO's business practices, rather than its tariff, injects substantial uncertainty into the markets. It claims that there may be no remedy available when a transmission provider and market administrator issue procedures that contradict its just and reasonable tariff. E.ON argues that the TEMT provides clear and undisputed notice that RSG charges would apply to cleared day-ahead virtual supply. E.ON states that market participants, including E.ON itself, relied on this filed rate and expected the Midwest ISO to do the same. E.ON adds that, like the Commission, it read nothing in the tariff to suggest that cleared day-ahead virtual supply would not pay real-time RSG charges.

69. E.ON argues that the Commission failed to engage in reasoned decision-making by not requiring refunds despite applicable precedent that indicates that a business practice manual cannot take precedence over a filed tariff. It indicates that this rationale is inapposite to the filed rate doctrine and inconsistent with applicable Commission precedent. E.ON states that the Commission has clearly indicated that an entity's tariff, not its manuals or handbooks, must define the rates, terms and conditions of jurisdictional services, and that the Commission's justification for denying refunds is a departure from this precedent.

70. Further, E.ON argues that the Commission's failure to order refunds establishes unsound Commission policy. According to E.ON, the Commission's decision signals to market participants that they may rely on business practice manuals over a filed rate, and to transmission providers that they can avoid following their tariff without consequence if they issue contradictory business practice manuals. As a result, entities that rely on the tariff are harmed, and those who rely on the business practice manuals are rewarded. This, E.ON says, undermines the premise that the filed rate provides predictability to market participants.

71. Ameren claims that the Commission's reversal of its initial decision to order refunds was arbitrary and capricious, and accordingly must be reversed. Ameren argues that the Commission has found that: (1) the TEMT requires the allocation of RSG costs to virtual supply offers; (2) virtual supply offers can increase RSG costs; (3) the Midwest ISO had violated its tariff by failing to allocate RSG costs to virtual supply offers; and (4) in light of the tariff violation, refunds would not unjustly reward other market participants. Ameren avers that none of the legal or factual predicates for the decision to order refunds has changed, and so there is no basis in law or in fact (nor is any reasoned explanation provided) for the Commission's departure from its initial ruling.

72. Ameren argues that the Commission's rationales for reversing its initial ruling are unsupported. First, it alleges that the "revisiting decisions" precedent generally stands for the proposition that the Commission should allow changes in rate design to be effective prospectively only because ratepayers cannot revisit their economic decisions in light of the rate design change. Ameren avers that this precedent is inapplicable in this case, where the filed tariff provision remains unchanged. Second, Ameren claims that market participants are on notice that only the tariff has legal force and effect, and that they are bound by the terms of the tariff, and not the internal publications of the Midwest ISO.⁴⁶ Ameren states that any expectations that the Midwest ISO was acting properly in failing to allocate RSG charges to virtual supply offers were unreasonable, and that it would be unfair to market participants who made decisions based on the tariff language for the Commission to hold otherwise. Indeed, Ameren says, to reward participants who relied on non-filed protocols and disfavor participants who relied on the lawful tariff would upend the Commission's legal obligation to enforce the FPA.

73. Ameren alleges that the Commission's decision not to order refunds of RSG charges allocated in violation of the tariff is an abuse of discretion because the Midwest ISO violated its own, Commission-filed tariff (and thereby caused discriminatory charges

⁴⁶ Ameren Request for Rehearing at 6 (citing 16 U.S.C. § 824d (2000); *Sithe New England Holdings, LLC v. FERC*, 308 F.3d 71, 78 (1st Cir. 1992)).

and resulting windfalls) with impunity.⁴⁷ Ameren states that by its request for reversal, it asks that the Commission require compliance with the FPA – something that the Commission does not have discretion not to allow.

74. Ameren argues that the Commission did not adequately explain its departure from its “general policy of granting full refunds,”⁴⁸ arguing that the Commission’s discretion over refunds is constrained, and refunds are appropriate, if the overcharges “truly implicate the filed rate doctrine’s concerns” or “parties gain a windfall.”⁴⁹ Ameren and E.ON each argue that the facts of the instant case are not like those of the cases the Commission cited in support of its decision not to require refunds.

75. E.ON argues that the Commission cannot rely on *Towns of Concord v. FERC*⁵⁰ to justify its decision to reverse the refund requirements of the RSG Order. E.ON states that the utility in *Towns of Concord* could not be faulted for erroneously including certain costs in its fuel adjustment clause because the tariff violation at issue was minor, and highly technical in nature, with “little potential for unjust enrichment.”⁵¹ By contrast, in this case the Commission has found that the tariff expressly required the Midwest ISO to assess RSG charges to virtual transactions; the matter is neither confusing nor highly technical; and the tariff violation has produced over \$250 million in misallocated costs. E.ON states that the Midwest ISO has acted contrary to market participants’ reasonable expectations based on the tariff and has interfered with those market participants’ economic plans.

76. Ameren says that the court in *Towns of Concord* did not require refunds for two reasons: (1) the utility in question did not know that it was improperly charging its customers; and (2) the Commission’s alternative remedy – settlement – was designed to

⁴⁷ Ameren Request for Rehearing at 15-16 (citing *California ex. rel Bill Lockyer v. FERC*, 383 F.3d 1006, 1008 (9th Cir. 2004)).

⁴⁸ Ameren Request for Rehearing at 9 (citing *Consolidated Edison Co. v. FERC*, 347 F.3d 964, 972 (D.C. Cir. 2003); *Towns of Concord, Norwood and Wellesley v. FERC*, 955 F.2d 67, 76 (D.C. Cir. 1992)).

⁴⁹ *Id.* (citing *Koch Gateway Pipeline Co. v. FERC*, 136 F.3d 810, 817 (D.C. Cir. 1998) (*Koch Gateway*)).

⁵⁰ 955 F.2d 67 (D.C. Cir. 1990).

⁵¹ *Id.* at 76.

ensure that the utility was not unjustly enriched by the improper collection of spent nuclear fuel costs.⁵² Here, Ameren says, there was no widespread confusion about one set of utilities' charges to another set; rather, this case involves a provision of the Midwest ISO's tariff that the utility admits it failed to follow. Further, the Midwest ISO was aware that it was not following the tariff, and market participants that engaged in virtual supply offers avoided charges at the expense of other market participants. Ameren states that under *Towns of Concord*, failing to provide a remedy in this case is neither reasonable nor equitable; rather, the over- and under-collection of RSG charges is an offense to equity that must be remedied.

77. E.ON further argues that the Commission's reliance on *Louisiana Public Service Commission v. FERC*⁵³ for the proposition that the refund directive in the RSG Order is now "not appropriate" should be rejected. The Court upheld the Commission's decision not to order refunds in that case, E.ON says, because the end result of the tariff violation at issue was not unjust, unreasonable or unduly discriminatory – in fact, it conferred benefits on the system. E.ON avers that the tariff violation at issue here did not confer benefits to those market participants that were overcharged.

78. Ameren also contends that the facts of this proceeding do not fit within the scope of the court's decision not to grant refunds in *Louisiana*. There, the court found that since the customers of Entergy Corp.'s five subsidiaries (among which Entergy Corp. had improperly equalized costs) had fixed rates, the skewed cost equalization did not increase their rates, and therefore there was no unjust enrichment because Entergy as a whole did not receive any net gain. By contrast, here the Midwest ISO's failure to allocate costs to virtual supply offers did not result in any overall savings for Midwest ISO market participants, only to the market participants who wrongfully avoided RSG charges. Those savings, Ameren adds, occurred at the expense of other market participants whose rates increased as a result of the Midwest ISO's overcharging of RSG costs. Ameren contends that this amounts to unjust enrichment. It adds that failure to require refunds is unjust, unreasonable and unduly discriminatory because the misallocation spared some parties from RSG costs, while others bore a disproportionate share of those costs.

79. Ameren takes issue with the Commission's reliance on *Koch Gateway* to support its conclusion that refunds are not appropriate in this case because no party received a windfall. It notes that in *Koch Gateway*, the pipeline departed from the tariff by retaining revenues that it should have credited to shippers, but the court found that refunds were

⁵² *Id.* (citing *Towns of Concord* at 70, 75-76).

⁵³ 174 F.3d 218 (D.C. Cir. 1999) (*Louisiana*).

not required because Koch Gateway used the revenues to pay for other costs created by its shippers. Ameren complains that the Commission ignores the fact that the incorrect allocation of RSG costs resulted in windfalls to those market participants that engaged in virtual supply offers, because they avoided RSG charges that they rightfully should have paid to the Midwest ISO. Ameren submits that *Koch Gateway* stands for the proposition that each market participant should bear the costs that it is responsible for creating; further, unlike Koch Gateway's technical tariff violation, the Midwest ISO's tariff violation squarely implicated the filed rate doctrine.

b. Inequitable Windfall for Market Participants and Market Issues

80. E.ON and Ameren each challenge the Commission's finding that there is nothing in the record to suggest that avoiding RSG has resulted in an "inequitable windfall" for market participants. Both utilities point out that, in its May 11, 2006 motion to stay, the Midwest ISO estimated that assessing RSG charges on virtual transactions dating back to April 1, 2005 would result in a reallocation of RSG charges totaling \$250 million.

81. E.ON alleges that the Midwest ISO has continued to misapply RSG charges in the six months since the RSG Order was issued; therefore, some market participants have been misallocated costs in excess of \$250 million, while others have reaped an equivalent windfall. E.ON concludes that: (1) it is reversible error for the Commission not to take this into account; (2) the Commission's rationale for denying refunds is flawed and undermines the filed rate doctrine; and (3) the Commission must reverse its decision not to require the Midwest ISO to refund RSG charges.

82. E.ON claims that the Commission must be able to demonstrate that it made a reasoned decision based on substantial record evidence, yet the RSG Rehearing Order does not take into account relevant facts and is not supported by the cited precedent. E.ON claims that the Commission did not consider the economic impact to market participants who relied on the TEMT, which the Midwest ISO quantified in its May 11, 2006 motion to stay. As such, E.ON says, the Commission's requirement that the Midwest ISO assess real-time RSG costs to cleared day-ahead virtual supply and issue refunds to market participants who continue to be overcharged constitutes reversible error.

83. Citing the Commission's finding in the RSG Rehearing Order that "some market participants may have paid more than their share of RSG charges," Ameren claims that the Commission acknowledged past inequity through overcharges when it allocated

prospective RSG charges to virtual supply offers to prevent future inequity.⁵⁴ Ameren argues that it is not reasoned decision-making for the Commission to state that “[f]uture disregard of the filed rate may warrant appropriate remedies,” and yet fail to correct past tariff violations through refunds.⁵⁵ Failure to order refunds, Ameren concludes, allows some market participants to retain the value of RSG charges that they did not have to pay and permits other, competing parties to bear the charges on their behalf – creating a situation of unjust enrichment for market participants who engaged in virtual transactions.

84. Ameren states that the Commission’s refund decisions in this proceeding have a particularly inequitable result for some market participants (such as itself) that do not have grandfathered agreements (GFAs) and that engage in both physical and virtual transactions. Ameren states that the Commission required refunds with respect to GFAs and imports, and so Ameren will be assessed millions of dollars in surcharges so that the Midwest ISO can make these refunds. Because the Commission did not require refunds for virtual transactions, however, Ameren will not be compensated for the millions of dollars in RSG charges that it was incorrectly allocated. As such, Ameren will not receive any refunds to offset the RSG surcharges it will be assessed.

85. Ameren contends that the Commission’s reversal of the RSG Order was not supported by substantial evidence and therefore is without legal basis. Ameren states that the Commission’s only rationale for its reversal is a policy decision that “ordering refunds would create substantial uncertainty and undermine faith in the Midwest ISO’s markets,” and that the Commission did not cite anything in the record that would support this decision.⁵⁶ Ameren avers that the better policy judgment would be that allowing an RTO to violate its own tariff will create substantial uncertainty and undermine faith in both the RTO’s markets and in the Commission. Ameren argues that policy considerations are not determinative in the face of a tariff violation, and that without substantial evidence to support its new rationale, the Commission must reverse the RSG Rehearing Order.

86. E.ON alleges that the Commission’s decision does not promote market certainty, because if market participants cannot rely on the filed tariff that creates and defines the

⁵⁴ Ameren Request for Rehearing at 7 (citing RSG Rehearing Order at P 95).

⁵⁵ *Id.* (citing RSG Rehearing Order at P 96).

⁵⁶ Ameren Request for Rehearing at 8 (citing RSG Rehearing Order at P 95).

market, there can be no certainty. E.ON states that market participants that make economic decisions in reliance on the TEMT do so with the assurance that the Commission will require restitution for tariff violations.

3. Discussion

87. It is well-established that the Commission has broad discretion to fashion appropriate remedies “unless the statute itself mandates a particular remedy.”⁵⁷ The Commission, in its decision to order (or not to order) refunds for a tariff violation must provide “a reasoned explanation for its decision: it must show that it has ‘considered relevant factors and . . . struck a reasonable accommodation among them,’ and that its order was ‘equitable in the circumstances.’”⁵⁸ Although the requests for rehearing present numerous arguments (which we will answer in turn), their principal theme with respect to refunds is that the Commission abused this discretion. We will, therefore, revisit and further detail the balancing of equities that the Commission undertook in the RSG Rehearing Order.

a. The Filed Rate Doctrine

88. The Commission has consistently found that the Midwest ISO’s tariff requires allocation of RSG costs to virtual supply offers, and that the Midwest ISO violated its tariff by failing to do so.⁵⁹ There no longer seems to be any dispute that this is how the tariff should properly be read. Nor is there any question that the Midwest ISO’s Business Practice Manuals contradicted the tariff, and stated that virtual supply offers would not be assessed RSG costs. Unsurprisingly, every market participant argues that their own interpretation of the Midwest ISO’s publications should prevail. Their interpretations, as the Commission has found before, formed the basis of their economic decisions,⁶⁰ and those in turn stand to become inefficient if the Commission does not agree with them.

⁵⁷ *Connecticut Valley Electric Co v. FERC*, 208 F.3d 1037, 1043 (D.C. Cir. 2000) (citing *Towns of Concord*, 955 F.2d at 67, 72-73, 76 n.8).

⁵⁸ *Consolidated Edison Company of New York, Inc. v. FERC*, 347 F.3d 964, 972 (2003) (quoting *Towns of Concord*, 955 F.2d at 73) (*ConEd*).

⁵⁹ RSG Order at P 26-27; RSG Rehearing Order at P 45-47.

⁶⁰ RSG Rehearing Order at P 94.

89. Parties including E.ON and Ameren argue that they reasonably relied on the tariff to make their economic decisions, while others – such as Cargill Power Markets LLC, Constellation Energy Commodities Group, Inc. and Constellation NewEnergy, Inc., Otter Tail Power Company and Xcel Energy Services – contended earlier in the proceeding that the Business Practice Manuals were the best resource available to interpret the TEMT.⁶¹ The Federal Power Act requires that all rates, conditions and terms of service must be on file with the Commission,⁶² and we therefore find that the parties that grounded their decisions in the language of section 40.3.3.a.ii did so with good cause. We also found in the RSG Rehearing Order that market participants may, as a general matter, view an RTO as a credible source of information regarding the RTO’s own tariff.⁶³ We therefore disagree with E.ON that we made no finding in the RSG Rehearing Order as to whether market participants could reasonably rely on a business practices manual that contradicted the tariff.⁶⁴ However, to the extent it remains necessary, we find that the parties who relied on the Business Practice Manuals to make their decisions behaved reasonably. “It is unfair to market participants to assume that interpretations made by [an RTO] in its own publications . . . cannot be regarded as coming from a credible source.”⁶⁵

90. We disagree with E.ON’s assertions that the Commission’s failure to order refunds in this instance: (1) means that there is no remedy available when a transmission provider issues procedures that contradict its just and reasonable tariff; and (2) allows market participants and transmission providers to avoid following tariffs merely by

⁶¹ RSG Rehearing Order at P 76.

⁶² 16 U.S.C. § 824d (2000).

⁶³ RSG Rehearing Order at P 58, 94.

⁶⁴ We would, however, agree that we made no *general* finding as to whether a market participant may reasonably rely on a business practices manual that contradicts the tariff. Our finding is limited to the circumstances at hand.

⁶⁵ *PPL EnergyPlus, LLC v. New York Independent System Operator, Inc.*, 115 FERC ¶ 61,383 at P 29 (2006).

issuing or relying on a contradictory Business Practices Manual. The Court of Appeals has foreclosed this argument:

This argument assumes that the “right” [to be charged no more than the filed rate] ceases to exist unless it is backed up by a remedy, that the Commission’s denying refunds equals the Commission’s authorizing the utility to violate the filed rate doctrine . . . This is good advocacy but the case cannot be decided on any such theory. The Towns possess only the “rights” the Federal Power Act confers, no more, no less. The filed rate doctrine does not have a life of its own.⁶⁶

As the Commission has indicated twice before, the TEMT takes precedence over the Business Practice Manuals, and not the other way around. The Midwest ISO therefore violated its filed rate by failing to include virtual supply offers in the calculation and allocation of RSG costs. Like E.ON, we expect the Midwest ISO to rely on the filed rate and to ensure that its Business Practice Manuals are consistent with the TEMT.⁶⁷ We similarly expect transmission providers and market participants to know what is in a tariff and to follow its rates, terms and conditions.

91. It does not follow, however, that the filed rate doctrine requires us to impose refunds because the Midwest ISO erroneously elevated the Business Practice Manuals over the TEMT, as E.ON argues. As discussed in the RSG Order and the RSG Rehearing Order, the Commission has broad authority to fashion remedies for tariff violations.⁶⁸ In this instance, based on a balancing of the equities, we have elected not to impose refunds for this particular violation. We have, however, noted that if the Midwest ISO continues to disregard the filed rate, we may impose appropriate remedies, including penalties,⁶⁹ a finding that is unchallenged on rehearing. That is well within the Commission’s discretion.

⁶⁶ *Towns of Concord*, 955 F.2d at 73 (quoting *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922)).

⁶⁷ RSG Rehearing Order at P 96 (quoting *PPL EnergyPlus, LLC v. New York Independent System Operator, Inc.*, 115 FERC ¶ 61,383 at P 29 (2006)).

⁶⁸ *Id.* at P 93-95; RSG Order at P 27-30.

⁶⁹ RSG Rehearing Order at P 96.

92. We do not disagree with Ameren's argument that there were no changes to the facts of this case, or to the law that applies to them, between the RSG Order and the RSG Rehearing Order. What changed, as we explained in the RSG Rehearing Order, was our view of how to balance the equities. Parties seeking rehearing of the RSG Order presented us with a broad array of arguments, all of which indicated that market participants relied in good faith on *something* – either the Business Practices Manual or the plain language of the TEMT – to make economic decisions.⁷⁰ It thus appears that all of the parties acted in good faith, and that they made rational choices based on what they believed to be the governing rule regarding applicability of real-time RSG charges.

93. We hesitate to undo any of these economic decisions. And these decisions cannot be revisited regardless of which document they relied upon. (We also acknowledge Duke Energy Shared Services, Inc.'s argument on rehearing of the RSG Order that refunds cannot be made accurately, because they would not reflect the reduced price convergence between the day-ahead and the real-time market that may have occurred because fewer virtual transactions may have happened.⁷¹)

94. Ameren argues that the “revisiting decisions” precedent means only that changes in rate design should be made prospectively.⁷² We do not think that the Commission's decision not to impose refunds was inconsistent with the precedent cited in the RSG Rehearing Order, even though the matter at hand concerns the proper application of a Commission-approved tariff provision and not a change in rate design. While this was the rule applied in one case cited,⁷³ another concerned establishment of a refund date in relation to a complaint filed with the Commission under section 206 of the Federal Power Act, and not a change in rate design.⁷⁴ As such, the “revisiting decisions” precedent is

⁷⁰ *Id.* at P 80; RSG Order at P 16, 20.

⁷¹ RSG Rehearing Order at P 86.

⁷² Ameren cites no authority in its request for rehearing. We interpret its argument to refer to the cases cited in the RSG Rehearing Order.

⁷³ *New York Independent System Operator, Inc.*, 91 FERC ¶ 61,218 at 61,804-05, *clarified*, 92 FERC ¶ 61,181 (2000), *order on reh'g*, 97 FERC ¶ 61,154 (2001).

⁷⁴ *New York Independent System Operator, Inc.*, 92 FERC ¶ 61,073 at 61,307.

more broadly applicable than Ameren claims. The Commission's finding that the inability to change prior behavior weighed against refunds was therefore not unreasonable.

95. Ameren and E.ON argue that the Commission erred in declining to require refunds because the Midwest ISO's tariff violation and the end result of that violation are factually distinct from the violations at issue in the cases that the Commission cited in support of its conclusions. Both companies miss the point of those cases, which is that, faced with a public utility's violation of its own tariff, the Commission must examine the factual situation, balance the equities, and craft an appropriate remedy.⁷⁵ Refunds are only required if a statute affirmatively requires them – and the Federal Power Act does not.⁷⁶ “[A]ny assessment of the Commission’s remedial actions must be ‘based upon a considered analysis of the facts of [the] case and the precise purposes of the filed rate doctrine.’”⁷⁷ The Commission has considered the facts surrounding the violation of the Midwest ISO's tariff and concluded that refunds are not appropriate in this particular case. As detailed above, the Midwest ISO published information in its Business Practices Manuals that conflicted with the tariff, and the Midwest ISO and numerous market participants relied on that information. We have now made clear that it was erroneous for any party to rely on the Business Practice Manuals, and that the Midwest ISO and all market participants must rely on the language of the tariff itself going forward. We have also found, however, that market participants did not behave unreasonably when they relied on a Midwest ISO publication for accurate information concerning the application of RSG charges to virtual supply offers.

⁷⁵ *ConEd*, 347 F.3d at 972 (“[W]hen deciding whether to order refunds, FERC must . . . show that it has ‘considered relevant factors and . . . struck a reasonable accommodation among them.’”).

⁷⁶ *Towns of Concord*, 955 F.2d at 72 (“[O]ur examination of the Federal Power Act reveals no statutory command mandating refunds when the rate charged exceeds that filed.”).

⁷⁷ *Koch Gateway*, 136 F.3d 810, 817. *See also Towns of Concord*, 955 F.2d at 74 (“The question here is whether the remedy devised by FERC similarly conflicts with the ‘core purpose’ of the Federal Power Act and thereby constitutes an abuse of discretion.”).

b. **Inequitable Windfall for Market Participants and Market Issues**

96. E.ON and Ameren argue that the Commission erred in finding that there was no “inequitable windfall” to market participants despite evidence in the record that the amount of RSG charges that need to be reallocated totaled about \$250 million as of May 11, 2006. We will deny rehearing of their arguments. The Midwest ISO’s submittal does not provide sufficient detail for the Commission to make a reasoned finding that any particular market participant has received inequitable windfalls as a result of the Midwest ISO’s tariff violation.

97. The Midwest ISO’s May 11, 2006 Motion to Stay provided an estimate of the total amount of RSG charges that would need to be reallocated under the RSG Order:

For example, if there is no stay of the [RSG] Order’s directive to assess RSG charges on virtual transactions dating back to April 1, 2005, the Midwest ISO estimates that the resulting retroactive reallocation of RSG charges could total up to \$250 million. Such cost reallocation to virtual transactions would exceed the approximately \$240 million total value of virtual sale transactions in the Energy Markets to date. Moreover, such a cost reallocation could result in sever[e], if not debilitating, economic harm to certain Market Participants, and could result in substantial barriers to the participation by virtual traders in the Energy Markets.⁷⁸

The Midwest ISO’s representations make clear only that there may be a significant amount of money at stake in this proceeding. It does not answer the question of whether any market participant received an inequitable windfall as a result of the prior allocation of RSG costs. We cannot discern from these sentences how many market participants may have overpaid, how many may have underpaid, which market participants fall into which category, or how many dollars they may have gained or lost. We cannot rule out the possibility that some market participants may have both underpaid and overpaid, or know what their net positions may be. (Numerous market participants argue that they were underpaid, but none have presented numerical evidence to buttress their allegations.) Moreover, some Midwest ISO stakeholders have questioned the accuracy of

⁷⁸ Motion to Stay and Request for Expedited Treatment of the Midwest Independent Transmission System Operator, Inc., Docket No. ER04-691-065 (May 11, 2006) (footnote omitted).

the \$250 million figure.⁷⁹ Contrary to E.ON's assertion, the Commission has considered the evidence of potential harm and concluded that there is an insufficient record to conclude that market participants suffered or enjoyed an inequitable windfall as a result of the Midwest ISO's incorrect application of its tariff.

98. Ameren's arguments regarding market certainty highlight another of the difficult balancing issues that the Commission faced in its analysis of whether refunds were appropriate for the Midwest ISO's tariff violation. Ameren argues that refunds are appropriate because the Midwest ISO's tariff violation was disruptive. As the requests for rehearing of the RSG Order and the RSG Rehearing Order indicate, market uncertainty exists regardless of whether the Commission requires the Midwest ISO to reset its market to avoid RSG charges.⁸⁰ We also do not doubt that the violation was disruptive; once it was found, the volume of virtual trades in the Midwest ISO decreased as market participants adjusted to the correct costs of virtual trading. On the other hand, the remedy Ameren proposes is also disruptive since the Midwest ISO would need to develop software to perform the market resettlement automatically or develop alternative manual procedures in order to make the refunds initially ordered.⁸¹ Considering that

⁷⁹ “[Midwest ISO] staff stated that the magnitude of resettlement is estimated to be \$250 million re-allocation to virtual supply transactions. Some market participants said putting out a big number like that is dangerous and whether it is premature for [the Midwest ISO] to quote that number.” Notes of the May 10, 2006 RSG Task Force Meeting, available at http://www.midwestiso.org/publish/Document/7be606_10b7aacd66e_-775e0a48324a?rev=4.

⁸⁰ For example, the requests for rehearing of the RSG Order included arguments that: (1) ordering refunds would demonstrate that market participants cannot rely on the finality of prices; (2) penalizing market participants for relying on the TEMT would undermine faith in the market; and (3) resettling market results destroys market confidence and may do more damage than the original tariff violation. RSG Rehearing Order at P 73, 77, 87. Here, we confront arguments that allowing an RTO to violate its own tariff is disruptive and that there can be no certainty if market participants cannot rely on a filed tariff. *See supra* P 68-69.

⁸¹ Midwest ISO Motion to Stay at 4-6 (May 11, 2006). The complexity of the calculations necessary to implement RSG-related refunds underscores our concern regarding the accuracy of the estimated impact of the tariff violations, discussed above. *See Id.* at 5.

market uncertainty and disruption result from either refund scenario, our decision does not turn on the circumstances of market settlement, but rather on the other bases detailed in the RSG Rehearing Order and affirmed in this order.

F. Refund and RSG Charge Liability Periods

1. Requests for Rehearing

99. Xcel asks the Commission to clarify that virtual offers will become subject to real-time RSG liability once the Commission accepts the just and reasonable rate mechanism for the application of real-time RSG liability to virtual offers. Xcel asserts the clarification is necessary to ensure market predictability and to provide market participants with information to determine the full scope of their costs for which they will be responsible when transacting in the day-two market. Xcel submits that the RSG Rehearing Order's requirement that the Midwest ISO submit a compliance filing recognizes that a just and reasonable rate methodology does not currently exist to assess real-time RSG to virtual offers and therefore Xcel believes the Commission intended that real-time RSG should not apply to virtual offers until the effective date of a stakeholder-vetted, Commission-approved rate methodology on cost-causation principles.

100. WEPCO also asks the Commission to direct the Midwest ISO to clearly identify the effective dates that it will use for all the refunds of imports, lesser of following dispatch and virtual supply as directed in the RSG Order and the RSG Refund Order. In particular, WEPCO asks for clarification that the effective date for charging RSG to all virtual bids and offers should be April 25, 2006.

101. E.ON argues that the Commission should order refunds to E.ON from April 1, 2005 until the Midwest ISO actually begins to assess RSG costs to virtual suppliers in accordance with its tariff. E.ON claims that the Midwest ISO has failed to apply RSG charges to virtual suppliers even after the Commission required that it do so, and that it is currently not assessing such charges. As such, the Midwest ISO is bound to comply with section 40.3.3.a.ii of the TEMT.

2. Discussion

102. The Commission's finding in the RSG Order that virtual offers should share in the allocation of RSG costs, per the terms of the currently-effective tariff, served as notice to market participants that virtual offers, for those market participants withdrawing energy, were liable for RSG charges. Therefore, the RSG Rehearing Order's waiver of refunds applies to the period before that order, *i.e.*, from market start-up in April 2005 until

April 24, 2006. After this date, virtual supply offers are liable for RSG costs⁸² and therefore, to the extent virtual supply offers were not assessed RSG costs, refunds are due for the period starting April 25, 2006. To delay the effective date of liability for RSG charges would render the currently-effective tariff meaningless and without effect, even after the Commission made clear in the RSG Order and RSG Rehearing Order that the Midwest ISO had violated the terms of the tariff. Our finding here strikes an appropriate balance between the interests of market participants that reasonably relied on the Business Practices Manuals and the interest of the Commission in ensuring the tariff is implemented, particularly after it has provided notice of the effective tariff provisions.

G. Compliance Filing

1. Background

103. To ensure that cost responsibility follows cost incurrence, as required by traditional rate-making principles, the RSG Rehearing Order required the Midwest ISO to propose a charge that assesses RSG costs to virtual supply offers based on the RSG costs they cause.⁸³ To develop this charge, the Midwest ISO was required to identify costs caused by virtual supply offers, as determined by an analysis of the energy market with virtual supply offers compared to the energy market without virtual supply offers. Specifically, the Commission required the Midwest ISO proposal to calculate the RAC and real-time start-up, no-load and production costs not recovered by real-time revenues for each day – in one case with virtual supply offers, and another case assuming no virtual supply offers. The Midwest ISO was also required to adjust the real-time load so that it is equal to the day-ahead load, thereby avoiding attribution of higher-cost units to virtual supply offers when they in fact were caused by changes in load forecasts. Once the costs have been identified, the Midwest ISO was required to divide the costs attributed to virtual supply offers, *i.e.*, the difference between the case with virtual supply offers compared to the case without virtual supply offers, by the virtual supply offer megawatts, thereby yielding a \$/MW charge.

104. To give market participants a sense of the magnitude and variability of the charge, the Midwest ISO was also required to calculate a \$/MW charge for each hour of real-time for representative historic periods that would incorporate high unit commitment periods and low unit commitment periods.

⁸² Per the terms of the currently-effective TEMT, the liability for RSG costs is limited to market participants withdrawing energy in the real-time energy market.

⁸³ RSG Rehearing Order at P 117-18.

2. Request for Rehearing

105. DC Energy notes that the Commission required the Midwest ISO to propose a charge to assess RSG costs to Virtual Supply Offers on a prospective basis in a compliance filing within 60 days consisting of the specific analysis enumerated by the Commission in the RSG Rehearing Order. DC Energy does not interpret the compliance filing requirement to be a directive from the Commission to Midwest ISO to file tariff sheets that would eliminate the actual energy withdrawal requirement. Rather, DC Energy believes that the Commission instructed Midwest ISO to provide information and analysis so that the Commission could determine the next steps in the proceeding, including whether a technical conference is required to shape allocation of a prospective RSG charge proposal. DC Energy also does not interpret the guidance listed in the RSG Rehearing Order to restrict Midwest ISO to considering only the enumerated factors; rather, DC Energy interprets the RSG Rehearing Order as listing a number of non-exclusive factors which Midwest ISO should consider, among others, in formulating its analysis. DC Energy also seeks clarification that the RSG Rehearing Order is not intended to prevent Midwest ISO from complying with its stakeholder committee process to vet its analysis and to consider material issues raised by the stakeholders.

3. Discussion

106. In the RSG Rehearing Order, the Commission rejected the Midwest ISO's proposal to eliminate any assignment of RSG costs to virtual supply offers since the proposal did not accurately reflect cost causation. The Commission instructed the Midwest ISO to refile a proposal and to undertake an analysis to determine the impact of virtual supply offers on RSG costs. The Commission ruling provided no specific direction to eliminate the energy withdrawal condition that is in the currently-effective tariff. At the same time, the RSG Rehearing Order required the Midwest ISO to ascertain the impact of virtual supply offers on RSG costs, and did not instruct the Midwest ISO to limit its proposal to assign costs only to market participants withdrawing energy. Therefore, the required analysis leaves open the possibility that RSG costs may be assigned to market participants not withdrawing energy, if the cost analysis and record of comments support such a finding. Since the analysis is to be commented on by parties to this proceeding, we expect parties to raise issues beyond the analysis framework when the Midwest ISO submits its proposal and the Commission will consider those viewpoints in its determination. We also clarify that the RSG Rehearing Order does not foreclose stakeholder discussion, and further comments. Having considered the Midwest ISO compliance filing, discussed in the companion compliance order, we find that filing does not change the conclusions we draw from the record of this proceeding.

H. Resource Eligibility for RSG Credits

1. Request for Rehearing

107. WEPCO requests several clarifications with regard to the Commission's use of "SCUC," "SCED" and "State Estimator" in paragraphs 175 and 177 of the RSG Rehearing Order. WEPCO notes that the Midwest ISO's Unit Dispatch System (UDS) and state estimator lag 10 to 15 minutes behind the time units come online. WEPCO explains that: (1) the UDS produces security-constrained economic dispatch (SCED) instructions; (2) SCED data are used as the basis for the real-time dispatch system, for which the incremental energy portion of the production costs are calculated; (3) security-constrained unit commitment (SCUC) data produce commitment instructions for the units, that is, start/stop instructions and forecasts of potential dispatch.

108. WEPCO notes that it previously sought clarification that the Midwest ISO may not withhold RSG credits to generators because of these lags, and that the Commission appeared to agree with WEPCO's argument. WEPCO notes the RSG Rehearing Order found that "market participants should not be denied production cost recovery because of lags in the state estimator."⁸⁴ WEPCO states, however, that some of the terms the Commission used in its discussion of WEPCO's arguments are inconsistent with the Midwest ISO's algorithm, and it requests further clarifications.

109. In paragraph 175 of the RSG Rehearing Order, the Commission stated that "production costs eligible for RSG credits are the lesser of those MW amounts specified in the SCUC schedule, or, if the generator produced an amount less than the SCUC schedule, the amount actually produced." WEPCO argues that SCUC data only produce commitment instructions, and that the real-time dispatch system is predicated on SCED instructions from the UDS system. Later in the same paragraph, the Commission noted that "the purpose of [SCUC] is to minimize production costs." WEPCO finds this imprecise, because SCUC emphasizes maintaining security. Third, WEPCO argues that the last sentence of the paragraph -- "market participants should not be denied production cost recovery because of lags in the state estimator." -- is imprecise because the lag is caused by the UDS (which produces SCED instructions). WEPCO requests clarification that the Commission intended to use "SCED" or "security-constrained economic dispatch" in these three sentences of P 175.

110. WEPCO also asks for clarification of paragraph 177, in which the Commission found that "energy should not be denied cost recovery for production costs actually

⁸⁴ WEPCO Request for Rehearing at 9 (citing RSG Rehearing Order at P 175).

incurred but not recognized by the state estimator.” Because it is the UDS, not the state estimator, that lags, and because SCED instructions are produced by the UDS, WEPCO thinks that the Commission may have intended to use the term “SCED” rather than “state estimator.”

111. Next, WEPCO notes that the Commission instructed the Midwest ISO to add the phrase “and adjusted to reflect actual production within the SCUC-instructed hours of operation” after the term “state estimator” in proposed section 40.3.3.b.iii of the TEMT, but that “state estimator” appears three times in that section. WEPCO seeks clarification as to whether the Commission wants the Midwest ISO to insert the new phrase only after the third occurrence of “state estimator.” WEPCO further requests that the Commission direct the Midwest ISO to add the phrase “during hours where SCED instructions are delayed” at the end of the new phrase to account for the delay in the calculation of production costs that results from the UDS lag.

112. WEPCO notes that the Commission ordered refunds back to market start-up with regard to the requirement that production costs eligible for RSG credits are the lesser of the megawatt amounts specified in the SCED schedule, or, if the generator produced less than the SCED schedule, the amount actually produced.⁸⁵ WEPCO asks the Commission to clarify that the refunds to market start-up using this “lesser of” methodology should be applied only to those hours where a resource was previously deemed ineligible for cost recovery for not following the Midwest ISO’s dispatch instructions. Absent such clarification, WEPCO worries that the Midwest ISO will have to recalculate all production costs for all hours, for each generator, thereby re-opening hours to additional disputes or reverting resolved disputes back to their original state. WEPCO does not advocate refunds, because recalculating all hours for each generator could significantly affect the financial records relating to those charges that were already reconciled and booked. Ordering the Midwest ISO to make such recalculations, WEPCO says, would create substantial market uncertainty and would be inequitable because market participants cannot revisit their economic decisions.

113. WEPCO points out that the Commission twice referred to “SCUC instruction” and “SCUC schedule” in the RSG Rehearing Order (at paragraphs 173 and 174), but that these terms are not defined in either the order or in the TEMT. WEPCO believes that the Commission meant to use these terms to define the commitment period during which production costs are incurred, and it asks the Commission to clarify that this was its

⁸⁵ Consistent with other sections of its request for rehearing, WEPCO uses the term “SCED” instead of “SCUC.”

intent. WEPCO also asks the Commission to replace these terms in the order with the phrase “SCUC instructed hours of operation” to further clarify its intended reference to the commitment period.

2. Discussion

114. We clarify that the SCUC process produces schedules for committing resources, including schedules of megawatt over a multi-hour horizon.⁸⁶ The SCED and UDS processes provide five-minute instructions within the hours of the SCUC schedule, *i.e.*, increase or decrease megawatts over five-minute intervals. Therefore the SCUC process sets the hours of commitment and megawatts, if unadjusted by SCED/UDS instructions. The Commission clarification in paragraph 175 of the RSG Rehearing Order should recognize that production costs eligible for RSG credits are the lesser of megawatt amounts specified in SCUC schedule, *as adjusted within the hour for SCED/UDS instructions*, or if the generator produced less than these schedules, the amount actually produced. We expect this formulation would be the basis to determine refunds.

115. However, market participants should not be denied production cost recovery because of lags in the state estimator and UDS solutions. Just as market participants should not be assessed RSG charges for differences caused by lags in state estimator and UDS tracking of unit output that follows dispatch instructions,⁸⁷ RSG credits likewise should not be denied because of lags in state estimator and UDS solutions. However, the record in this proceeding does not support eliminating the reference to a state estimator lag since the Midwest ISO indicated that there is a state estimator lag⁸⁸ and WEPCO has not provided any evidence to the contrary. We clarify that the phrase ‘and adjusted to reflect actual production with the SCUC-instructed hours of operation’ should be inserted into section 40.3.3.b.iii at every instance the term ‘state estimator’ is used, to ensure clarity. We will not add the phrase ‘during hours where SCED instructions are delayed’ since this phrase does not accurately characterize the cause of lags, as discussed above.

116. We interpret WEPCO’s concern with refunds to be that they have already obtained refunds in settlements and do not want the Commission to disturb those settlements.

⁸⁶ RSG Rehearing Order at P 174.

⁸⁷ RSG Order at P 80.

⁸⁸ RSG Order at P 68. The state estimator must solve with the unit having measurable injections, which typically takes between 1 and 90 seconds.

While we affirm that refunds are due for RSG charges and credits, we will not preclude settlements or require changes to settlements already completed to determine the ultimate refund amounts due to market participants.

117. We clarify that paragraphs 173 and 174 refer to SCUC instructions on the commitment hours and megawatt of production, and therefore provide instructions on more than just the commitment period.⁸⁹ Therefore, the SCUC instructions and schedule apply to commitment periods during which production costs are incurred and the megawatts produced in those periods. The previous orders in this docket have already required “SCUC instructed hours of operation” for the tariff, and therefore have already addressed WEPCO’s concern.

The Commission orders:

The requests for rehearing of the RSG Rehearing Order are hereby denied, as discussed in the body of this order.

By the Commission. Commissioner Moeller not participating.

(S E A L)

Philis J. Posey,
Acting Secretary.

⁸⁹ We recognize that within the hour the SCUC instruction is modified by five-minute SCED/UDS instruction in real time, as discussed above.