127 FERC ¶ 61,121
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Suedeen G. Kelly, Marc Spitzer,
and Philip D. Moeller.

Ameren Services Company Northern Indiana Public Service Company v. Midwest Independent Transmission System Operator, Inc.	Docket Nos.	EL07-86-005 EL07-86-007
Great Lakes Utilities Indiana Municipal Power Agency Missouri Joint Municipal Electric Utility Commission Missouri River Energy Services Prairie Power, Inc. Southern Minnesota Municipal Power Agency Wisconsin Public Power Inc. v. Midwest Independent Transmission System Operator, Inc.	Docket Nos.	EL07-88-005 EL07-88-007
Wabash Valley Power Association, Inc. v. Midwest Independent Transmission System Operator, Inc.	Docket Nos.	EL07-92-005 EL07-92-007

ORDER GRANTING REHEARING IN PART AND
DENYING REHEARING IN PART

(Issued May 6, 2009)

1. In this order, the Commission grants in part and denies in part rehearing of its November 10, 2008 order in this proceeding.[1] The Commission found in that order that the complainants had met their burden of proof under section 206(b) of the Federal Power Act (FPA)[2] and that they had demonstrated that the real-time Revenue Sufficiency Guarantee charge cost allocation in effect under the Midwest Independent Transmission System Operator, Inc.'s (Midwest ISO) Transmission and Energy Markets Tariff (tariff) is unjust and unreasonable, and that the proposed alternative cost allocations are just and reasonable. The Commission also exercised its discretion to require refunds. In this order, the Commission denies rehearing of its decision to approve the proposed alternative cost allocations but grants rehearing of its decision to require refunds from the date of the underlying complaints.

I. Background

2. The Commission has addressed issues associated with the allocation of Revenue Sufficiency Guarantee charge costs in several proceedings – first under FPA section 205, in a number of orders in Docket No. ER04-691, and now, under FPA section 206, in this complaint docket. The Revenue Sufficiency Guarantee charge recovers start-up, no-load and incremental costs of generators that are not recovered in the locational marginal price. There are two Revenue Sufficiency Guarantee charges, one applicable to the day-ahead market and the other one applicable to the real-time market. The latter charge is at issue in this proceeding.

3. This real-time charge recovers the costs of generators committed in the reliability assessment commitment process that occurs after the day-ahead market closes and in subsequent intra-day commitments to ensure sufficient resources are on-line to meet operating requirements during the operating day. When the Midwest ISO started its energy markets, the tariff provision for the Revenue Sufficiency Guarantee charge was allocated to market participants who "actually withdraw energy" during an operating day, and was based on each market participant's virtual offers and deviations from load and generator schedules in the day-ahead market.[3]

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[1] *Ameren Servs. Co. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 125 FERC ¶ 61,161 (2008) (Order on Paper Hearing).

[2] 16 U.S.C. § 824e (2006).

[3] The Midwest ISO tariff specification of the Revenue Sufficiency Guarantee charge originally stated, in relevant part: "On any Day when a Market Participant actually withdraws any Energy the Market Participant shall be charged a Real-Time Revenue Sufficiency Guarantee Charge." The allocation factors are specified as the

(continued…)

4. On April 25, 2006, in Docket No. ER04-691, the Commission issued an order rejecting the Midwest ISO's proposal to, among other things, remove references to virtual supply from the tariff provisions related to calculating Revenue Sufficiency Guarantee charges.[4] The Commission further found that because the Midwest ISO had not been including virtual supply offers in its Revenue Sufficiency Guarantee calculations, it had violated its tariff and must make appropriate refunds.[5] However, the requests for rehearing of the Revenue Sufficiency Guarantee Order persuaded the Commission to change course and exercise its equitable discretion not to require refunds for the Midwest ISO's failure to include virtual supply offers in its calculation of Revenue Sufficiency Guarantee charges.[6]

5. On March 15, 2007, the Commission issued two orders regarding the Midwest ISO's Revenue Sufficiency Guarantee charges, the Second Rehearing Order and the First Compliance Order.[7] In the Second Rehearing Order, the Commission reiterated that "the Midwest ISO's tariff requires allocation of Revenue Sufficiency Guarantee costs to virtual supply offers, and . . . the Midwest ISO violated its tariff by failing to do so. There no longer seems to be any dispute that this is how the tariff should properly be read."[8] The Commission then revisited the issue of whether to exercise its discretion to require refunds, and it granted rehearing of its prior decision to impose refunds based on a balancing of equities.[9] In the First Compliance Order, the Commission found that the

market participant's total load purchased in the real-time energy market, virtual supply for the market participant in the day-ahead market and resource uninstructed deviation quantities. Original Sheet Nos. 577 and 578. We refer to this rate throughout the order as the "Original Rate."

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

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

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

[7] *Midwest Indep. Transmission Sys. Operator, Inc.*, 118 FERC ¶ 61,213 (2007) (First Compliance Order), *order on reh'g*, Third Rehearing Order, 121 FERC ¶ 61,131 (2007).

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

[9] *Id.* P 88-98.

Midwest ISO failed to analyze the relationship between virtual supply offers and Revenue Sufficiency Guarantee cost incurrence as the First Rehearing Order required. The Commission rejected the Midwest ISO's proposal to allocate costs based on net virtual offers, *i.e.*, virtual offers minus virtual bids, and it clarified that the currently-effective tariff, which allocates Revenue Sufficiency Guarantee costs to virtual supply offers, remains in effect.[10] On November 5, 2007, the Commission denied rehearing of the Second Rehearing Order and First Compliance Order and accepted the Midwest ISO's second compliance filing (dated April 17, 2007).[11]

6. Ameren Services Company and Northern Indiana Public Service Company (Ameren and Northern Indiana); Great Lakes Utilities, Indiana Municipal Power Agency, Missouri Joint Municipal Electric Utility Commission, Missouri River Energy Services, Prairie Power, Inc., Southern Minnesota Municipal Power Agency, and Wisconsin Public Power Inc.; and Wabash Valley Power Association, Inc. (collectively, Complainants) each filed a complaint against the Midwest ISO pursuant to section 206 of the FPA and Rule 206 of the Commission's Rules of Practice and Procedure.[12] These complaints concern the allocation of Revenue Sufficiency Guarantee charges to market participants under the Midwest ISO's tariff. Complainants alleged that the Revenue Sufficiency Guarantee rate, which is based in part on virtual supply offers, is unjustly and unreasonably assessed on only a subset of market participants with virtual supply offers and withdrawals of energy. Complainants argued that there is no justification for differentiating among virtual supply offers with regard to Revenue Sufficiency Guarantee charge allocation and that the Commission's prior orders have found that there is no basis to do so. Complainants asked that the Commission set for hearing the issue of the tariff revisions necessary to remedy this alleged discrimination.

7. The Commission granted in part and denied in part the relief requested in the complaints.[13] The Commission found that the Midwest ISO's existing Revenue

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

[11] Third Rehearing Order, 121 FERC ¶ 61,131 (2007); *Midwest Indep. Transmission Sys. Operator, Inc.*, 121 FERC ¶ 61,132 (2007) (Second Compliance Order).

[12] 18 C.F.R. § 385.206 (2008).

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

Sufficiency Guarantee cost allocation methodology may not be just and reasonable, but the Revenue Sufficiency Guarantee cost allocation methodologies Complainants proposed also had not been shown to be just and reasonable. The Commission thus established a refund effective date of August 10, 2007 – the date of the earliest of the three complaints – and set the complaints for paper hearing and investigation to review evidence and to establish a just and reasonable Revenue Sufficiency Guarantee cost allocation methodology. The Commission held the paper hearing in abeyance pending the conclusion of a then-ongoing stakeholder proceeding by the Midwest ISO Revenue Sufficiency Guarantee Task Force that was seeking to identify improvements that could be made to the Revenue Sufficiency Guarantee cost allocation methodology, or February 1, 2008, whichever is earlier.[14]

8. On February 1, 2008, the Midwest ISO made an informational filing stating that it was not able to meet the February 1, 2008 deadline because the Revenue Sufficiency Guarantee Task Force was still in negotiations. The Midwest ISO proposed to file specific tariff provisions and supporting documentation on or about March 3, 2008.

9. On March 3, 2008, the Midwest ISO filed what it referred to as "indicative" tariff revisions that reflect an alternative mechanism for allocating Revenue Sufficiency Guarantee charges and costs. The Midwest ISO explained that these provisions represent a new real-time Revenue Sufficiency Guarantee cost allocation methodology that was developed based on the principles agreed upon in stakeholder discussions but that had not yet been conformed to incorporate the Midwest ISO's new Ancillary Services Markets market design elements. The Midwest ISO submitted that the Commission should determine whether the language in its indicative revisions represents a just and reasonable basis for a subsequent section 205 filing that would replace the Revenue Sufficiency Guarantee cost allocation methodology for the Ancillary Services Markets. The Midwest ISO stated that if the Commission determines that the proposed indicative tariff language is a just and reasonable basis for further developing provisions that would adapt the new Revenue Sufficiency Guarantee cost allocation methodology to the Ancillary Services Markets context, it would agree to file, within approximately 60 days from that determination, Ancillary Services Markets-specific tariff provisions embodying this suggested new allocation methodology. Within that period, the Midwest ISO would work with stakeholders to develop Ancillary Services Markets-adapted tariff language and determine whether additional cost causation analysis is required for such purpose.

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[14] The Revenue Sufficiency Guarantee Task Force is a working group consisting of market participants organized by the Midwest ISO Market Subcommittee. The Task Force was charged with exploring potential improvements to the Revenue Sufficiency Guarantee cost allocation methodology.

10. On August 21, 2008, the Commission issued an order commencing a paper hearing.[15] The Commission noted that parties in the stakeholder proceeding were not able to resolve the issues raised by Complainants. The Commission stated that to fulfill their obligations under section 206(b) of the FPA, Complainants carry the burden of proof and therefore must demonstrate, on the basis of substantial evidence, both that the rate in effect is unjust and unreasonable and that their proposed alternative rate is just and reasonable.[16] The Commission explained that it is not the Midwest ISO's responsibility to propose and justify a new cost allocation because the Midwest ISO is not the complainant but rather the party to which the complaints are directed.[17]

11. In the Order on Paper Hearing, the Commission found that the Complainants had met their burden under section 206(b) of the FPA to demonstrate that the application of the Original Rate was unduly discriminatory and therefore unjust and unreasonable. The Commission found that for Revenue Sufficiency Guarantee purposes, there is no cost-causation basis for differentiating between market participants that withdraw energy on a particular day and market participants that are engaged in the same activities but do not withdraw energy. The Commission also found that each of the two replacement rate proposals, *i.e.*, an interim cost allocation resulting from the removal of the phrase "actually withdraws energy" from the Original Rate (which we call the Interim Rate) and the cost allocation developed by the Midwest ISO Revenue Sufficiency Guarantee Task Force (the Indicative Rate), are just and reasonable. The Commission ordered the Midwest ISO to implement the Indicative Rate on a going-forward basis as soon as tariff provisions were finalized, filed, and approved by the Commission, and it ordered the Midwest ISO to use the Interim Rate to compute Revenue Sufficiency Guarantee charges until Indicative Rate tariff provisions are finalized and approved.

II. Procedural Matters

A. Motions to Intervene

12. Motions to intervene out of time and requests for rehearing were filed separately by AI Funds, Inc.; Argo Navis Fundamental Power Fund, L.P.; GLE Trading, LLC and Franklin Power, LLC; JJR Power, LLC; JPTC, LLC; Jump Power, LLC; Palms Asset Management LLC; and Solios Power, LLC (collectively, the Financial Late Intervenors),

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

[16] *Id.* P 9.

[17] *Id.*

as well as Sempra Energy Trading LLC (Sempra). The Financial Late Intervenors allege, variously, that they were unaware of the complaint filings and had little reason to know that their interests could be adversely affected, and argue that their motions to intervene out-of-time will not result in undue prejudice or delay to the proceeding. They also state that the Midwest ISO staff misled and failed to update them on their exposure to Revenue Sufficiency Guarantee charges. Sempra states that there is good cause to allow its late intervention because it is directly and dramatically affected by the Order on Paper Hearing in a manner that was difficult to predict at the outset of these proceedings.

13. Northern Indiana Public Service Corporation (Northern Indiana); the Coalition of Midwest Transmission Customers, Indiana Municipal Power Agency, Midwest Municipal Transmission Group, Missouri Joint Municipal Electric Utility Commission, Missouri River Energy Services, Prairie Power, Inc., Southern Minnesota Municipal Power Agency, Wisconsin Public Power Inc., and Great Lakes Utilities (collectively, Midwest Industrials and TDUs) filed answers in opposition to the motions to intervene out of time. In general, these parties argue that the Commission should reject the Financial Late Intervenors' argument that they never received notice of the potential that Revenue Sufficiency Guarantee charges could be applied to them. They contend that: (1) the evaluation of Revenue Sufficiency Guarantee charges in Midwest ISO has been argued and litigated before the Commission for over two years; and (2) the notices of the complaint proceedings in the *Federal Register* were sufficient to alert Midwest ISO market participants that their interests may be affected. They also argue that the late interventions and requests for rehearing cannot meet the Commission's "extraordinary circumstances" test because of the substantial burden that would be placed on parties to this proceeding if the out-of-time motions to intervene were granted because the Commission has already issued an order on the merits of the case.

14. On March 12, 2009, American Electric Power Service Corp. (AEP) filed a motion to intervene out of time. AEP argues that good cause exists to permit its untimely intervention because it could be subjected to increased Revenue Sufficiency Guarantee settlement costs as a result of Midwest ISO's proposed changes to Revenue Sufficiency Guarantee charges. AEP states that it will take the record as it currently exists so that its participation will not disrupt the current proceeding.

15. 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, a moving party bears a high burden to demonstrate good cause for allowing late intervention after the Commission has issued a

dispositive order in a proceeding.[18] We find that the Financial Late Intervenors' claims of unfair surprise, and Sempra's claim that it did not know that it would be affected by the outcome of this proceeding, are insufficient to support their out-of-time interventions. Similarly, AEP has failed to demonstrate good cause to permit its untimely intervention. Notice by publication in the *Federal Register* constitutes adequate notice to all parties whom this notice might affect.[19] The three complaints at issue in this proceeding were separately noticed in the *Federal Register* in August and September of 2007.[20] In addition, notice of the Order on Revenue Sufficiency Guarantee Complaints was published in the *Federal Register* on December 7, 2007.[21] The notice states "the Commission issued an order … to review evidence and to establish a just and reasonable Revenue Sufficiency Guarantee cost allocation methodology for market participants…" and sets forth a refund effective date of August 10, 2007.[22] Accordingly, we will deny the out-of-time motions to intervene filed by the Financial Late Intervenors, Sempra, and AEP.

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[18] *See, e.g., Midwest Independent Transmission System Operator, Inc.*, 102 FERC ¶ 61,250, at P 7 (2003); *H.Q. Energy Services (U.S.), Inc. v. New York Independent System Operator, Inc.*, 100 FERC ¶ 61,028, at 61,072 (2002); *North Baja Pipeline LLC*, 99 FERC ¶ 61,028, at 61,109-10 (2002); *Florida Power & Light Company*, 99 FERC ¶ 61,318, at 62,358 (2002).

[19] *See, e.g.*, *Federal Crop Ins. Corp. v. Merrill, et al.*, 332 U.S. 380, 384-85 (1947) (publication in the *Federal Register* provides legal notice); *California Department of Water Resources and the City of Los Angeles*, 122 FERC ¶ 61,150, at P 12 (2008) (publication of notice in the *Federal Register* provides adequate notice to all interested parties).

[20] Notice of the Ameren and Northern Indiana's complaint was published in the *Federal Register* on August 21, 2007, with interventions and comments due by September 4, 2007. 72 Fed. Reg. 46,618 (2007). Notice of the Midwest TDUs' complaint was published in the *Federal Register* on August 28, 2007, with interventions and comments due by September 7, 2007. 72 Fed. Reg. 49,277 (2007). Notice of Wabash Valley's complaint was published in the *Federal Register* on September 6, 2007, with interventions and comments due by September 13, 2007. 72 Fed. Reg. 51,222 (2007).

[21] 72 Fed. Reg. 69,203 (2007).

[22] *Id.*

16. We reject the argument of the Financial Late Intervenors, Sempra, and AEP that their motions to intervene out of time will not result in disruption, undue prejudice or delay to the proceeding. To the contrary, we find that the attempts of the Financial Late Intervenors, Sempra, and AEP to participate in the proceeding after the issuance of the Order on Paper Hearing, including Financial Late Intervenors' and Sempra's attempt to participate in order to seek rehearing of this order, would be unduly burdensome to those parties who have actively participated in the case since September 2007 and who have briefed their positions to the Commission.

17. In light of our decision to deny the late motions to intervene of the Financial Late Intervenors and Sempra, we will dismiss the requests for rehearing of the Financial Late Intervenors and Sempra. Because the Financial Late Intervenors and Sempra are not parties to this proceeding, they lack standing to seek rehearing of the Order on Paper Hearing under the Federal Power Act and the Commission's regulations.[23]

B. Requests for Rehearing

18. Timely requests for rehearing of the Order on Paper Hearing were filed by Credit Suisse Energy LLC (Credit Suisse); DC Energy Midwest, LLC (DC Energy); E.ON U.S. LLC (E.ON); Edison Mission Energy (Edison Mission); EPIC Merchant Energy, LP, SESCO Enterprises, LLC, and CAM Energy Trading, LLC (Financial Marketers); FirstEnergy Service Company (FirstEnergy); Integrys Energy Services, Inc. (Integrys); Otter Tail Corporation (Otter Tail); and Xcel Energy Services Inc. (Xcel). Edison Mission's request for rehearing includes new evidence, in the form of an affidavit from Andrew Hartshorn. We will reject the affidavit, as the Commission generally does not permit parties to introduce new evidence for the first time on rehearing.[24]

19. Answers to these requests for rehearing were filed by Ameren Services Company and Northern Indiana Public Service Company (Ameren and Northern Indiana). Edison Mission filed an answer to the answer of Ameren and Northern Indiana.

20. Rule 713(d)(1) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d)(2) (2008), prohibits answers to requests for rehearing. Accordingly, we will

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[23] *See* 16 U.S.C. § 825(a) (2006); 18 C.F.R. § 385.713(b) (2008); *Southern Company Services, Inc*. 92 FERC ¶ 61,167 (2000).

[24] *See, e.g., Ocean State Power II*, 69 FERC ¶ 61,146, at 61,548 n.64 (1994) (stating that "[t]he Commission generally will not consider new evidence on rehearing, as we cannot resolve issues finally and with any efficiency if parties attempt to have us chase a moving target.").

reject the answers of Ameren and Northern Indiana, DC Energy and Edison Mission to the requests for rehearing. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2008), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We are not persuaded to accept Edison Mission's answer and will, therefore, reject it.

C. Independent Market Monitor

21. On February 23, 2009, Potomac Economics, the Midwest ISO's Independent Market Monitor (Independent Market Monitor) submitted a document entitled "Findings and Recommendations of the Midwest ISO's Independent Market Monitor." The Independent Market Monitor, invoking its obligation under the Midwest ISO tariff to advise the Commission of matters that it considers necessary to achieving the purposes of the tariff, contends that implementation of the Paper Hearing Order has had, and will continue to have, adverse effects on the Midwest ISO markets.

22. The Independent Market Monitor states that its analysis indicates that the replacement cost allocation for real-time Revenue Sufficiency Guarantee costs that was established in the Order on Paper Hearing – the Interim Rate - is resulting in substantial excess costs being allocated to real-time deviations in general, and virtual supply in particular. It argues that these excess costs have contributed to a sharp decline in virtual trading volumes. The Independent Market Monitor states that, in light of the divergence between the replacement cost allocation and the true causes of Revenue Sufficiency Guarantee costs, as well as the arguments and analyses submitted by parties in the rehearing requests and the requests for stay (discussed below), it recommends that the Commission reconsider the determinations made in the Order on Paper Hearing. It asserts that this recommendation is enhanced by the vital role that virtual transactions play in the Midwest ISO markets and the dramatic effects that the replacement cost allocation is having on these transactions. The Independent Market Monitor also states that the Midwest ISO has proposed a new Revenue Sufficiency Guarantee cost allocation method – the Indicative Rate – for implementation in late 2009. It argues that the Indicative Rate would provide the Commission a just and reasonable alternative to the Midwest ISO's prior cost allocation, which was determined to be unjust and unreasonable in the Order on Paper Hearing.

23. On February 17, 2009, EPIC Merchant Energy, LP, SESCO Enterprises, LLC, AI Funds, Inc., JJR Power, LLC, Jump Power, LLC, Palms Asset Management, LLC, Solios Power, LLC, Energy Endeavors, LLC, Westar Energy, Inc., GLE Trading, LLC and Franklin Power, LLC jointly submitted the report upon which the Independent Market Monitor's February 23 filing is based under the heading "Report Warranting Immediate Consideration."

24. Midwest ISO, Wisconsin Electric Power Company (Wisconsin Electric) and Ameren and Northern Indiana filed answers to the Independent Market Monitor's

February 23 filing. E.ON filed comments on the filing submitted by the Independent Market Monitor. Midwest ISO does not address the legal conclusions included in the Independent Market Monitor's report; however, it states that the Independent Market Monitor's statistical data and related facts are consistent with the Midwest ISO's information. Wisconsin Electric urges the Commission not to act on the recommendations suggested in the Independent Market Monitor's filing without allowing market participants a meaningful opportunity to fully scrutinize the report and the underlying data. Wisconsin Electric also asserts that there are several flaws in the Independent Market Monitor's analysis that place into question its overall validity. Ameren and Northern Indiana argue that the Independent Market Monitor's filing should be rejected because it is essentially an out-of-time request for rehearing that is based on information that could have been submitted earlier in these proceedings. Northern Indiana filed a letter requesting that the Commission disregard the "Report Warranting Immediate Consideration" filed on February 17. E.ON states that it does not support a proposal to adopt the Midwest ISO's redesign proposal as filed, and it requests that the Commission grant rehearing of the Interim Rate adopted in the Order on Paper Hearing.

25. Although we take very seriously the Independent Market Monitor's tariff obligation to advise us on the efficacy of tariff provisions and of matters necessary to ensure smooth market operations in the Midwest ISO,[25] this tariff duty does not empower the Independent Market Monitor to bypass the requirements of the FPA or the Commission's regulations. We find that the Independent Market Monitor's submission, which advocates that the Commission take specific action on rehearing, constitutes an impermissible out-of-time request for rehearing. Section 313 of the FPA provides that a request for rehearing of a Commission order may be made within 30 days of the date of that order, but not thereafter.[26] Requests for rehearing of the Order on Paper Hearing were due on or before December 10, 2008. We therefore reject the Independent Market Monitor's February 23, 2009 submission, but will address the arguments in its filing in order to clarify our prior ruling and the rationale for that ruling.

26. We will also reject the "Report Warranting Immediate Consideration" as an additional, untimely request for rehearing. In addition, we note that several of the parties

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[25] Midwest ISO Transmission, Energy and Operating Reserve Markets Tariff at §§ 50.1, 52.3(b).

[26] 16 U.S.C. § 825l (2006).

that submitted this report are not parties to this proceeding,[27] and therefore lack standing to seek rehearing of the Order on Paper Hearing.[28]

27. Rule 713(d)(1) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d)(2) (2008), prohibits answers to requests for rehearing. Accordingly, we will reject the answers to the out-of-time requests for rehearing of the Independent Market Monitor and the "Report Warranting Immediate Consideration."

D. Requests for Stay

28. On January 23, 2009, EPIC Merchant Energy, LP; SESCO Enterprises, LLC; AI Funds, Inc.; JJR Power, LLC; Jump Power, LLC; Palms Asset Management, LLC; Solios Power, LLC; Energy Endeavors, LLC; and Westar Energy, Inc. (collectively, Indicated Participants)[29] jointly submitted an emergency motion and request for stay of the Order on Paper Hearing. They argue that immediate action is needed "to avoid catastrophe in the [Midwest ISO] markets" and to halt unlawful, irreparably harmful action by the Midwest ISO.[30] Indicated Participants contend that the Commission should order the Midwest ISO to correct invoices and refund or credit, with interest, amounts wrongly charged to virtual supply offers of market participants not actually withdrawing energy on the same day. They argue that the Midwest ISO has no tariff authority to impose Revenue Sufficiency Guarantee charges on these market participants because the tariff sheets filed in compliance with the Order on Paper Hearing (December 10 Compliance Filing) are not a section 205 filing, and do not become effective until approved by the Commission. Indicated Participants also argue that the Revenue Sufficiency Guarantee refunds and charges that the Midwest ISO has calculated based on the December 10 Compliance Filing are excessive and unduly discriminatory.[31]

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[27] AI Funds, Inc., JJR Power, LLC, Jump Power, LLC, Palms Asset Management, LLC, Solios Power, LLC, and GLE Trading, LLC and Franklin Power, LLC are not parties to the instant proceeding. *See supra* P 5.

[28] *See supra* P 17.

[29] AI Funds, Inc., JJR Power, LLC, Jump Power, LLC, Palms Asset Management, LLC, Solios Power, LLC, Energy Endeavors, LLC and Westar Energy, Inc. are not parties to the instant proceeding.

[30] Indicated Participants' January 23, 2009 Request for Stay at 2, 26-27.

[31] *Id*. at 11.

29. Indicated Participants argue that the public interest requires that the Commission stay the market resettlement and refund directives in the Order on Paper Hearing because virtual supply offers in the Midwest ISO have experienced "a steep decline" and may decline "to the point where virtual supply trading may no longer be viable in the [Midwest ISO]."[32] They add that granting a stay will not harm other parties because it will not take money out of other parties' pockets.

30. DC Energy, Edison Mission, and Integrys filed motions in support of the Indicated Participants' request for stay. FirstEnergy and Twin Cities Power, LLC and Fairway Dairy & Ingredients, LLC (Twin Cities)[33] filed comments in support of the Indicated Participants' request for stay. Lighthouse Energy Trading Company, Inc. (Lighthouse) filed a motion to intervene out of time and comments in support of the Indicated Participants' request for stay. These entities contend, variously, that the directives in the Order on Paper Hearing have resulted in a steep decline in virtual supply offers, and that this decline is causing irreparable injury that warrants expedited stay and rehearing of the Order on Paper Hearing.

31. Lighthouse argues that good cause exists to grant its out-of-time motion to intervene because it only recently became aware of the Midwest ISO's December 10 Compliance Filing and the potential impacts on its operations. Lighthouse claims that no disruption of the proceeding will result from permitting its late intervention since the Commission has not yet acted on the December 10 Compliance Filing, and because Lighthouse accepts the record as it currently stands.

32. Midwest ISO filed an answer to the Indicated Participants' emergency motion and request for stay. Midwest ISO takes no position on the Indicated Participants' argument that the Order on Paper Hearing erred in holding that the actual energy withdrawal condition for imposing Revenue Sufficiency Guarantee charges is not just and reasonable. Midwest ISO seeks expedited acceptance of its December 10 Compliance Filing, and/or expeditious confirmation, or clarification of the Order on Paper Hearing, as well as the Third Compliance Order's associated no-mismatch/no shortfall interpretation of the Revenue Sufficiency Guarantee rate.

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[32] *Id*. at 14.

[33] Twin Cities is not a party to the instant proceeding. It submitted a motion to intervene out of time in Docket No. EL07-86-006 on January 7, 2009 – i.e., in response to a Midwest ISO compliance filing. The Commission will rule on the out-of-time intervention at the time it considers the compliance filing.

33. Ameren and Northern Indiana submitted an answer in opposition to the Indicated Participants' emergency motion and request for stay. They argue that contrary to the claims made in the Indicated Participants' request for stay, there is no need for immediate Commission intervention in the Midwest ISO markets with respect to the Revenue Sufficiency Guarantee charges because "mere financial harm has never been sufficient grounds to support a stay."[34] Ameren and Northern Indiana argue that the Indicated Participants' claims regarding the impact of the Order on Paper Hearing on the Midwest ISO markets are greatly overstated. They also argue that the emergency motion and request for stay is an out-of-time request for rehearing and stay of the Order on Paper Hearing, and should be rejected on this basis.

34. Northern Indiana filed an answer in opposition to Lighthouse's motion to intervene out of time. Northern Indiana argues that Lighthouse has not shown good cause for its late intervention or that its interests are not adequately represented by numerous similarly situated parties in this case. Northern Indiana also asserts that Lighthouse lacks standing to comment on the Indicated Participants' emergency motion and request for stay.

35. We reject the argument of Lighthouse that its motion to intervene out of time will not result in undue prejudice or delay to the proceeding. To the contrary, we find that the attempt of Lighthouse to participate in the proceeding after the issuance of the Order on Paper Hearing in order to request stay of this order would be unduly burdensome to those parties who have actively participated in the case since September 2007 and who have briefed their positions to the Commission.

36. In light of our decision to deny Lighthouse's late motion to intervene, we reject its comments in support of the Indicated Participants' emergency motion and request for stay. Because Lighthouse is not a party this proceeding, it lacks standing to comment on the request for stay of the Order on Paper Hearing.

37. On March 24, 2009, Credit Suisse and Sempra submitted an emergency motion to stay the resettlement of the Revenue Sufficiency Guarantee charges that the Midwest ISO is conducting pursuant to the Order on Paper Hearing. They argue that the magnitude of the resettlement has already caused significant defaults of market participants and a severe reduction in the availability of virtual supply. They also claim that if the resettlement continues and causes more defaults, it will result in irreparable injury not just to the individual defaulting market participants, but to the market as a whole by reducing liquidity, undermining confidence, and weakening competition at a time of profound economic crisis.

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[34] Ameren and Northern Indiana February 29, 2009 Answer at 2.

38. FirstEnergy and Cargill Power Markets, LLC (Cargill)[35] filed comments in support of the emergency motion of Credit Suisse and Sempra to stay the Order on Paper Hearing. They agree with the assertion of Credit Suisse and Sempra that implementation of the Order on Paper Hearing is causing severe, irreparable harm to the Midwest ISO market and must be stayed pending resolution of the requests for rehearing of the Order on Paper Hearing and protests to the December 10 Compliance Filing.

39. Ameren and Northern Indiana filed an answer in opposition to the emergency motion of Credit Suisse and Sempra to stay the Order on Paper Hearing. They argue that the Commission should deny the emergency motion to stay because it fails to demonstrate that any parties will suffer irreparable harm absent a stay, provides speculative claims of financial harm, and is an out-of-time request for rehearing and stay of a Commission order.

40. On March 30, 2009, DC Energy submitted a renewed request for expedited action on rehearing and request for stay, and an answer to several pleadings. DC Energy states that it supports the motion for stay submitted by Credit Suisse and Sempra.

41. Integrys submitted a motion in support of DC Energy's renewed request for expedited action and stay. Integrys argues that ample evidence of harm to the Midwest ISO market has been submitted since the issuance of the Order on Paper Hearing. It further contends that this evidence provides ample rationale for granting the requests for rehearing of the Order on Paper Hearing.

42. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2008), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We are not persuaded to accept DC Energy's answer and will, therefore, reject it.

43. This order renders moot the March 24 request for stay of Credit Suisse and Sempra, as well as Indicated Participants' January 23 emergency motion and request for stay, to the extent that these pleadings ask the Commission to order the Midwest ISO to cease issuing resettlement invoices based on the Interim Rate for the period from August 10, 2007 to November 10, 2008. For the period of time beginning November 10, 2008, we find that Indicated Participants' pleading amounts to an additional, out-of-time request for rehearing, and we therefore reject it. Our determination rests on the fact that the rehearing request of Financial Marketers (which includes the arguments of Epic Merchant Energy, LLC and SESCO Enterprises, the only two Indicated Participants who are parties to this proceeding) did not raise the issue of whether the Interim Rate could

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[35] Cargill is not a party to the instant proceeding.

become effective on the date that the Commission fixed that rate under FPA section 206; it argues only that that rate cannot become effective retroactively.[36]

44. We further find that Credit Suisse, Sempra and the Indicated Participants do not make the required demonstration for a stay of the effectiveness of the Interim Rate for the period beginning November 10, 2008.[37] Under section 705 of the Administrative Procedure Act (APA), the Commission may stay its action when it finds that "justice so requires."[38] In addressing requests for stay, the Commission considers: (1) whether the moving party will suffer irreparable injury without a stay; (2) whether issuing a stay will substantially harm other parties; and (3) whether a stay is in the public interest.[39] The Commission's general policy is to refrain from granting a stay of its orders, to assure definiteness and finality in Commission proceedings.[40] The key element in the inquiry is

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[36] The Order on Paper Hearing fixed the rate on November 10, 2008. Order on Paper Hearing, 125 FERC ¶ 61,161 at P 120-21, Ordering Paragraph (B). The Commission later reiterated that the Midwest ISO should have begun charging the Interim Rate going forward from the issuance of the Order on Paper Hearing, and no party sought rehearing of that statement. *Wabash Valley Power Ass'n, Inc. v. Midwest Independent Transmission System Operator, Inc. and Ameren Services Company v. Midwest Independent Transmission System Operator, Inc.*, 126 FERC ¶ 61,174, at P 20-21 (2009) ("The Midwest ISO should charge the new, Commission-fixed rate going forward from the date" of the Order on Paper Hearing).

[37] Several entities that filed requests for stay or motions in support of the request for stay are not parties to this proceeding. Specifically, AI Funds, Inc., JJR Power, LLC, Jump Power, LLC, Palms Asset Management, LLC, Solios Power, LLC, Energy Endeavors, LLC and Westar Energy, Inc., Lighthouse, Cargill and Twin Cities are not parties to the instant proceeding. The discussion of the requests for stay below does not make the non-parties that are requesting stay parties to this proceeding. *See supra* P 16-17.

[38] 5 U.S.C. § 705 (2006).

[39] *Pinnacle West Capital Corp.*, 115 FERC ¶ 61,064, at P 8 (2006) (citing *CMS Midland, Inc., Midland Cogeneration Venture Limited Partnership*, 56 FERC ¶ 61,177, at 61,361 (1991), *aff'd sub nom. Michigan Municipal Cooperative Group v. FERC*, 990 F.2d 1377 (D.C. Cir. 1993), *cert. denied*, 510 U.S. 990 (1993)).

[40] *Id.*

irreparable injury to the moving party.[41] If a party is unable to demonstrate that it will suffer irreparable harm absent a stay, we need not examine the other factors.[42]

45. The requests for stay of Credit Suisse, Sempra and the Indicated Participants do not demonstrate that these parties will suffer irreparable injury absent a stay of the effectiveness of the Interim Rate for the period beginning November 10, 2008. Here, the requests for stay fail to provide proof that the harm they claim is "certain and great; . . . actual and not theoretical," that there is a "clear and present need" for equitable relief, and that the harm "is certain to occur in the near future," that it "threatens the very existence of the business, and that it will "directly result from the action which the movant seeks to enjoin."[43] It is well settled that economic loss does not, in and of itself, constitute irreparable harm sufficient to support a stay.[44] Indicated Participants claim that the Midwest ISO's proposals for compliance with the Order on Paper Hearing "will put some market participants permanently out of business [and] will exacerbate the downward spiral of virtual supply trading in [the Midwest ISO markets]."[45] However,

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[41] *Id*.

[42] *CMS Midland, Inc.*, 56 FERC ¶ 61,177, at 61,631 (1991) (footnote omitted).

[43] *Id.* In *Wisconsin Gas v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) the court stated that, to meet the irreparable injury test for granting a stay:

> First, the injury must be both certain and great; it must be actual and not theoretical. Injunctive relief "will not be granted against something merely feared as liable to occur at some indefinite time," *Connecticut v. Massachusetts*, 282 U.S. 660, 674, 75 L. Ed. 602, 51 S. Ct. 286 (1931); the party seeking injunctive relief must show that "the injury complained of [is] of such imminence that there is a 'clear and present' need for equitable relief to prevent irreparable harm." *Ashland Oil, Inc. v. FTC*, 409 F. Supp. 297, 307 (D.D.C.), *aff'd*, 179 U.S. App. D.C. 22, 548 F.2d 977 (D.C. Cir. 1976) (citations and internal quotations omitted).

[44] *Wisconsin Gas v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) ("'The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation weighs heavily against a claim of irreparable harm.'") (quoting *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958)); *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc*., 559 F.2d 841, 843 n.2 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d at 925.

[45] Indicated Participants January 23, 2009 Motion for Stay at 2.

they provide no proof that they are suffering or will imminently suffer irreparable financial harm.[46] Further, as detailed below, the requests for rehearing have persuaded us to reverse the refund requirement of the Order on Paper Hearing, and thereby to provide the type of corrective relief for the period of time up to November 10, 2008 that weighs against a claim of irreparable harm.[47] As of the date of issuance of the Order on Paper Hearing, all market participants were on notice that the Commission had fixed a new rate (the Interim Rate) to be thereafter observed and in force. Accordingly, any financial harm that a market participant may have incurred after November 10, 2008 was the result of a business decision by that market participant. Further, despite the assertions of Credit Suisse, Sempra and the Indicated Participants that reducing their profitability by applying Revenue Sufficiency Guarantee charges to them will lead to a downward spiral of virtual supply trading in the Midwest ISO markets, thus "eliminating competition and the beneficial effects of virtual supply trading,"[48] they are not the only Midwest ISO market participants that engage in virtual trading and profitability is not the sole measure of benefits derived from virtual trading. As discussed below, one of the principal benefits of virtual trading is day-ahead and real-time price convergence. In fact, physical market participants, such as load-serving entities and generators, may also engage in purely financial virtual trades. Because Credit Suisse, Sempra and the Indicated Participants fail to provide the required justification for a stay of the Interim Rate for the period beginning November 10, 2008, their request for stay is denied.

E. Motion to Lodge

46. On March 6, 2009, Edison Mission, DC Energy, the Financial Marketers, JJR Power, LLC, Jump Power, LLC, Argo Navis Fundamental Power Fund, L.P., Solios Power, LLC, AI Funds, Inc., GLE Trading, LLC and Franklin Power, LLC, Palms Asset Management, LLC, Energy Endeavors LP, and Westar Energy, Inc., (collectively, Movants) submitted a motion to lodge with the Commission the February 27, 2009 decision of the United States Court of Appeals for the District of Columbia Circuit in *City of Anaheim, California v. FERC*, No. 07-1222, 2009 U.S. App. LEXIS 3938 (D.C. Cir. Feb. 27, 2009). They argue that this decision's holding that the Commission cannot

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[46] In support of their request for stay, Indicated Participants submit the affidavits of John Jaffray on behalf of JJR Power, LLC and of George McTague on behalf of Palms Asset Management, LLC. Because JJR Power, LLC and Palms Asset Management, LLC are not parties to this proceeding, we will not consider the information submitted in these two affidavits.

[47] *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d at 925.

[48] Indicated Participants January 23, 2009 Motion for Stay at 2.

order retroactive rate increases under section 206 of the FPA is on point with, and should resolve the outcome of, the refund issue pending before the Commission on rehearing in this proceeding. Specifically, they contend that FPA section 206(b) cannot be used to retroactively increase Revenue Sufficiency Guarantee charges to parties like themselves because they neither collected any Revenue Sufficiency Guarantee charges nor provided any jurisdictional service resulting in such charges.

47. FirstEnergy submitted comments in support of the motion to lodge, arguing that *City of Anaheim* establishes the scope of the Commission's authority to give retroactive effect to a rate change under FPA section 206, and contends that the Order on Paper Hearing is inconsistent with the holdings in *City of Anaheim*.

48. Ameren and Northern Indiana submitted an answer in opposition to the motion to lodge, arguing that the Movants use their motion to lodge as a vehicle to reargue their rehearing requests concerning the Commission's authority to order retroactive refunds of Revenue Sufficiency Guarantee charges. Ameren and Northern Indiana contend that *City of Anaheim* does not hold that the Commission lacks authority to order the Midwest ISO to pay refunds of Revenue Sufficiency Guarantee over-charges collected during the section 206(b) refund period just because suppliers may be surcharged in the process.

49. Midwest TDUs[49] submitted an answer to the motion to lodge. Midwest TDUs state that they do not object to the *City of Anaheim* being lodged, however they strongly disagree with Movant's conclusion that the *City of Anaheim* supports rehearing of the determination in the Order on Paper Hearing to direct refunds.

50. E.ON submitted an answer to the answers to the motion to lodge.

51. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2008), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We are not persuaded to accept E.ON's answer and will therefore reject it.

52. We will deny the motion to lodge *City of Anaheim*. We do not rely on it to reach our conclusions in this matter, as further detailed below, and therefore also do not rely on the parties' interpretations of that case and whether it may apply to the situation at hand.

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[49] In their answer to the motion to lodge, the Midwest TDU's state that they consist of: Great Lakes Utilities, Indiana Municipal Power Agency, Midwest Municipal Transmission Group, Missouri Joint Municipal Electric Utility Commission, Missouri River Energy Services, Prairie Power, Inc., Southern Minnesota Municipal Power Agency, and WPPI Energy.

III. Substantive Matters

53. The Commission has considered, over three and a half years, a wide range of substantive arguments regarding what the Revenue Sufficiency Guarantee rate should be, and how it should be applied. In this order, we deny rehearing of our finding that the Original Rate in the "then-current tariff"[50] is unduly discriminatory, and therefore unjust and unreasonable. We reaffirm our holding that it should be replaced with the same rate, less the phrase "actually withdraws energy," and with the word "cleared" inserted before the phrase "virtual supply offers." (We call this second rate the Interim Rate.) We also affirm on rehearing that the "indicative" tariff sheets submitted by the Midwest ISO, and reflecting the outcome of the stakeholder process led by the Revenue Sufficiency Guarantee Task Force, form the basis for a just and reasonable rate, and we will call that rate the Indicative Rate.

54. Though we deny rehearing on the rates that should be applied going forward, the requests for rehearing have persuaded us to exercise our discretion to waive the refund requirement imposed in the Paper Hearing Order. The Original Rate shall therefore be effective through November 10, 2008, and the Interim Rate effective starting November 10, 2008. The Commission will act separately on the Midwest ISO's December 8, 2008 compliance filing, which included tariff sheets to place the Interim Rate in its tariff, and the Midwest ISO's February 23, 2009 compliance filing, which includes tariff sheets to place the Indicative Rate in its tariff.

A. Justness and Reasonableness of the Original Revenue Sufficiency Guarantee Charge Cost Allocation

1. Background

55. In the Order on Paper Hearing, the Commission determined the Complainants had met their burden to establish that the then-current tariff's Revenue Sufficiency Guarantee charge was unduly discriminatory and therefore unjust and unreasonable. The Commission agreed with the Complainants' position that the then-current provision was unduly discriminatory because it treated differently two market participants undertaking the same activity. Specifically, the Commission found that there was no basis in cost causation for assessing the Revenue Sufficiency Guarantee charge only to market participants who physically withdrew energy during a particular operating day, and

[50] The Midwest ISO replaced its Transmission and Energy Markets Tariff entirely on January 6, 2009, with a new tariff called the Transmission, Energy and Operating Reserve Markets Tariff. For purposes of this order, the two tariffs are indistinguishable, so we will use the single term "tariff" to refer to both of them.

exempting market participants who made virtual supply offers but did not withdraw energy.[51] As a result, the tariff undercharged some market participants whose activities can cause Revenue Sufficiency Guarantee costs from responsibility for those costs, and overcharged other market participants for the same activities.[52]

56. The Commission also considered the Indicative Rate to be just and reasonable because it allocates costs to the factors that have been determined to contribute to unit commitment and to the incurrence of Revenue Sufficiency Guarantee costs.[53] The Commission found that the proposed allocation ensures that cost incurrence follows cost causation, and determined that there was no basis to conclude that the cost allocation results in inequities or unduly discriminatory outcomes.[54] While the Commission found this proposed allocation to be a just and reasonable basis for a future cost allocation, it recognized that the allocation is not ready for implementation. The Commission therefore required the Midwest ISO to re-file the original rate, with the phrase "actually withdraws energy" removed and the word "cleared" inserted before "virtual supply offers," and to later submit revised tariff sheets that would implement the Revenue Sufficiency Guarantee Task Force's indicative cost allocation.

57. As support for its finding, the Commission noted that the Revenue Sufficiency Guarantee Task Force did not find that withdrawing energy was a factor in determining whether or not a market participant contributed to the incurrence of Revenue Sufficiency Guarantee costs.[55] The Commission also noted the Independent Market Monitor's findings in its *2007 State of the Market Report* likewise did not find that Revenue

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[51] Order on Paper Hearing, 125 FERC ¶ 61,161 at P 39-41.

[52] *Id.* P 49.

[53] The Commission noted these activities include generation injections at constrained flowgates, deviations in imports, exports, load, and generation, and virtual supply offers.

[54] Order on Paper Hearing, 125 FERC ¶ 61,161 at P 109.

[55] *Id.* P 40, 51.

Sufficiency Guarantee cost incurrence was conditioned on whether the market participant withdrew energy.[56]

2. Requests For Rehearing

58. Integrys claims the Commission erred in relying on the Complainants' evidence, which failed to meet the statutory burden to show that the existing rate is unjust and unreasonable and unduly discriminatory. Integrys notes that although the Revenue Sufficiency Guarantee Task Force did not use the phrase "energy withdrawals," it found that load contributed to the need for additional generation in real time. Further, Integrys contends that the Independent Market Monitor's *2007 State of the Market Report*, which the Commission also relied on, found that Revenue Sufficiency Guarantee costs are caused, often primarily, by under-scheduling of load in the day-ahead market.[57] Finally, Integrys argues that the Midwest TDUs' cost correlation analysis did not show a strong correlation between Revenue Sufficiency Guarantee cost incurrence and virtual supply offers (and that load is the primary cause of Revenue Sufficiency Guarantee cost incurrence) and that any correlation between Revenue Sufficiency Guarantee costs and virtual supply offers can be explained by other cost drivers that are coincident with virtual supplies.

59. DC Energy also argues that the Revenue Sufficiency Guarantee Task Force never considered whether withdrawing energy was a driver of Revenue Sufficiency Guarantee costs, and whether it is a cause of Revenue Sufficiency Guarantee costs has been neither proven nor disproven. DC Energy maintains that the Revenue Sufficiency Guarantee Task Force's failure to find that the "actually withdraws energy" was dispositive in determining whether a market participant contributed to Revenue Sufficiency Guarantee cost incurrence cannot be construed as evidence that supports eliminating the clause.

60. Integrys argues that the Commission ignored evidence that there were valid reasons for the different treatment of virtual supply offers entered into among market

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[56] *Id.* P 40-41 (citing David B. Patton, Ph.D., *2007 State of the Market Report: Midwest ISO* (June 2008), *available at* http://www.potomaceconomics.com/uploads/midwest_presentations/2007_State_of_the_Market_Report-Full_Text_07-08.pdf (hereinafter *2007 State of the Market Report*)).

[57] See *2007 State of the Market Report* at 53, 96. Integrys also points out that the report shows that Revenue Sufficiency Guarantee payments to peaking resources accounted for 70 percent of Revenue Sufficiency Guarantee payments in 2007 and these peaking resources were committed to meet obligations of load. *See 2007 State of the Market Report* at 126.

participants that serve load or withdraw energy, and among market participants that do not withdraw energy. It contends that load-serving entities have statutory obligations to serve load, and generally do not engage in speculative trading activities. They may, however, use virtual supply offers to hedge physical activities. By contrast, purely financial participants engage in virtual supply transactions to bring convergence between the day-ahead and real-time markets, and only make money when they achieve this goal. Integrys argues that this distinction justifies the difference in the applicability of the Revenue Sufficiency Guarantee charge, and that the Commission's finding of undue discrimination was in error. Integrys points to the testimony of its expert witness, Brian Tang, who concludes that virtual traders prevent unit commitments because they only offer supply when day-ahead prices are high and therefore it is profitable to offer. By contrast, Mr. Tang says, physical participants have an incentive to pursue price divergence and unprofitable virtual offers, causing the commitment of units.

61. Similarly, DC Energy objects to the Commission finding that removing the "actually withdraws energy" clause is justified because the current provision exempts certain market participants that engage in virtual transactions from Revenue Sufficiency Guarantee charge responsibility and is therefore detrimental to market efficiency.[58] DC Energy asserts that purely financial virtual participants have no incentive to cause Revenue Sufficiency Guarantee costs because their sole purpose is to bring price convergence between the day-ahead and real-time markets.

62. Edison Mission contends that distinguishing between market participants that do and do not withdraw energy in real time to serve real-time load is not discriminatory under the FPA because the two classes of market participants are not similarly situated for Revenue Sufficiency Guarantee cost allocation purposes.

3. <u>Commission Determination</u>

63. We reaffirm that the Complainants met their burden to show that the current Revenue Sufficiency Guarantee allocation is unjust and unreasonable. We therefore deny the requests for rehearing on this point, and on the related ground that the Commission erred in relying on Complainants' evidence.

64. We first affirm that the cost causation evidence in this proceeding does not support allocating Revenue Sufficiency Guarantee costs only to market participants that withdraw energy, while exempting market participants who make virtual supply offers but do not withdraw energy. The Revenue Sufficiency Guarantee Task Force Study – the result of a multi-year effort by Midwest ISO and market participant analysts to determine all the

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[58] Order on Paper Hearing, 125 FERC ¶ 61,161 at P 45.

causes of Revenue Sufficiency Guarantee cost incurrence – made no such differentiation in the proposed cost assignment. Rather, the study proposes to allocate Revenue Sufficiency Guarantee costs to all market participants that undertake activities that contribute to cost incurrence.[59]

65. With regard to Integrys's argument that the Revenue Sufficiency Guarantee Task Force found that load contributed to the need for additional generation in real time, we acknowledge that the Revenue Sufficiency Guarantee Task Force Study allocates one of the charges, the intra-hour demand charge, to load and exports. But we disagree with Integrys' assertion that load is the only driver of Revenue Sufficiency Guarantee charges. The Indicative Rate does not exempt market participants from all the other Revenue Sufficiency Guarantee charge allocations if they do not withdraw energy, as the Original Rate did.[60] Similarly, the Independent Market Monitor found that load deviations are one of many causes of Revenue Sufficiency Guarantee costs. That does not justify the kind of cost allocation DC Energy and Integrys advocate, which would focus only on withdrawals of energy for purposes of assigning Revenue Sufficiency Guarantee cost responsibility. Such a rate, as we have explained many times, is unduly discriminatory because it does not assess Revenue Sufficiency Guarantee cost responsibility to all market participants who undertake activities that are key drivers of Revenue Sufficiency Guarantee costs.

66. Integrys' argument that real-time Revenue Sufficiency Guarantee costs are caused primarily by under-scheduling of load and the pricing of peak units in real-time does not provide a basis for discriminating among market participants in allocating Revenue Sufficiency Guarantee costs. Rather, it goes to the proportion of the costs of committing peak units that are recovered in the locational marginal price as opposed to the Revenue Sufficiency Guarantee charge. While the pricing of peak units impacts the total costs to be recovered in the Revenue Sufficiency Guarantee charge, load deviations[61] and net virtual offers are the drivers of increases in Revenue Sufficiency Guarantee charges.[62]

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[59] *Id.* P 40, 51.

[60] We also note that the basis for the allocation of the intra-hour demand charge is the correlation of Revenue Sufficiency Guarantee cost incurrence and *changing* load (or deviations) and greater headroom. This is in contrast to the allocation in the Original Rate, which determines liability for Revenue Sufficiency Guarantee costs on the basis of any *level* of withdrawal, or load.

[61] Load deviations are the change in load in the real-time market compared to the amount of load scheduled in the day-ahead market.

[62] *2007 State of the Market Report* at 52-53.

Whichever price or charge recovers the costs, the reason those units were committed in real time, and the reason the Revenue Sufficiency Guarantee cost will consequently increase, will include factors such as virtual supply offers and deviations. Integrys has provided no basis to exclude market participants undertaking these activities from the cost allocation.[63]

67. We disagree with DC Energy's contention that the Revenue Sufficiency Guarantee Task Force never considered whether the withdrawal of energy was a driver of Revenue Sufficiency Guarantee costs. As discussed above, the Task Force included load, specifically the change or deviation in load, as one of the drivers of Revenue Sufficiency Guarantee costs. What the Task Force did not do – and this is the relevant issue here – is find that the withdrawal of energy was the sole determinant in whether a market participant's activities caused Revenue Sufficiency Guarantee costs. As a result, the Task Force did nothing to suggest that withdrawal of energy should be the sole basis for determining whether or not a market participant should be allocated Revenue Sufficiency Guarantee costs.

68. We also disagree with Integrys' conclusion that financial participants' virtual transactions do not impact Revenue Sufficiency Guarantee costs in the same way as virtual transactions by physical participants. All the evidence in this proceeding supports the allocation of Revenue Sufficiency Guarantee costs to all participants engaging in virtual supply offers, and there is no evidence that supports distinguishing between market participants based on whether or not they also make physical withdrawals of energy. It is important to note in this regard that the Task Force's analysis by system operators and analysts possessing significant experience and insights on the causes of Revenue Sufficiency Guarantee costs did not find any basis to differentiate between virtual supply offers of financial and physical participants with respect to their impacts on Revenue Sufficiency Guarantee costs.[64]

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[63] A correlation between load and Revenue Sufficiency Guarantee costs, as noted by Integrys, is not a basis to exempt market participants from paying the Revenue Sufficiency Guarantee charge if they undertake other activities that can cause Revenue Sufficiency Guarantee costs.

[64] As an example, the Task Force did not make findings consistent with Integrys' assumption that the Midwest ISO does not expect a financial participant's virtual offer to result in the commitment of physical generation units. In fact, by including virtual offers of all market participants as drivers of Revenue Sufficiency Guarantee costs, the Task Force found that virtual offers, irrespective of the type of market participant, could cause Revenue Sufficiency Guarantee costs. See Task Force Report at 14 ("The proposal does not provide separate treatment for virtual versus physical transaction deviations, as all

(continued…)

69. We are not persuaded by DC Energy's argument that exempting financial participants from Revenue Sufficiency Guarantee costs is not undue discrimination because virtual participants and load-serving entities use virtual supply offers for different purposes. The Commission has repeatedly found that all virtual supply offers cause Revenue Sufficiency Guarantee costs. While purely financial participants may have no incentive for causing Revenue Sufficiency Guarantee costs, exempting them from such costs means that financial participants are not seeing the full cost of their activities. As such, they have no disincentive from engaging in higher levels of activity that cause higher Revenue Sufficiency Guarantee costs, and thereby shifting a larger cost burden to market participants who overpay under the original rate structure.

70. We will discuss the Midwest TDUs' correlation study in greater detail below, and respond to Integrys' arguments that this study is not reliable evidence.

B. Justness and Reasonableness of the Proposed Revenue Sufficiency Guarantee Cost Allocations

1. Background

71. The Commission found in the Order on Paper Hearing that both the Interim Rate (proposed in the Complaints) and the Indicative Rate (supported in Ameren and Northern Indiana's brief) are just and reasonable. The Commission found that the record of this proceeding establishes that the components of the cost allocation in the then-current tariff, including virtual supply offers and generator deviations, can cause Revenue Sufficiency Guarantee costs and that it is appropriate that these components remain in the cost allocation. The Commission also noted that the record in Docket No. ER04-691 supports a finding that these factors cause Revenue Sufficiency Guarantee costs. The Commission thus agreed with the Complainants that the Interim Rate, which eliminates the "actually withdraws energy" language, would provide the basis for a just and reasonable rate.[65]

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transactions are represented in the Day-Ahead commitment process and deviations from these cleared transactions impact the Capacity requirements and constraints input into the subsequent [Reliability Assessment Commitment] process.").

[65] Order on Paper Hearing, 125 FERC ¶ 61,161 at P 105.

2. Requests For Rehearing

a. Sufficiency of the Evidence

72. Integrys claims that the record of this proceeding contains no cost support or cost causation analysis that would validate any rate design that assesses Revenue Sufficiency Guarantee charges on virtual supply offers. Integrys states that the Revenue Sufficiency Guarantee Task Force study the Commission relies on was never intended to support removal of the "actually withdraws energy" language from the tariff on a retroactive basis.[66] Integrys argues the evidence submitted shows that the costs (if any) that virtual supply offers cause are not a significant cost driver for Revenue Sufficiency Guarantee charges.[67]

73. Financial Marketers contend that the Commission's decision is not supported by substantial evidence, as section 206 requires, but rather relies on conjecture that virtual supply offers can cause Revenue Sufficiency Guarantee costs.[68] Financial Marketers dismiss as irrelevant the arguments that the Commission put forth in support of an allocation of Revenue Sufficiency Guarantee costs to virtual offers[69] because the Complainants have not met their burden of showing that virtual supply offers cause Revenue Sufficiency Guarantee costs under all circumstances and providing a reasoned basis for quantifying the impact of virtual transactions. Financial Marketers also consider it meaningless that the statistical analysis in the record does not refute the conclusion that virtual offers can cause Revenue Sufficiency Guarantee costs.

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[66] Integrys' Rehearing Request at 24-25. Integrys also notes the Midwest ISO did not supply the underlying cost support for the correlation analysis and that its filing materials were not sworn and verified. *Id.*

[67] Integrys asserts that virtual supply activity is not relied upon as a significant driver of Revenue Sufficiency Guarantee costs in the Independent Market Monitor *2007 State of the Market Report*. *Id.* at 28.

[68] Financial Marketers Rehearing Request at 37. Financial Marketers also state that, without an empirical analysis of the effect of virtual transactions on Revenue Sufficiency Guarantee costs, it is impossible for the Complainants to meet their burden to show that the proposed assignment of Revenue Sufficiency Guarantee costs to virtual market participants is equitable and in accord with the FPA.

[69] Financial Marketers Rehearing Request at 42-43.

74. DC Energy claims that the Revenue Sufficiency Guarantee Task Force analysis is unfit as a predicate for cost allocation. It cites the affidavit of Dr. Lorna Greening, which states that the coefficient analysis the Commission relied on was non-probative of cost causation and the relative degrees to which different sources caused Revenue Sufficiency Guarantee costs.[70] Financial Marketers agree that the correlation analysis is not proof of causation. Financial Marketers also fault the analysis because it did not evaluate Revenue Sufficiency Guarantee costs without virtual transactions.[71] Edison Mission also contends that the correlation analysis the Commission relied on does not equate to causation.

75. DC Energy also states the Commission was wrong to rely on the conclusion that the correlation coefficient of 0.4372 between virtual supply offers and real-time Revenue Sufficiency Guarantee payments was the strongest pair-wise correlation in the proceeding. DC Energy asserts that Mr. Tang demonstrated a correlation factor of 0.5262 between real-time Revenue Sufficiency Guarantee costs and real-time load.

b. Cost Causation As Reflected In Cost Allocation

76. DC Energy asserts that the Task Force's analysis concluded that there are several significant causes of Revenue Sufficiency Guarantee cost incurrences that are not subject to the Interim Rate. DC Energy contends that it is arbitrary and capricious "to assume, without any evidence on the degree to which such significant costs contribute to RSG cost incurrence, that [virtual supply offers] contribute more and should be allocated" unrelated costs.[72] Edison Mission agrees, stating that the evidence on cost causation on which the Commission relied did not address the extent to which virtual supplies may contribute to Revenue Sufficiency Guarantee costs. Credit Suisse also argues that the Order on Paper Hearing offers no evidence that the Interim Rate results, overall, in a less discriminatory allocation of Revenue Sufficiency Guarantee charges than the existing

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[70] DC Energy Rehearing Request at 7-8. Integrys faults the Commission for ignoring her analysis and notes that Dr. Greening showed that each factor assumed to cause Revenue Sufficiency Guarantee costs was not independent (meaning a correlation is unreliable), and some of the explanatory variables were limited to positive values and therefore subject to the potential for bias.

[71] Financial Marketers also argue that the data analysis undertaken by the Revenue Sufficiency Guarantee Task Force cannot be relied upon since it is based on limited data and it is based on flawed analytical methods.

[72] DC Energy Rehearing Request at 6.

tariff requirements. Credit Suisse considers the Interim Rate unsound because the magnitude of actual costs caused by virtual trades is still unknown.

77. Financial Marketers also fault the Order on Paper Hearing for lack of evidence on the degree (if any) of cost causation, and they maintain that as a result the Interim Rate and the Indicative Rate could over-allocate costs to virtual supply offers. According to Financial Marketers, even if virtual offers can cause Revenue Sufficiency Guarantee costs, that finding does not make Complainants' allocation proposals just and reasonable, as the Commission noted in Docket No. ER04-691.[73] Edison Mission makes a similar point, noting that the cost allocation to deviations in the Interim Rate is based on the same assumptions that the Commission found to be deficient in Docket No. ER04-691. DC Energy argues that the Commission explicitly rejected the Midwest ISO's proposed cost allocation that assumed, in the absence of any evidence, that there is a Revenue Sufficiency Guarantee cost impact in any hour in which net virtual supply offers are positive. According to DC Energy, the Commission is here endorsing such an allocation, and the Order on Paper Hearing therefore fails based on the standard the Commission previously established.

78. FirstEnergy states that in the Order on Paper Hearing, the Commission's sole support for the Interim Rate was its statement that the components of the cost allocation in the then-current tariff can cause Revenue Sufficiency Guarantee costs. FirstEnergy contends that this is not consistent with the standards for a just and reasonable replacement rate.[74] FirstEnergy also contends the Commission did not address the shortcomings of the existing rate.[75] E.ON asserts that the Commission's determination on the Interim Rate is not based on cost causation and creates a less precise formulation for Revenue Sufficiency Guarantee cost allocation than the Original Rate.

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[73] Financial Marketers Rehearing Request at 41.

[74] FirstEnergy Rehearing Request at 15 (citing Order on Paper Hearing, 125 FERC ¶ 61,161 at P 105).

[75] *Id.* at 16 (citing First Compliance Order at P 88). FirstEnergy also cites to shortcomings identified in the Midwest ISO Tariff Filing. *Id.* at 17 (citing Midwest ISO's Electronic Tariff Filing Involving Complaints of Ameren Services Company, *et al.* Regarding Revenue Sufficiency Guarantees at 7-8 (Mar. 3, 2008) (Indicative Rate informational filing)).

79. Integrys states that there has been no showing that virtual supply offers share equally in the cost contribution.[76] It faults the Commission for ignoring Dr. Hogan's finding that it is likely that the virtual supply offer contribution to Revenue Sufficiency Guarantee costs is small.[77] Integrys further contends that the Commission erred by ignoring: (1) the affidavit of Dr. Greening, (2) the affidavit of Dr. Hogan, and (3) the affidavit of Mr. Tang.

80. Credit Suisse claims that the record shows that the Interim Rate would allocate responsibility for Revenue Sufficiency Guarantee costs to virtual offers in all hours, even though virtual offers contributed materially to Revenue Sufficiency Guarantee costs in only 15 percent of the hours in 2007 and less than 9 percent in 2008 and even though the replacement cost allocation would allocate 50 percent of the costs to virtual supply.[78] Credit Suisse considers this disproportionate allocation, and the fact that the replacement cost allocation does not net out virtual demand and supply, to be inconsistent with cost causation. Financial Marketers cite the same analysis to conclude that virtual trading either reduces Revenue Sufficiency Guarantee costs or has no appreciable impact.[79] DC Energy also faults the Commission for ignoring evidence that cleared virtual supply offers do not contribute appreciably or proportionately to Revenue Sufficiency Guarantee costs.[80]

81. Financial Marketers also consider allocating Revenue Sufficiency Guarantee costs to virtual offers in hours in which there is net virtual demand to be unfair and

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[76] Integrys also contends that there is no evidence to support the Commission's statement that all customers "share equitably in the cost responsibility for these factors and therefore the allocation is equitable and not unduly discriminatory." Integrys Rehearing Request at 30 (quoting Order on Paper Hearing, 125 FERC ¶ 61,161 at P 106).

[77] *Id.* at 31.

[78] Credit Suisse Rehearing Request at 5 (citing Order on Paper Hearing, 125 FERC ¶ 61,161 at P 71, 78).

[79] Financial Marketers also note that it is not possible to discern a net impact on Revenue Sufficiency Guarantee costs when all virtual transactions in all hours in the Revenue Sufficiency Guarantee Task Force study are evaluated.

[80] DC Energy notes the Midwest ISO Revenue Sufficiency Guarantee Task Force admitted that it may be appropriate to allocate only Revenue Sufficiency Guarantee costs incurred in the Forward Reliability Assessment Commitment to cleared virtual supply offers.

unsupported either by evidence that virtual offers cause any Revenue Sufficiency Guarantee costs in those hours or evidence that they cause a level of costs comparable to other causes.[81] Financial Marketers assert that the Interim Rate exacerbates the discrimination inherent in a cost allocation that lacks netting since it would retroactively subject virtual supply offers to Revenue Sufficiency Guarantee costs that had been recovered through Second Pass charges.

82. DC Energy and Edison Mission fault the Commission for relying on the Independent Market Monitor's *2007 State of the Market Report* because it does not constitute evidence of the degree to which virtual supply offers cause Revenue Sufficiency Guarantee costs. DC Energy claims that the Commission ignored Dr. Patton's conclusion that only net virtual supply offers are a driver of Revenue Sufficiency Guarantee costs. DC Energy notes that participant-based netting is an intrinsic component of the Midwest ISO indicative Revenue Sufficiency Guarantee proposal.[82] Based on the fact that Revenue Sufficiency Guarantee costs are lower in hours with net negative virtual supply offers and the Commission's position that netting may yield a more precise allocation methodology, DC Energy requests that the Commission grant rehearing so that netting is made a part of the Interim Rate and any subsequent rate. Alternatively, DC Energy requests that the matter be set for hearing.[83]

83. While the Independent Market Monitor agrees that virtual suppliers can sometimes contribute to Revenue Sufficiency Guarantee costs, it does not believe this conclusion justifies the Interim Rate's allocation of all real-time Revenue Sufficiency Guarantee costs to real-time deviations.[84] The Independent Market Monitor notes there are many

[81] Financial Marketers point to the Revenue Sufficiency Guarantee Task Force study finding that Revenue Sufficiency Guarantee costs were 38.8 percent lower than average in hours with net virtual demand and that these hours accounted for almost two-thirds of hours in 2007 and nearly 75 percent of hours to date in 2008. Financial Marketers Rehearing Request at 60.

[82] DC Energy asserts that the Interim Rate must be adjusted by applying Revenue Sufficiency Guarantee charges to cleared virtual supply offers only during those hours that cleared virtual supply offers exceed cleared virtual demand bids, and by applying Revenue Sufficiency Guarantee charges only to each participant's net cleared virtual supply offers. DC Energy Rehearing Request at 16-18.

[83] *Id.* at 18.

[84] Findings and Recommendations of the Midwest ISO's Independent Market Monitor at 6.

other causes of Revenue Sufficiency Guarantee costs, as recognized in the Indicative Rate.

84. The Independent Market Monitor contends that the contribution of virtual supply transactions to Revenue Sufficiency Guarantee costs is closer to zero than 40 percent, and therefore the pre-existing cost allocation method is more closely aligned with cost causation than the Interim Rate's cost allocation.[85] For this reason, the Independent Market Monitor recommends that the Indicative Rate, adjusted for revisions proposed by the Independent Market Monitor, be used to resettle Revenue Sufficiency Guarantee costs back to August 2007.[86]

85. DC Energy argues in support of the testimony of Mr. Tang, which states the Revenue Sufficiency Guarantee Task Force analysis more readily supports allocation of Revenue Sufficiency Guarantee costs to load than to virtual supply offers.[87] The Independent Market Monitor states the correlation analysis does not establish causality and notes the highest correlation was found to be between Revenue Sufficiency Guarantee costs and physical load.

86. DC Energy maintains that the Interim Rate is unduly discriminatory because it exempts load from the cost allocation while applying the charge exclusively to deviations and does so without any evidence to support a finding that this is just and reasonable. DC Energy claims that the Commission must include all real-time load – not just real-time load deviations – in the denominator used to develop the Revenue Sufficiency Guarantee rate. DC Energy and Edison Mission state that it is not true that all customers share equitably in cost responsibility under the Interim Rate since it does not allocate any Revenue Sufficiency Guarantee costs to the vast majority of real-time load.[88]

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[85] *Id.* at 9.

[86] *Id.* The Independent Market Monitor proposed that the Midwest ISO use the net positive deviation quantity for the entire market as the basis to allocate the costs between the effects of the net deviations versus other factors. Motion to Intervene Out of Time and Comments of the Midwest ISO's Independent Market Monitor at 5, Docket No. EL07-86-003, *et al*. (Mar. 27, 2008).

[87] Affidavit of Mr. Brian Tang at 2-9.

[88] It is not entirely clear that Edison Mission's arguments go solely to the Interim Rate.

87. Edison Mission makes the same recommendation in recognition of the following factors: (1) many of the causes of Revenue Sufficiency Guarantee costs are not related to deviations; (2) Revenue Sufficiency Guarantee costs are incurred to provide reliable service to load; and (3) such a change to the allocation would achieve an equitable allocation of Revenue Sufficiency Guarantee costs since it would make virtual suppliers, other deviations, and real-time load responsible for Revenue Sufficiency Guarantee costs on a comparable basis.

88. E.ON contends there is no reliable evidence that positive import deviations cause Revenue Sufficiency Guarantee costs. Accordingly, E.ON requests that the Commission add language to the tariff clarifying that only negative import deviations should be assessed Revenue Sufficiency Guarantee charges. E.ON notes that the Revenue Sufficiency Guarantee Task Force study found that only physical deviations that increase demand in real-time or reduce supply in real-time were significant drivers of Revenue Sufficiency Guarantee costs.[89] E.ON also cites to the statement of Midwest TDU witness Dr. Sapper that there is a slight correlation between physical deviations that result in increased demand or reduced supply in real-time.[90]

89. E.ON argues that positive import deviations create no real-time demand and do not result in the actual withdrawal of energy. E.ON claims that it is not unduly discriminatory to assess Revenue Sufficiency Guarantee charges against importers whose market activities are a significant cause of Revenue Sufficiency Guarantee cost incurrence while not assessing those costs against other importers whose market activity has not been shown to cause them because these two entities are not similarly situated.[91]

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[89] E.ON Rehearing Request at 20. Midwest TDU witness Dr. Sapper explained that only imports that decrease from day-ahead to real-time cause a reduction in supply and a resultant increase in Revenue Sufficiency Guarantee costs. *See* Midwest TDU Initial Brief at 14. Dr. Sapper also notes an insignificant correlation between import deviations and Revenue Sufficiency Guarantee costs. *See* Sapper Affidavit at P 22.

[90] E.ON Rehearing Request at 22. Sapper Affidavit at P 20. E.ON notes Dr. Sapper's discussion of causative impacts of imports and exports only refers to negative import deviations. Sapper Affidavit at P 21.

[91] E.ON avers that the record in Docket No. ER04-691, reliance on precedent and equities support retention of the "actually withdraws energy" exemption when the Midwest ISO assesses Revenue Sufficiency Guarantee costs to increased real-time imports in the Midwest ISO relative to the market participant's day-ahead import schedule. Alternatively, E.ON recommends the Commission include market participants such as entities that make virtual supply offers that fall outside the criteria but nonetheless cause Revenue Sufficiency Guarantee costs.

E.ON considers the Commission determination to be inconsistent with Commission rulings in Docket No. ER04-691 that uphold the requirement that only market participants that physically withdraw energy in real-time should be assigned Revenue Sufficiency Guarantee costs.[92]

90. DC Energy and Integrys recommend that the Commission direct modification of the Interim Rate to allocate only an allocable share of forward reliability assessment commitment costs to cleared virtual supply offers. In the alternative, DC Energy recommends that the Commission reverse the Interim Rate and order a hearing to resolve the material issue of fact as to whether cleared virtual supply offers should be allocated any intra-day reliability assessment commitment costs.[93] E.ON also argues that the Commission should hold an evidentiary hearing to determine an appropriate Revenue Sufficiency Guarantee cost allocation based on cost causation. Integrys considers removal of these costs to be consistent with the allocation of costs under similar charges in NYISO and ISO-NE. Integrys contends that in a rate design where only the "actually withdraws energy" language is removed, virtual supply offers pay a disproportionately high portion of Revenue Sufficiency Guarantee costs.

91. Edison Mission faults the Commission for not addressing its claim that the treatment of peaking units in setting locational marginal prices is a major cause of Revenue Sufficiency Guarantee costs. Similarly, E.ON asserts the Commission ignores the Revenue Sufficiency Guarantee cost triggers, specifically peaking units, in the Independent Market Monitor's *2007 State of the Market Report*.

92. DC Energy and Edison Mission conclude that since the cost allocation under the Interim Rate does not include the causes of Revenue Sufficiency Guarantee cost incurrence identified in the Revenue Sufficiency Guarantee Task Force Study, it is not based on cost causation.[94] Edison Mission notes only one of the three identified causes of Revenue Sufficiency Guarantee costs in the study are deviations, whereas the entire cost allocation for the Interim Rate is based on deviations. Edison Mission also notes that the

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[92] Second Rehearing Order, 118 FERC ¶ 61,212 at P 22 and P 55.

[93] DC Energy Rehearing Request at 35.

[94] Credit Suisse states that the Interim Rate does not include the features of the Indicative Rate that ensure virtual transactions are only charged for costs attributable to them; thus, it makes virtual transactions responsible for costs in excess of those costs caused by virtual transactions. Credit Suisse Rehearing Request at 6.

cost allocation for the Interim Rate allocates virtually no Revenue Sufficiency Guarantee costs to entities responsible for the other two causes,[95] including real-time load.[96]

93. The Independent Market Monitor asserts that Revenue Sufficiency Guarantee costs are generated when the Midwest ISO must commit additional resources in the real-time market for a number of reasons unrelated to market-wide deviations, including the need to manage network congestion in an area, satisfy local reliability needs, and ramp constraints. The Independent Market Monitor contends it is likely that these causes are responsible for a substantial portion of the real-time Revenue Sufficiency Guarantee costs, which is why they are explicitly recognized in the Indicative Rate. Because these causes have little relationship to real-time market-wide deviations, the new allocation method proposed by the Midwest ISO would generally allocate these Revenue Sufficiency Guarantee costs to physical load rather than real-time deviations. The Independent Market Monitor faults the Interim Rate for not including these factors and asserts that the Commission should find that it is not just and reasonable to exempt real-time physical load in the Interim Rate.

94. Edison Mission considers the Order on Paper Hearing to be at odds with ISO-New England precedent and therefore a reversal on the issue of cost responsibility for reliability uplift costs.[97] Edison Mission and Financial Marketers contend the Order on Paper Hearing is inconsistent with previous Commission rulings recognizing that an

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[95] According to Edison Mission the other causes are: (1) managing a transmission constraint or addressing a local reliability problem; and (2) addressing intra-hour demand changes.

[96] Edison Mission notes the Independent Market Monitor's *2007 State of the Market Report* lists transmission congestion, generator and load deviations and net virtual supply offers as major drivers of cost incurrence, and therefore is inconsistent with the cost allocation for the replacement rate which allocates all costs to deviations. E.ON asserts congestion costs should be part of the Revenue Sufficiency Guarantee charge. E.ON also claims the Order on Paper Hearing ignored Revenue Sufficiency Guarantee cost triggers identified in the Independent Market Monitor *2007 State of the Market Report* and thus failed to engage in reasoned decision-making in its findings as to drivers of Revenue Sufficiency Guarantee costs.

[97] *See ISO-New England Inc.,* 110 FERC ¶ 61,250, at P 30 (2005) ("[i]t is not appropriate that these costs be allocated disproportionately to virtual traders.") and P 19-20. Credit Suisse and Financial Marketers also consider the Order on Paper Hearing to be at odds with the ISO-New England precedent since the replacement cost allocation allocates excessive Revenue Sufficiency Guarantee charges to virtual trades.

allocation of Revenue Sufficiency Guarantee costs to load is just and reasonable since Revenue Sufficiency Guarantee costs are incurred on behalf of load to ensure reliable service.[98] Edison Mission and Financial Marketers assert the Commission must provide a rational basis to explain why it no longer intends to follow the reasoning of its prior decisions. Edison Mission claims that including real-time load in the denominator of the Interim Rate would be consistent with the evidence on cost responsibility of load and Commission holdings in ISO-New England and Docket No. ER04-691 that Revenue Sufficiency Guarantee costs are incurred in order to provide reliable service to load and that load is the predominant cause and beneficiary of Revenue Sufficiency Guarantee costs.

95. Edison Mission and Financial Marketers take exception to the Commission's finding that it may not be practical to perform a cost causation analysis. According to Edison Mission and Financial Marketers, the Commission has stated in Docket No. ER04-691 that it is possible to do such an analysis, and it acknowledged that the New York Independent System Operator Corp. (NYISO) performs a simplified analysis of cost causation.[99] Financial Marketers contend that the Revenue Sufficiency Guarantee Task Force data analysis was done to support a predetermined allocation, and the Midwest ISO has refused to provide the underlying data.[100] Edison Mission also contends that it is not sufficient that the required analysis is difficult to undertake.[101]

96. DC Energy contends that the Commission unfairly shifted the burden of proof to responding parties and has denied them the discovery to support their position that a meaningful cost causation analysis can be performed. DC Energy considers the Commission's adoption of the Indicative Rate to be arbitrary and capricious because it did not let DC Energy's witness, Dr. Lorna Greening, undertake a cost causation analysis based on its conclusion that cost causation analyses are difficult to undertake.[102] DC

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[98] Edison Mission Rehearing Request at 6, 33; Financial Marketers Rehearing Request at 51.

[99] Edison Mission Rehearing Request at 21-22 (citing First Compliance Order, 118 FERC ¶ 61,213 at P 80, 84-87). Edison Mission notes that the NYISO methodology is based on the fact that deviations are not the exclusive cause of Revenue Sufficiency Guarantee-equivalent costs.

[100] Financial Marketers Rehearing Request at 66-69.

[101] Edison Mission Rehearing Request at 27.

[102] DC Energy Rehearing Request at 38-39 (citing Order on Paper Hearing, 125 FERC ¶ 61,161 at P 112). DC Energy notes that the United States Court of Appeals

(continued…)

Energy considers the Commission's actions to be particularly egregious because there is no evidence to support a finding that cleared virtual supply offers cause Revenue Sufficiency Guarantee costs in the same degree as other causes and because the Commission has found that a number of categories of Revenue Sufficiency Guarantee costs now being allocated to cleared virtual supply offers have nothing to do with virtual supplies.[103] In a similar vein, Edison Mission notes that the Commission places the burden on the intervenors to demonstrate that virtual supplies cannot cause Revenue Sufficiency Guarantee costs under any circumstances rather than requiring the Complainants to demonstrate that they do contribute to such costs.[104]

97. Financial Marketers fault the Commission's acceptance of the Indicative Rate allocation as merely "rubber-stamping" the proposal instead of providing objective criteria for the allocation of Revenue Sufficiency Guarantee costs. Financial Marketers also object that the Commission did not provide a reasonable basis for deferring to the Midwest ISO's discretion over the allocation of Revenue Sufficiency Guarantee costs. Financial Marketers consider the Indicative Rate to be discriminatory because it allocates headroom-related Revenue Sufficiency Guarantee costs to virtual supply offers even though there is no evidence that such Revenue Sufficiency Guarantee costs would be lower if there were no virtual trading.

98. Edison Mission asserts that the Indicative Rate is inconsistent with cost causation. Accordingly, Edison Mission recommends that the Indicative Rate be revised by aggregating net deviations across relevant market participants. Edison Mission states that system operators make commitment decisions based on total load and supply quantities and therefore in the circumstance in which the net of virtual bids and offers is zero, a system operator would not dispatch any additional units as a result of virtual transactions. Edison Mission contends that if the Revenue Sufficiency Guarantee costs that do occur were allocated to parties with net positive virtual supply, as occurs in the Indicative Rate,

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for the Ninth Circuit found that the Commission abused its discretion when it rejected a rate calculation upon finding it too difficult to calculate without providing any reasoned explanation of impossibility. *Id.* at 39 (citing *Pub. Utils Comm'n of Cal. v. FERC,* 462 F.3d 1027, 1060-61 (9th Cir. 2006)).

[103] *Id.* at 6, 12 (citing First Compliance Order, 118 FERC ¶ 61,213 at P 84, 88).

[104] Edison Mission Rehearing Request at 28-29 (citing Order on Paper Hearing, 125 FERC ¶ 61,161 at P 113). Edison Mission also states that the Commission did not explain why the analysis it had directed be done in the First Rehearing Order was no longer relevant or necessary. *Id.* at 29 & n.12 (citing First Rehearing Order, 117 FERC ¶ 61,113 at P 117-18).

those parties would pay for costs they did not cause. Edison Mission avers that the Commission's failure to respond to this argument is a breach of its obligation to engage in reasoned decision-making.[105]

99. Financial Marketers assert it is unclear how the Indicative Rate would net virtual offers and virtual demand bids. They contend that it is illogical to net only virtual supply offers and virtual demand bids of the same market participant at the same CPnode in the same hour because this would almost never occur. Financial Marketers also argue that this method would be restrictive because virtual supply offers and virtual demand bids need not be made by the same market participant in order to offset their effect on Revenue Sufficiency Guarantee costs. Financial Marketers fault the Commission for not making an effort to gather information regarding how netting would work and whether any limitations the Midwest ISO would impose on netting are just and reasonable.

100. DC Energy faults the Commission for failing to properly consider the evidence of market harms and for failing to reconcile the Interim Rate with its holdings in ISO New England cases.[106] DC Energy states that the Commission failed to address evidence that elimination of the "actually withdraws energy" requirements would cause material harm to the pure virtual energy market, and Mr. Tang's estimate that this tariff revision would result in an average cost per megawatt-hour of cleared virtual supply offers of over 12 times the average profit for virtual transactions.[107] Integrys claims that it is likely that the charge to be assessed under the Interim Rate would be higher than profits, resulting in significant losses to affected market participants. DC Energy notes Mr. Tang's conclusion that dropping this tariff requirement would drive out any remaining virtual

[105] Edison Mission notes that the Independent Market Monitor supported this revision. Edison Mission Rehearing Request at 37 (citing Independent Market Monitor Comments at 3-5). Edison Mission also asserts the Commission ignored its proposal that, in the case of a unit committed solely to manage a constraint, any residual Revenue Sufficiency Guarantee costs that are not recovered through the Constraint Management charge should pass directly to the Second Pass charge, not to the Deviations charge to be allocated to deviations. *Id.* at 39.

[106] DC Energy Rehearing Request at 43-44 (citing First Rehearing Order, 117 FERC ¶ 61,113 at P 120 (citing *ISO New England, Inc.,* 113 FERC ¶ 61,055, at P 36 (2005))). DC Energy also notes that PJM and NYISO take different approaches to the allocation of Revenue Sufficiency Guarantee-type costs to virtuals.

[107] *Id.* at 47-48 (citing Tang Affidavit at 15). DC Energy estimates an average Revenue Sufficiency Guarantee charge of $2.28 per virtual supply offer megawatt-hour that compares to the $0.584 charge in the ISO-New England proceedings. *Id.* at 48-49.

activity by financial participants, and Professor William Hogan's view that high Revenue Sufficiency Guarantee charges would cause a significant downturn in virtual market participation and efficiency.[108]

101. Integrys asserts that the Commission did not take into consideration the benefits to the market of virtual transactions,[109] and that this renders the Interim Rate unjust and unreasonable.

102. According to Financial Marketers, lack of virtual offers and liquidity means generators will regain market power, creating market mitigation issues for the market monitor, as well as poor pricing and investment signals to the market. By shifting supply-related costs away from load, the approved cost allocation would competitively harm virtual participants who neither cause these costs to be incurred nor benefit from the acquisition of physical supplies. Financial Marketers explain that virtual participants are harmed because the replacement cost allocation will make most or all of their virtual transactions uneconomic, and such impacts ultimately harm the Midwest ISO market and all electric consumers in the Midwest.

103. The Independent Market Monitor states that virtual transactions contribute to Revenue Sufficiency Guarantee costs when virtual supply schedules are larger than virtual load schedules. Based on this assumption, the Independent Market Monitor estimates that net virtual supply offers may be responsible for about 11 percent of total real-time Revenue Sufficiency Guarantee costs for the period from January 2008 to January 2009. Under the Interim Rate, however, the Independent Market Monitor estimates that virtual suppliers will bear almost 40 percent of all real-time Revenue Sufficiency Guarantee costs for the period from September 2007 to December 2008. The Independent Market Monitor asserts that allocating such a large share of real-time Revenue Sufficiency Guarantee costs to virtual suppliers will likely result in a number of

[108] According to DC Energy, several financial institutions have curtailed or ceased completely their Midwest ISO virtual market participation because of uncertainty and the Interim Rate has already caused an immediate decline in pure virtual trading activity. *Id.* According to Financial Marketers, the Midwest ISO reports that virtual supply offers have declined 30 percent since issuance of the Order on Paper Hearing. Financial Marketers estimate the decline of virtual supply offers since the Revenue Sufficiency Guarantee cost allocation first arose in 2005 to be as high as 80 percent. Financial Marketers Rehearing Request at 33.

[109] Integrys Rehearing Request at 33-34.

defaults that will remove the defaulting entities from the market.[110] The Independent Market Monitor also argues that prospective exposure of market participants to Revenue Sufficiency Guarantee costs is providing a significant disincentive to the ongoing participation of virtual suppliers.

104. The Independent Market Monitor provides data showing that cleared virtual supplies in January 2009 were almost 60 percent lower than the levels that prevailed in the fall of 2008 (prior to the Order on Paper Hearing), and that cleared virtual demand decreased by over 30 percent during the same period. While all RTOs have experienced an overall decline in virtual trading, due in part to recent financial conditions and credit problems, the Independent Market Monitor contends the reductions in Midwest ISO virtual supply levels (to 3.4 percent of load) is substantially below historical levels and below corresponding levels in other RTOs.

3. Commission Determination

105. We affirm that the Interim Rate (proposed in the Complaints) and the Indicative Rate (supported in Ameren and Northern Indiana's brief) are just and reasonable. Accordingly, we deny the requests for rehearing of our decision to accept both the Interim Rate and the Indicative Rate.

106. Turning first to the issue of cost causation, we find sufficient evidence in support of the alternative cost allocations for us to find that the proposed allocations assign costs to the activities that can cause Revenue Sufficiency Guarantee costs. Both the Revenue Sufficiency Guarantee Task Force and the Independent Market Monitor identified the components in these allocations – including virtual supply offers – as activities that can cause Revenue Sufficiency Guarantee costs. Their efforts also incorporated statistical analysis to test the validity of allocating costs to these components. As discussed further below, we find no reason based on the record in this proceeding to consider these findings to be insufficient or otherwise unreliable.

107. We agree with Edison Mission and the Financial Marketers that the correlation analysis does not prove cost causation by itself. We find, instead, that the correlation analysis tends to support the other analysis on which the Commission relied, i.e., the knowledge and expertise of system operators and analysts. The Commission evaluated the statistical analysis as information that confirmed others' findings as to what activities could contribute to the incurrence of Revenue Sufficiency Guarantee costs. The

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[110] According to the Independent Market Monitor, four participants are in default and nine participants are past due on initial invoices that include the Revenue Sufficiency Guarantee resettlements.

Commission properly recognized the limitations of correlation analysis in the context of many factors impacting unit commitment and Revenue Sufficiency Guarantee cost incurrence simultaneously.[111]

108. Many parties contend, in one way or another, that the Interim Rate's and the Indicative Rate's allocations of Revenue Sufficiency Guarantee costs to virtual supply offers is too high. Others, such as Integrys, express concern that the Commission did not attempt to analyze the precise degree to which virtual offers contribute to costs or whether virtual offers share equally in cost contribution. We note at the outset that the allocation of Revenue Sufficiency Guarantee costs to virtual offers will be a function of many factors, including the overall level of Revenue Sufficiency Guarantee costs and the megawatts of deviations compared to the megawatts of virtual supply offers, all of which change every day depending on market conditions. Hence, there is no objective basis on which to determine a uniform level, or static percentage, of Revenue Sufficiency Guarantee costs that should be allocated to virtual offers. There is also no objective way to determine what allocation share would precisely recover Revenue Sufficiency Guarantee costs – that is, what share would ensure that Revenue Sufficiency Guarantee costs are neither over- nor under-allocated. As the Midwest ISO noted in Docket No. ER04-691, such a determination is not possible, because there is no one-to-one correspondence between cleared virtual supply and units committed after the day-ahead market.[112] There is not enough market data in the record for the Commission to

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[111] Order on Paper Hearing, 125 FERC ¶ 61,161 at P 111-12. The Commission did not conclude that the virtual offer/Revenue Sufficiency Guarantee cost correlation of 0.4372 was the highest correlation in the proceeding, as parties contend here. Rather, the Commission found that this "was the strongest pair-wise correlation in a study that also evaluated other factors such as import and export deviations and differences in load forecasts." *Id.* P 111 (citing Mr. Sapper's affidavit). Mr. Tang's correlation analysis covers a longer time period than the Revenue Sufficiency Guarantee Task Force study (July 2005 to September 2008, and June 2006 to March 2008, respectively), and the Task Force study did not reference it. Mr. Tang's study found a correlation of 0.5262 between Revenue Sufficiency Guarantee costs and load, a variable that was not included in the Task Force study. *Id.* P 81. We note again that correlation in either study does not establish causation. *Id*. P 111. But we disagree with DC Energy's claim that the correlation study is not at all probative of cost causation. We consider correlation a single piece of evidence that has little weight without being corroborated by other data or analysis. Here, the correlation study was consistent with the Task Force's findings, but not conclusive of results on its own.

[112] *Midwest Indep. Transmission Sys. Operator, Inc.,* 118 FERC ¶ 61,213, at P 77 (2007).

undertake an analysis that would prove cost causation in precise detail – and even if the Commission could do so, the results would be certain to spawn further litigation about the quantity and quality of that data, and whether the results of the Commission's analysis are conclusive. For these reasons, the Commission did not attempt to analyze the precise degree to which virtual offers contribute to costs. Such an analysis would unduly delay resolution of this lengthy proceeding.

109. Ultimately, therefore, the question becomes whether the proposed allocation of Revenue Sufficiency Guarantee costs to virtual supply offers falls within the just and reasonable range.[113] Since data that would support a hypothetical, ideal allocation is not available, analysis of this issue necessarily requires the experience and knowledge of system operators and analysts as well as modeling and statistical techniques. Relying on their knowledge and expertise, the Revenue Sufficiency Guarantee Task Force and the Independent Market Monitor confirm that virtual offers can cause Revenue Sufficiency Guarantee costs.[114] Unlike the circumstance in Docket No. ER04-691, cited to by parties, here the Commission has analysis supporting the allocation of these costs to virtual supply offers[115] and a full record from a paper hearing that evaluates all the analysis and parties' challenges thereto.[116]

110. However, the Commission is not relying on these analyses or the hypotheses of other experts to make a definitive determination of the precise cost allocation for virtual

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[113] "Statutory reasonableness is an abstract quality represented by an area rather than a pinpoint. It allows a substantial spread between what is unreasonable because too low and what is unreasonable because too high." *Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 251 (1951).

[114] Contrary to Integrys' claim, the Independent Market Monitor considered virtual supply to be a significant contributor to Revenue Sufficiency Guarantee costs. *See 2007 State of the Market Report* at 53.

[115] As the Commission noted in that proceeding, the Midwest ISO had presented no evidence concerning the relationship between virtual offers and Revenue Sufficiency Guarantee cost incurrence to support its proposal to allocate costs based on net virtual offers. *Midwest Indep. Transmission Sys. Operator, Inc.,* 118 FERC ¶ 61,213, at P 84 (2007).

[116] We clarify that the Commission is not accepting the same cost allocation that the Midwest ISO proposed in Docket No. ER04-691. The Indicative Rate accepted in this proceeding incorporates locational factors, thereby addressing concerns expressed by the Commission in Docket No. ER04-691. *See infra* at P 112-113.

offers. As indicated above, there is no single cost-recovering rate, because Revenue Sufficiency Guarantee costs fluctuate from hour to hour along with a multitude of other factors. We decline (as the Commission did in the Order on Paper Hearing) to identify and set such a rate.[117] As the Commission stated in the Order on Paper Hearing, a finding that the cost allocation is just and reasonable does not require complex statistical analysis to determine the precise cost impact before any Revenue Sufficiency Guarantee costs can be allocated based on virtual offers.[118] The replacement rate cost allocation appropriately allocates Revenue Sufficiency Guarantee costs to the factors that can cause their incurrence and therefore we affirm the Commission's finding in the Order on Paper Hearing that the replacement rate cost allocation is just and reasonable.

111. The Independent Market Monitor's argument that a 40 percent allocation to virtual supply offers is too high because net virtual offers only occur in 22 percent of hours points to the pitfalls involved in attempting to determine a precise cost allocation. The 40 percent allocation represents one historical period during which no Revenue Sufficiency Guarantee costs were allocated to virtual traders and in which their activity in terms of megawatts therefore was high. As discussed, this allocation will change daily based on a number of factors. The 22 percent allocation is not a precise allocation either because, as discussed earlier, it assumes with no cost-causation basis that every virtual bid reduces Revenue Sufficiency Guarantee costs. Further, the Independent Market Monitor did not analyze the distribution of Revenue Sufficiency Guarantee cost incurrence to see if the greatest (or least) incurrence was occurring in the hours in which there were net virtual offers. As noted already, and as illustrated in this example, the record in this proceeding does not provide a sufficient basis for us to make a definitive determination of the most correct allocation of Revenue Sufficiency Guarantee costs.[119] We can only ensure that the proposed rates fall within the zone of reasonableness.

112. We disagree with Financial Marketers and Edison Mission that the Commission's analysis of netting virtual supply offers and virtual bids produced erroneous results. Edison Mission contends that the Commission's discussion of in the Order on Paper

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[117] Order on Paper Hearing, 125 FERC ¶ 61,161 at P 115 (citing *FPC v. Conway Corp.,* 426 U.S. 271, 278 (1976)); *Maine Pub. Utils. Comm'n v. FERC,* 454 F.3d 278, 288 (D.C. Cir. 2006).

[118] Order on Paper Hearing, 125 FERC ¶ 61,161 at P 115.

[119] We also note that the analysis referred to by Credit Suisse and DC Energy relies entirely on a correlation analysis of many factors impacting unit commitment and Revenue Sufficiency Guarantee cost incurrence simultaneously and therefore has limited value in determining cost causation.

Hearing of Edison Mission's netting proposal "ignores the obvious logic" of that proposal, so we provide more detail here.[120] While the Commission has agreed that a cost allocation that nets virtual offers (i.e., one based on virtual supply offers minus virtual bids), can be a more precise formulation for cost allocation, it is not needed to establish a just and reasonable rate[121] – and, in fact, could have the opposite effect here if done on a footprint-wide basis. The record in this proceeding and in Docket No. ER04-691 indicates that simply subtracting all virtual bids from virtual offers on a footprint-wide basis for a market participant, or among all market participants, has no basis in cost causation.[122] The Midwest ISO energy market is a locational market, and a market participant's activities must be evaluated on a locational basis to determine their cost causation impact. Therefore, a virtual supply offer at one location would still require unit commitment even if there were an equivalent virtual bid amount at another location. Thus, the fact that the volume of virtual bids is equal to (or even greater than) the volume of virtual offers across the Midwest ISO footprint does not mean that virtual offers are not causing unit commitment and the incurrence of Revenue Sufficiency Guarantee charges, as Edison Mission claims. Rather, unit commitment is locational, so virtual offers in one location may be causing Revenue Sufficiency Guarantee costs even if they are matched or exceeded by virtual bids at other locations. The Indicative Rate developed by the Revenue Sufficiency Guarantee Task Force more appropriately assigns costs based on virtual transactions for asset owners affecting flows at specific transmission constraints. The analysis Credit Suisse, Financial Marketers and the Independent Market Monitor cite to support an allocation that nets all virtual offers would, in the end, exempt at least some virtual offers from an allocation of Revenue Sufficiency Guarantee costs for hours in which they may cause unit commitment and Revenue Sufficiency Guarantee costs.

113. With regard to netting between market participants at a transmission constraint, we expect that typically all market participants will have positive or negative net virtual offers at locations that also have a positive or negative aggregate net virtual offer position. We expect this result because all market participants will be responding to the same price dynamics at a location, *i.e.*, market participants will face the same supply-demand trends and make their offers and bids accordingly. While it is possible that a market participant may be a net virtual buyer when all other virtual marketers are net sellers at the location (or vice versa), we do not expect this to be a common occurrence. In the rare circumstances that this occurs, the potential for over-allocation of costs to the

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[120] Edison Mission Rehearing Request at 34-35.

[121] *Id.* P 116.

[122] *Id.* P 119.

net virtual supply offeror is counter-balanced by instances in which there are net virtual bids at a location, and the cost allocation does not allocate Revenue Sufficiency Guarantee costs to virtual supply offerors that are, in fact, causing those costs.[123] For these reasons, we find that the indicative cost allocation to net virtual offers is just and reasonable.[124] In response to Edison Mission's concern that the Indicative Rate charges all deviations for any residual Revenue Sufficiency Guarantee costs associated with generators committed solely for constraint management that are not recovered through the Constraint Management charge, we have no basis to conclude that such an allocation of these residual costs, if any, among all the activities in the Deviations Charge that can cause Revenue Sufficiency Guarantee costs is inequitable or unduly discriminatory.

114. As with the issue of net virtual offers, we find in response to Edison Mission's arguments that it is unnecessary to put load in the denominator of the Interim Rate or to allocate Revenue Sufficiency Guarantee costs to load to make the cost allocation just and reasonable. There are two reasons for this. First, there is no cost-causation basis for such an allocation since the *level* of load – not to be confused with the *deviation* in real-time load compared to the day-ahead market schedules – has not been identified as a cause of Revenue Sufficiency Guarantee costs in this proceeding.[125] The Interim Rate's cost allocation to load deviations is consistent with the Revenue Sufficiency Guarantee Task Force analysis, which justified an allocation to intra-hour demand changes based on a correlation between higher Revenue Sufficiency Guarantee costs and changing demand (or deviations) and increased headroom.[126] It is also consistent with the Independent

[123] Market participants could be avoiding costs when their net virtual offers are below zero but the transmission constraint or market position of net virtual offers is above zero and therefore net virtual offers could be causing Revenue Sufficiency Guarantee costs.

[124] Responding to Financial Marketers' concerns with netting, we note the Commission has accepted the locational basis for netting in the indicative cost allocation since it appropriately reflects cost causation. *Supra* at n.117.

[125] We do not consider Mr. Tang's correlation analysis to be a basis for establishing cost causation in recognition of its limitations in the context of many factors impacting unit commitment and Revenue Sufficiency Guarantee cost incurrence simultaneously. As previously discussed, Mr. Tang's correlation analysis covers a longer time period than the Revenue Sufficiency Guarantee Task Force study. It also included findings regarding the correlation between Revenue Sufficiency Guarantee costs and load, a variable that was not included in the Task Force study.

[126] We do not consider headroom, defined as the sum of differences between real-time economic maximum dispatch and actual injections of resources, to be a proxy for

(continued…)

Market Monitor's *2007 State of the Market Report* analysis, which identified load deviations as one of the causes of Revenue Sufficiency Guarantee costs.[127] Second, the Interim Rate identifies other factors that can cause unit commitment and the incurrence of Revenue Sufficiency Guarantee costs. We have no basis to conclude that such an allocation is inequitable or unduly discriminatory.

115. The requests for rehearing advocate for cost allocation that recovers costs perfectly, yet propose to reduce the allocation of Revenue Sufficiency Guarantee charges to some of the activities that have been determined to cause such costs. If the Commission accepted the argument that all load (as opposed to load deviations) should be included in the denominator of the formula for calculating Revenue Sufficiency Guarantee costs, the revised formula would shift Revenue Sufficiency Guarantee costs toward load (which is not identified as a significant driver of these costs) and away from entities that engage in other activities known to cause Revenue Sufficiency Guarantee costs. We are not persuaded to adjust the rate in this way based on the argument that some (possibly small) costs are not caused by the activities encompassed in the Interim Rate. Considering how large load is in comparison to the other factors that can cause Revenue Sufficiency Guarantee costs,[128] the result is that most of the costs would be allocated to load even though load has not been shown to be a cause of Revenue Sufficiency Guarantee costs. We do not consider this outcome just and reasonable, let alone a more precise cost allocation.

116. We disagree with Edison Mission and Financial Marketers that previous Commission orders recognize that it is just and reasonable to allocate Revenue Sufficiency Guarantee costs to load, since Revenue Sufficiency Guarantee costs are incurred on behalf of load. Edison Mission first points to a 2007 statement in which the Commission noted that the Original Rate was "just and reasonable, since it ensures that market participants buying real-time energy pay the full cost of energy, including

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load. It is more accurate to consider this activity to be changes in generator injections that would cause the Midwest ISO to commit additional units due to uncertainty.

[127] As discussed more fully below, the Independent Market Monitor's most recent submittal does not claim that physical load is a cause of Revenue Sufficiency Guarantee costs.

[128] As an example, real-time load ranges from 11 to 30 times larger than cleared virtual supply offers in the Independent Market Monitor data. *See* Independent Market Monitor Findings and Recommendation at 4.

guarantee costs for generators [availability]."[129] It argues that the Order on Paper Hearing then rejected a tariff provision that would assess a charge to load in recognition of the benefit to load that additional unit commitment provides. Second, Edison Mission contends that the Revenue Sufficiency Guarantee First Rehearing Order rejected the same discrimination argument that the Paper Hearing Order endorses, by stating that "virtual supply offers . . . may increase [Revenue Sufficiency Guarantee] charges when combined with a market participant's physical transaction."[130] Third, Edison Mission and Financial Marketers both argue that the Commission endorsed the Original Rate when it noted that it found "nothing inconsistent in a tariff provision that makes market participants eligible for [Revenue Sufficiency Guarantee] costs based on their purchase of energy in the real-time market."[131] Edison Mission states that the Commission failed to explain its change of position between the 2006 and 2007 orders accepting the Original Rate, and the Paper Hearing Order. Financial Marketers aver that the Complaints are merely collateral attacks on the earlier orders.

117. While the Commission did find that the Original Rate was just and reasonable, Edison Mission and the Financial Marketers ignore important intervening events. In the sentence that follows the first one Edison Mission quotes on rehearing, the Commission noted that the Original Rate "arguably could be refined or improved," and that such a change must be made pursuant to FPA section 206.[132] This statement recognizes that an allocation of costs to virtual offers – irrespective of whether the market participant withdraws energy – may be an improvement on the Original Rate. The Commission also found, in response to the complaints that initiated this docket, and following a detailed paper hearing, that the Complainants had demonstrated that the Original Rate may be unjust and unreasonable. (The Commission has already noted in this proceeding, and we note again now, that a rate that was once found just and reasonable may be found unjust and unreasonable in a later proceeding.[133]) Finally, the Commission explained in the

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[129] Edison Mission Rehearing Request at 30-31 (citing Second Rehearing Order, 118 FERC ¶ 61,212 at P 22).

[130] *Id.* at 31-32 (citing First Rehearing Order, 117 FERC ¶ 61,113 at P 45).

[131] *Id.* (citing First Rehearing Order, 117 FERC ¶ 61,113 at P 140); Financial Marketers Rehearing Request at 49 (citing same paragraph).

[132] Second Rehearing Order, 118 FERC ¶ 61,212 at P 22.

[133] *Ameren Services Company and Northern Indiana Public Service Company v. Midwest Independent Transmission System Operator, Inc.*, 125 FERC ¶ 61,162, at P 22 (2008) (citing *Oxy USA v. FERC*, 64 F.3d 679, 690 (D.C. Cir. 1995)).

Order on Paper Hearing how it determined that the Original Rate was, in fact, unjust and unreasonable. We therefore reject Edison Mission's contention that the Order on Paper Hearing did not acknowledge or explain the Commission's change of position. We also find that the complaints were not mere collateral attacks on an approved rate: they provided the Commission with allegations that warranted investigation.

118. In response to E.ON's concerns, we do not find unreasonable an allocation of Revenue Sufficiency Guarantee charges based on positive imports. While the Task Force only included negative import deviations in its assessment of drivers of unit commitment, the Indicative Rate was not justified solely on this basis. In Docket No. ER04-691, the Commission found acceptable the Midwest ISO proposal to allocate costs to transactions that either increase commitment costs or reduce the real-time market revenues available for payment to committed resources, both of which reduce revenue sufficiency. Positive import deviations fall into the latter class of transactions that increase Revenue Sufficiency Guarantee costs, since increased imports can require increased Revenue Sufficiency Guarantee payments to committed units, while increasing payments to external generators providing the increased imports.[134] Considering their impact on revenue sufficiency, we consider it reasonable that positive import deviations are in the replacement rate cost allocation.

119. Furthermore, as discussed above, the Commission's statements in Docket No. ER04-691 did not unconditionally endorse an allocation based on the actual withdrawal of energy. The Commission initially accepted the Original Rate as just and reasonable, but later asserted that the Original Rate "arguably could be refined or improved" in an FPA section 206 proceeding. Accordingly, the Order on Paper Hearing does not represent a reversal of the Commission's position, and market participants cannot rely on the Commission's earlier orders to retain the actually withdraws energy exemption for positive import deviations.[135]

120. We do not consider the Midwest ISO's assertion that it is conceivable that assessing forward reliability assessment commitment costs only to virtual offers has some merit to be a basis for setting a cost allocation.[136] The Midwest ISO has also said that it

[134] *Midwest Indep. Transmission Sys. Operator, Inc.,* 115 FERC ¶ 61,108, at P 84 (2006).

[135] E.ON's arguments regarding the appropriate costs to include in the Revenue Sufficiency Guarantee charge are beyond the scope of this complaint proceeding.

[136] The forward reliability assessment commitment refers to the initial commitment of units for the real-time market, after the close of the Day-Ahead Market.

does not know which specific units will be committed in real time when it completes the forward reliability assessment commitment process.[137] Therefore, assuming the DC Energy hypothesis is correct, costs may be incurred during the real-time commitment process that were caused by the forward reliability assessment commitment process and, thus, by virtual offers. In any case, there is no evidence corroborating the DC Energy hypothesis in this proceeding, and these statements therefore do not provide a suitable basis for a more precise cost allocation.

121. Edison Mission and E.ON argue that real-time Revenue Sufficiency Guarantee costs are higher than they should be because of the pricing of peak units. This argument does not go to cost causation, but rather to the proportion of the costs of committing peak units that are recovered in the locational marginal price as opposed to being recovered in the Revenue Sufficiency Guarantee charge. In other words, while the pricing of peak units impacts the overall costs to be recovered in the Revenue Sufficiency Guarantee charge, load deviations and net virtual offers are the drivers of increases in Revenue Sufficiency Guarantee charges, as the Independent Market Monitor states in the *2007 State of the Market Report* E.ON relies on.[138]

122. We reject arguments that because the Interim Rate is not the Revenue Sufficiency Guarantee Task Force's Indicative Rate, it is not based on cost causation and therefore is not just and reasonable. The only activities that are identified in the Indicative Rate as drivers of Revenue Sufficiency Guarantee costs, but not included in the Interim Rate, are headroom and virtual bids. Both the Interim Rate and the Indicative Rate allocate costs to injection, load deviations, export and import deviations, and virtual offers. (While the definitions of deviations in the Indicative Rate are more complex than they are in the Interim Rate cost allocation, and while those definitions differentiate between deviations at transmission constraints and deviations system-wide, we consider these differences from the Interim Rate to be refinements.) We do not find that the few differences between the cost allocations, such as virtual bids, are necessary to identifying a just and reasonable cost allocation; rather, these differences help to make an already just and reasonable cost allocation more accurate. Accordingly, we affirm that the Interim Rate is based on cost causation and is just and reasonable, and that the Revenue Sufficiency Guarantee Task Force cost analysis supports it.

123. We also disagree with the claims by Edison Mission and E.ON that the replacement cost allocation is not consistent with the Independent Market Monitor's

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[137] *Midwest Indep. Transmission Sys. Operator, Inc.,* 118 FERC ¶ 61,213, at P 77 (2007).

[138] *2007 State of the Market Report* at 52-53.

assessment of the drivers of Revenue Sufficiency Guarantee cost incurrence.[139] The Independent Market Monitor's analysis in the *2007 State of the Market Report* determined that load deviations were the primary cause of Revenue Sufficiency Guarantee costs, and identified import deviations and net virtual offers as significant contributors to these costs.[140] These causes are all included in the replacement cost allocation.

124. We continue to find that the analysis in the Independent Market Monitor's *2007 State of the Market Report* is the most persuasive available. While the analysis in the *2007 State of the Market Report* indicated that the highest Revenue Sufficiency Guarantee costs were associated with increased transmission congestion, the Independent Market Monitor's analysis identified changes in real-time load, or load deviations, as well as net virtual supply as the key drivers of Revenue Sufficiency Guarantee costs. These are all included in the replacement cost allocation. In any case, to the extent there are other factors that can cause Revenue Sufficiency Guarantee costs, the replacement cost allocation allocates those costs equitably among the factors that can cause the incurrence of Revenue Sufficiency Guarantee costs. Therefore, the replacement cost allocation is just and reasonable, and the fact that this allocation does not include load does not make it unjust and unreasonable.

125. We do not consider the ISO-New England decision that Edison Mission and DC Energy cite to be a bar to our findings in this proceeding. As discussed above, based on the record of this case, load has not been shown to be a key driver or cause of Revenue Sufficiency Guarantee costs, but virtual transactions, specifically virtual supply offers, can cause unit commitment. Accordingly, we find that this case is distinguishable from the *ISO-New England* order.

126. Considering the expertise and analysis that the Midwest ISO and its stakeholders committed to the effort of determining the causes of Revenue Sufficiency Guarantee costs, we do not consider it a fatal omission that the Complainants did not also undertake additional modeling analysis. The parties recommending this analysis admit that such modeling techniques represent simplifications of market operations and therefore may be unsuitable for more precise cost allocations[141] because they ignore the impact of virtual

[139] We note that it is not clear from their pleadings which replacement cost allocation Edison Mission and E.ON are referring to.

[140] *Id*.

[141] *See* Edison Mission Rehearing Request at 21.

transactions after the initial commitment of generator units as noted by the Midwest ISO.[142]

127. While DC Energy claims that it could perform a meaningful cost causation analysis if it had access to the necessary data, we do not have any basis to conclude that this analysis would result in a different cost allocation. Dr. Greening does not challenge the components of either the Interim Rate or the Indicative Rate cost allocations,[143] and therefore her analysis would only assess the degree to which the drivers identified by the Revenue Sufficiency Guarantee Task Force can cause Revenue Sufficiency Guarantee costs. As discussed above, such an attempt to develop a more precise cost allocation is not needed since the Interim Rate and the Indicative Rate appropriately identify the factors that can cause Revenue Sufficiency Guarantee costs and the resulting cost allocations are in the zone of reasonableness.

128. We note that the Commission's acceptance of the Indicative Rate is appropriate under the requirements of section 206, and the Commission's acceptance of this cost allocation does not amount to "rubber-stamping" or deferring to the Midwest ISO. Section 206 requires the complainants to demonstrate that the new rate is just, reasonable and not unduly discriminatory, and the Complainants have done that here. The Commission has stated its reasons for accepting this allocation and explained why the Commission accepted it as just and reasonable.

129. In response to Financial Marketers' claim that the Complainants propose to allocate to virtual transactions any of the Revenue Sufficiency Guarantee costs associated with intra-hour deviations, we note that the Indicative Rate allocates Revenue Sufficiency Guarantee costs associated with intra-hour deviations to market participants with intra-hour deviations, not to virtual transactions, and the Complainants support that allocation in its entirety.[144] While the Indicative Rate proposal refines the allocation of Revenue Sufficiency Guarantee costs in this and other ways, the Commission recognized that that proposal could not be implemented for a number of months.[145] Accordingly, the

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[142] *Supra* at P 71.

[143] Affidavit of Dr. Greening at 3, 19 ("Sufficient data does exist in the [Midwest ISO] databases to at least model many of the major factors hypothesized to cause Revenue Sufficiency Guarantee costs. . . . More focused and relevant cost causality studies employing as much of the available data as possible can be done.")

[144] Ameren and Northern Indiana Brief at 26, Docket No. EL07-86 *et al*. (Sept. 22, 2008).

[145] Order on Paper Hearing, 125 FERC ¶ 61,161 at P 120.

Commission found the Interim Rate, which eliminates unduly discriminatory treatment among the activities that the existing tariff identifies that can cause Revenue Sufficiency Guarantee costs and can be implemented before the Midwest ISO is able to implement the Indicative Rate, to be the just and reasonable replacement rate to take effect for the period before the Midwest ISO is able to implement the more refined allocation reflected in the Indicative Rate proposal.

C. Effective Date and Refunds

1. Background

130. The Order on Paper Hearing required the Midwest ISO to make refunds to market participants, using the Interim Rate to calculate the amounts owed. The Commission noted that market participants had had ample notice of the potential for refunds and of the composition of the refund rate.[146] Although two alternative cost allocations had been at issue, the Commission held that market participants could only have reasonably expected that the Commission would implement the Interim Rate at the conclusion of the paper hearing; the Indicative Rate could not be implemented for several more months pending software modifications.[147]

131. The Commission stated that it expected that parties will be able to pay the refunds and participate in the markets going forward since they have been on notice for several years that the Revenue Sufficiency Guarantee charge allocation could change, and they have had ample opportunity to adjust their activity to account for this possibility.[148] For this reason, the Commission did not consider it reasonable to void the refunds or not assess Revenue Sufficiency Guarantee charges based on cost causation principles because parties claim that they will not be profitable or will cease to participate.

132. The Commission also stated that it did not find a basis to conclude the proposed cost allocation will eviscerate the virtual energy market or will nullify the price convergence benefits of virtual transactions.[149] The Commission noted that virtual transactions increased through 2007 and the Independent Market Monitor considered

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[146] *Id.* P 142.

[147] *Id*. P 143.

[148] *Id.* P 156-58.

[149] *Id.* P 158.

price convergence in the Midwest ISO to be consistent with the price convergence in other independent system operators.[150]

2. Requests For Rehearing

133. A number of parties argue that the Commission failed to give adequate notice that the "actually withdraws energy" language would be removed from the tariff. DC Energy and E.ON maintain that the Commission found in prior orders that this provision was just and reasonable, and as a result market participants could not have reasonably anticipated that the language would be removed. E.ON states that it avoided extracting any energy from the Midwest ISO market in justifiable reliance on prior Commission orders. It maintains that market participants could not have changed behavior, and could not have deduced the rates they would be charged, based on the complaints or the Commission's specific description of the remedy it was contemplating during the Paper Hearing. Neither the proposal to remove the "actually withdraws energy" language nor the proposed Indicative Rate provided adequate notice. The only notice provided was that the Midwest ISO had to complete a cost causation study to allocate Revenue Sufficiency Guarantee charges more precisely. E.ON states that market participants reasonably expected that the tariff language would not be altered until the tariff was altered.

134. E.ON maintains that the only notice that the Commission cited in the Order on Paper Hearing was the statement in the April 25, 2006 Order that virtual supply offers might be charged Revenue Sufficiency Guarantee costs whether or not they withdraw energy in Real-Time[151] and the statement in the October 26, 2006 Order noting that acceptance of a future Revenue Sufficiency Guarantee cost allocation will be conditional upon a filing by the Midwest ISO of a new tariff proposal.[152] E.ON states that neither order provides notice that positive import deviations by a market participant that does not withdraw energy will be charged Revenue Sufficiency Guarantee costs. E.ON also states that the Commission recognized that "having two proposed alternative allocations, as well as abundant evidence of other factors that affect Revenue Sufficiency Guarantee charges, makes it impossible for parties to forecast with certainty the ultimate rate to be approved."[153]

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[150] *Id.*

[151] E.ON Rehearing Request at 32.

[152] *Id.*

[153] E.ON Rehearing Request at 32-33 (citing Order on Paper Hearing, 125 FERC ¶ 61,161 at P 143).

135. Integrys argues that the Commission's claims that parties had ample notice of the potential for refunds and of the "possible compositions of a refund rate" involves speculative matters that cannot be considered reasonable notice. It maintains that statements in Docket No. ER04-691 maintaining that limitation of the Revenue Sufficiency Guarantee charges to entities that actually withdraw energy in real time "did not comport with cost causation" do not permit a reasonable person to ascertain what the replacement rate would be, in particular given the lack of cost support for such a proposed rate.

136. Financial Marketers maintain that FPA section 206(a) requires a complainant to state the changes to be made to the rate, and Rule 206(b)(7) of the Commission's Rules of Practice and Procedure requires a complaint to state the specific relief requested. This is necessary to permit interested parties to evaluate the potential impact the complaint proceeding has for them. Financial Marketers maintain that none of the complaints requested specific relief, and none requested refunds based on deleting the "actually withdraws energy" language and allocating to virtual supply offers the same Revenue Sufficiency Guarantee costs that are allocated to physical deviations. The complaints simply asked that the Commission set for hearing the issue of necessary revisions to Section 40.3.3.a.ii of the tariff.

137. Several parties argue that the Commission lacks jurisdiction to require a resettlement that includes charges for costs caused by virtual supply offers. Xcel states that the plain meaning of the term "refund" demonstrates that FPA section 206 does not authorize the Commission to direct market resettlements that require a set of market participants that neither provide jurisdictional service nor collected excessive charges to make refunds to another set of market participants. Xcel maintains that the FPA seeks primarily to protect the customers of public utilities, and section 206(b) permits the Commission to direct public utilities to refund overcharges to their customers. A refund is the "return of money to a person who overpaid"[154] and section 206 does not authorize requiring market resettlements in which a set of market participants that did not provide jurisdictional service or collect excessive charges are required to make refunds to another set of market participants. Xcel argues that the Midwest ISO is the entity that provided service and that collected the Revenue Sufficiency Guarantee charges. It states that the legislative history of section 206(b) makes no mention of market resettlements, and the purpose of a refund effective date is to prevent public utilities from needlessly delaying section 206 proceedings.

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[154] Xcel Rehearing Request at 11 (citing Garner, Bryan, ed., Black's Law Dictionary, p. 1285 (Seventh ed. 1999)).

138. Edison Mission maintains that virtual suppliers are customers under the rate at issue, not service providers, and that requiring them to pay some higher rate is not a refund but rather the retroactive application of a new, higher charge or rate. The Midwest ISO is the public utility that charged the rate at issue, and it used the money to compensate other public utilities. Section 206 refunds apply when a public utility that supplies a jurisdictional service charges an excessive rate, not when the Commission decides that customers should pay a rate that is higher than the one they previously paid. Edison Mission argues that the Commission can order resettlement when the existing rate is improperly charged, not when it determines that the filed rate is unjust and unreasonable. It states that section 206(b) does not mention "surcharges assessed," reallocations, new rates, redesigned rates, or increased charges.

139. Edison Mission states that the Commission failed to address the argument that it cannot order a customer under a filed rate to pay more for service retroactively by calling the retroactive rate increase a refund. Instead the Commission simply said that the issue is not whether the virtual market participants supplied or overcharged for jurisdictional service but rather whether refunds or surcharges would apply to them. Edison Mission states that this is a non-sequitur that holds that the Commission can order virtual market participants to make refunds because refunds apply to them. Edison Mission states that the Commission can order a resettlement when the RTO has misapplied the filed rate, but not when the Commission decides that the filed rate is unjust and unreasonable. In that case the Commission is not using resettlement to ensure compliance with the filed rate; it is imposing a new rate on customers retroactively.

140. DC Energy maintains that it is inconsistent with precedent and in violation of the plain meaning of the statute to require refunds by virtual suppliers that are not public utilities providing service and that did not collect any rates for services. Section 206(b) makes the public utility or jurisdictional service provider the entity that is responsible for providing refunds. Section 206(a) permits the Commission to establish a new rate applicable to customers that were not subject to the charge under the filed rate, but the new rate is one "to be thereafter observed and in force," i.e., one that applies prospectively.

141. DC Energy states that the California refund proceedings, to which the complainants and the Commission refer, do not support a claim to authority under section 206(b) to order refunds here. Those proceedings address whether buyers have paid rates that are unjust and unreasonable. Here virtual suppliers did not provide jurisdictional service and did not receive revenues from overcharges. In addition, the California refund proceedings did not establish a new, increased rate for market participants.[155]

[155] DC Energy Rehearing Request at 60.

142. Integrys states that the Commission cannot retroactively implement a rate where one was not charged previously. FPA section 206(a) allows the Commission to establish a rate that will apply going forward after a finding that an existing rate is not just and reasonable, but it cannot do this retroactively. Integrys maintains that to require refunds under FPA section 206(b), there must be a rate in place that was under or over-collected. Refunds flow from the utility that charged the existing rate to the customers who paid it. Integrys asserts that there are no overcharges to refund or under collections to collect from financial Market Participants because their virtual supply offers were never subject to the Revenue Sufficiency Guarantee charge.

143. Financial Marketers and Integrys argue that Commission policy is not to apply changes in rate design retroactively. This policy is based on the fact that market participants whose past decisions were made on the basis of the tariff then in effect cannot alter their behavior retroactively. Financial Marketers maintain that if market participants had known that virtual offers would be subjected to Revenue Sufficiency Guarantee charges they would not have made offers or would have offered virtual supply at a higher price to account for the charges.

144. FirstEnergy argues that the Commission attempts to justify the imposition of surcharges by asserting that the market participants who will pay them were subject to the Revenue Sufficiency Guarantee tariff provisions even if they did not actually pay Revenue Sufficiency Guarantee charges. FirstEnergy maintains that this would not justify the Commission's actions because assessing those charges on market participants that did not pay them under the existing tariff represents a rate increase for them. FirstEnergy states that no such rate increase can be effective until Midwest ISO files, and the Commission accepts, the new rate.

145. E.ON argues that the Commission erred by finding that the indicative tariff proposal represents a just and reasonable Revenue Sufficiency Guarantee cost allocation. It contends that the Commission previously indicated that this was inappropriate based on the procedural posture of the case, but the Order on Paper Hearing approves the allocation as just and reasonable despite this prior ruling. E.ON states that the Commission did not address its argument that such tariff changes must be submitted under section 205 of the FPA, and the Commission appears to call only for a compliance filing under section 205. E.ON argues that it is not just and reasonable to approve a rate in piecemeal, without a section 205 filing and where the Commission knows that there will be future adjustments.

146. Financial Marketers maintain that "there is no 'just and reasonable' rate upon which refunds can be ordered."[156] To order refunds, FPA section 206 requires that the

[156] Financial Marketers Rehearing Request at 26-29.

Commission first prescribe a just and reasonable rate to be "thereafter observed," and refunds are the amounts paid in excess of that rate. They maintain that the Commission has not prescribed such a rate here and instead has said that deleting the "actually withdraws energy" language from the existing rate yields a just and reasonable rate and has ordered that this deletion be observed until the Midwest ISO is ready to implement its indicative proposal. They state that the Commission has found the indicative proposal to be just and reasonable but did not order it to be thereafter observed because the Midwest ISO cannot yet implement it.

147. Financial Marketers also argue that the Order on Paper Hearing violates what they refer to as the *Arizona Grocery* doctrine.[157] The Supreme Court held in *Arizona Grocery* that the Interstate Commerce Commission cannot establish a maximum reasonable rate that a carrier is to charge and then find at a later time on the same or additional evidence that this finding was erroneous and impose refunds on the carrier based on what the agency now holds it should have decided in the earlier proceeding. Financial Marketers state that this ensures that parties who rely on an agency's rate determinations will not be forced to pay reparations when the agency reconsiders its decision, and the Commission's authority to order refunds must be read against this backdrop. Financial Marketers maintain that "while the Commission may generally have authority to order refunds in a complaint case under the FPA, it does not have such authority where the rates being challenged are ones that had been approved, prescribed, or found just and reasonable by the Commission."[158] They state that the Commission approved the Midwest ISO's existing Revenue Sufficiency Guarantee tariff as just and reasonable in Docket No. ER04-691. To find differently at a later time, as the Order on Paper Hearing does, violates the *Arizona Grocery* doctrine.

148. FirstEnergy states that the Commission has broad discretion to fashion remedies, but the Commission must provide a reasoned explanation for its decision to order refunds. 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 . . . ."[159] FirstEnergy maintains that the Commission abused its discretion in ordering refunds in the Order on Paper Hearing. This is because the complaints were defective in that they failed to state proposed changes to the rate, because market participants were not given

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[157] *Arizona Grocery Co. v. Atchison, T & S. F. Ry Co.*, 284 U.S. 370 (1932) (*Arizona Grocery*).

[158] Financial Marketers Rehearing Request at 24-25.

[159] FirstEnergy at 17 (citing *Towns of Concord, Norwood, and Wellesley, Massachusetts v. FERC*, 955 F.2d 67, 76 (D.C. Cir. 1992)).

meaningful notice, because refunds requiring resettlement are disfavored, and because of the uncertainties market participants faced.

149. Xcel states that the Commission has declined refunds where they would create substantial market uncertainty. Resettlement would be disruptive here and would discourage market participation. Xcel notes that in adding section 206(b) to the FPA, Congress recognized that the Commission might choose not to exercise its refund authority where the issue is one of cost allocation among utilities, and Congress stated that the Commission should not order refunds that are not in the public interest. Xcel maintains that not ordering refunds here would be consistent with the principles behind the filed rate doctrine and the prohibition on retroactive ratemaking. It states that the Commission decided not to require refunds in Docket No. ER04-691 because market participants reasonably relied on statements by Midwest ISO concerning the application of Revenue Sufficiency Guarantee charges to virtual supply offers. Xcel maintains that even though market participants were aware of the complaints, they were not able to gauge adequately their exposure if the complaints were granted.

150. Credit Suisse maintains that the Order on Paper Hearing fails to explain why the Commission departed from the equitable balancing it applied in Docket No. ER04-691 when considering the applicability of Revenue Sufficiency Guarantee charges to virtual traders. The Commission determined in that docket that it would be inequitable to order refunds because market participants had a reasonable expectation that virtual transactions would not incur Revenue Sufficiency Guarantee charges, and there was no inequitable windfall in the absence of refunds. The Commission concluded that refunds would render previous transactions uneconomic, and they would be unfair because market participants cannot revisit their prior decisions. FirstEnergy makes this argument also and states that resettlements are disfavored because they assume incorrectly that significant changes in the tariff would not have changed the behavior of market participants. DC Energy maintains that since the Revenue Sufficiency Guarantee charge allocation vastly exceeds the potential expected profits of the virtual transactions in question, it is inconceivable that financial participants would have continued to participate in a way that would lead to accumulating large losses.

151. Xcel believes that prospective application of the Revenue Sufficiency Guarantee charge is consistent with the Revenue Sufficiency Guarantee Task Force stakeholder process and that a future section 205 filing would be preferable to the Commission's approach. It maintains that the litigation involved here undermines the Commission's position that Midwest ISO tariff issues are best raised first in the stakeholder process. Xcel also maintains that the Commission should consider whether the parties acted in bad faith and argues that nothing suggests that resettlement of Revenue Sufficiency Guarantee charges will remedy actions that were performed in bad faith. Refunds will instead create random winners and losers, depending on choices made prior to the Order on Paper Hearing.

152. Credit Suisse states that the Commission has not explained why it is now inequitable for virtual traders to avoid Revenue Sufficiency Guarantee charges. It concedes that the complaints and the November 28, 2007 Order provided notice that there may be refunds, but virtual traders had no way of knowing what their eventual obligations might be. Credit Suisse maintains it could not have known what the allocation mechanism would be, and even if the allocation mechanism was clear, the magnitude of Revenue Sufficiency Guarantee charges associated with its virtual transactions would have been difficult to compute in advance. Credit Suisse also argues that refunds are inequitable here because they threaten a protracted process of rerunning market transactions that occurred over 15 months. This would undermine market confidence and be fundamentally unfair to all Midwest ISO market participants.

153. Edison Mission argues that the Commission may not order retroactive relief when the decision represents an abrupt change in policy and when the parties ordered to make refunds justifiably relied on prior Commission decisions. The Order on Paper Hearing reaches a result that is the opposite of prior rulings in ISO-New England and Docket No. ER04-691. Edison Mission states that the abrupt change in position calls for prospective application of the new position. It asserts that the Commission has denied refunds on the equitable grounds that a decision should not be given retroactive effect when there has been reliance on the decision that is being overruled.

3. **Commission Determination**

154. Section 206 of the Federal Power Act requires that the Commission establish a refund effective date in any case commenced under that section, but it does not require that the Commission order refunds in every instance.[160] Based on the facts described below, we find good cause to exercise our discretion and to grant rehearing of our decision to require the Midwest ISO to provide refunds to customers. We will also change the effective date of the rate change from August 10, 2007 to November 10, 2008.

155. We agree with parties such as DC Energy, E.ON and Integrys that it was unreasonable for us to expect market participants to adjust their economic decisions to correctly accommodate the eventual rate change. As Credit Suisse and Xcel point out, while market participants knew about the complaints, and the Order on Revenue Sufficiency Guarantee Complaints made it clear that refunds were a possibility, it would not have been possible for market participants to accurately predict the significant increase in costs. As we stated earlier, the allocation of Revenue Sufficiency Guarantee costs to virtual offers will be a function of a wide range of factors, including the overall level of Revenue Sufficiency Guarantee costs and the megawatts of deviations compared

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[160] 16 U.S.C. § 824e(b) (2006).

to the megawatts of virtual supply offers, all of which change every day depending on market conditions. The interaction of such factors is difficult to predict in any event, but it is particularly hard to do so when a market participant also must understand, and account for, other market participants' expectations of an ongoing Commission proceeding and how those other participants alter their behavior in response.

156. The requests for rehearing and related filings suggest a substantial impact from the Interim Rate on market participants. The Independent Market Monitor alleges that since the Order on Paper Hearing, virtual trading activity in the Midwest ISO has decreased to levels substantially below historical levels, and that this decline is out of proportion to declines in other organized markets.[161] The refund requirements in this proceeding will substantially increase market participants' Total Potential Exposure, and eventually require that they post additional financial security worth as much as $77.7 million.[162] Over a dozen market participants have defaulted already,[163] and at least two such parties have alleged that the resettlement has driven them out of business.[164] While we stand by our determinations on the merits of the Original Rate, the Interim Rate, and the Indicative Rate, we see that the Order on Paper Hearing's refund and resettlement requirements

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[161] Findings and Recommendations of the Independent Market Monitor at 4-5.

[162] The Midwest ISO's statement in this regard does not break down the increase in Total Potential Exposure, and related financial security requirements, that will arise from the refund requirements of the Order on Paper Hearing and the Third Compliance Order. Midwest ISO, *Supplemental Information Regarding Compliance Filings of the Midwest Independent Transmission System Operator, Inc. Addressing Real Time Revenue Sufficiency Guarantee Charges* at 2, Docket Nos. ER04-691-088, ER04-691-089, EL07-86-000, EL07-88-000, EL07-92-000 (Dec. 19, 2008). The Midwest ISO indicates in other proceedings that it has begun making margin calls and requiring these parties to post additional financial security. *E.g.*, Midwest ISO, *Request to Terminate Market Participant Agreement and Notice Regarding Continuing and Anticipated Default* at 2, Docket No. ER09-964-000 (Apr. 28, 2009).

[163] Midwest ISO Market Subcommittee, *RSG Resettlement Order: Credit and Default Update* at 2, *available at* http://www.midwestiso.org/publish/Document/62c6cd_120e7409639_-7e730a48324a?rev=1 (May 5, 2009).

[164] *Midwest Independent Transmission System Operator, Inc.*, 127 FERC ¶ 61,015 (2009) (accepting, subject to further order, the Midwest ISO's terminations of the Market Participant Agreements of Olde Towne Energy Associates, LLC and JJR Power, LLC, due to those parties' failure to cure Total Potential Exposure violations).

have caused difficulties and market uncertainty well in excess of the financial impact the Commission anticipated.

157. In cases involving changes in market design, the Commission generally exercises its discretion and does not order refunds when doing so would require re-running a market.[165] Our decision to grant rehearing and to exercise our discretion not to grant refunds that require re-running the market is appropriate under the circumstances of this case. We hesitate to retroactively undo the decisions of market participants. We recognize that refunds that true up market participants to the costs they would have paid under the Interim Rate would necessarily be inaccurate because they cannot take into account the changes in behavior that those market participants would have made if they could be certain of the rate the Commission would ultimately adopt.[166] We also find that the computation of refunds will be complex, and likely to encourage needless litigation.[167] We therefore direct the Midwest ISO to cease the ongoing market resettlement, and to reconcile all invoices and payments issued therein.

158. While we disagree with Xcel that a future filing under FPA section 205 is the best way to initiate the application of the revised Revenue Sufficiency Guarantee charge allocation developed in the Revenue Sufficiency Guarantee Task Force process, we accept its reasoning (as well as that of E.ON, Financial Marketers, FirstEnergy, and Integrys) that we should look forward, and not backward, to apply the revised charges. Because the Order on Paper Hearing made clear the Commission's position on who

[165] *Maryland Public Service Comm'n v. PJM Interconnection, L.L.C.*, 123 FERC ¶ 61,169, at P 49 (2008) (citing *Mirant Energy Trading, LLC v. PJM Interconnection, LLC*, 122 FERC ¶ 61,007 (2008); *Bangor Hydro-Electric Company v. ISO New England Inc.*, 97 FERC ¶ 61,339 (2001) (finding that re-running markets even when an error was made would do more harm to electric markets than is justifiable)), *reh'g denied*, 125 FERC ¶ 61,340 (2008), *reh'g pending*. *See also California Indep. Sys. Operator*, 120 FERC ¶ 61,271, at P 25 (2007) (identifying market reruns as the exception, not the rule).

[166] *See* Second Rehearing Order, 118 FERC ¶ 61,212 at P 93 ("[R]efunds . . . 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.").

[167] *New York Independent System Operator Corporation*, 92 FERC ¶ 61,073, at 61,307 (2000).

should be allocated charges, and fixed a specific new rate "to be thereafter observed and in force,"[168] the date of issuance of the Order on Paper Hearing is the most appropriate date on which to make the Interim Rate effective. We will therefore modify our requirement that the Interim Rate take effect on August 10, 2007, and instead require that the Midwest ISO begin charging that rate on November 10, 2008.[169]

IV. Other Issues

159. Otter Tail claims the Commission erred by concluding[170] that the Revenue Sufficiency Guarantee rate denominator includes all virtual supply offers irrespective of whether they withdrew energy was an error.

160. This issue is beyond the scope of this proceeding. Otter Tail's argument regarding the inclusion of all virtual supply offers is presented in Docket No. ER04-691, and will be addressed in a future order in that proceeding.

The Commission orders:

(A) The requests for rehearing of the Order on Paper Hearing are granted in part and denied in part, as described in the body of this order.

(B) The Midwest ISO is hereby directed to cease the ongoing refund process, and to reconcile the amounts paid and the amounts collected therein so that each participant is returned to the financial position it was in before the refund process began.

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[168] 16 U.S.C. § 824e (2006). We disagree with Financial Marketers' claim that there was no just and reasonable rate upon which refunds could be ordered. The Order on Paper Hearing specifically approved the Interim Rate for immediate implementation. Order on Paper Hearing, 125 FERC ¶ 61,161 at P 120-21, Ordering Paragraph (B).

[169] *See Wabash Valley Power Association, Inc. v. Midwest Independent Transmission System Operator, Inc. and Ameren Services Company v. Midwest Independent Transmission System Operator, Inc.*, 126 FERC ¶ 61,174, at P 20-21 (2009) ("The old, unjust and unreasonable rate ceased to be in effect with the issuance of the Paper Hearing Order. The Midwest ISO should charge the new, Commission-fixed rate going forward from the date" of the Order on Paper Hearing). To the extent necessary, we clarify that "going forward from the date of" the Order on Paper Hearing means that the Interim Rate should take effect on the day of issuance of that order. *See* 18 C.F.R. § 385.2007(c)(1) (2008).

[170] Second Rehearing Order.

(C) The Midwest ISO is hereby directed to begin charging the Interim Rate on November 10, 2008.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.