

117 FERC ¶ 61,113
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Midwest Independent Transmission
System Operator, Inc.

Docket No. ER04-691-074

ORDER ON REHEARING

(Issued October 26, 2006)

1. This order addresses requests for rehearing and clarification of the Commission's RSG Order.¹ That order accepted in part, and rejected in part proposed revisions to the Midwest Independent Transmission System Operator, Inc.'s (Midwest ISO) Transmission and Energy Markets Tariff (TEMT or tariff) that the Midwest ISO submitted in order to amend and clarify certain provisions of its real-time revenue sufficiency guarantee (RSG). It also required the Midwest ISO to make refunds to market participants for incorrect applications of the real-time RSG provisions the Midwest ISO proposed to modify. The Commission is granting, in part, and denying, in part, the requests for rehearing, and clarifying its prior order. In particular, the Commission is granting rehearing as to refunds associated with virtual transactions.

I. Background

2. In an order dated August 6, 2004, the Commission approved the Midwest ISO's TEMT, which allowed the Midwest ISO to initiate Day 2 operations in its 15-state

¹ *Midwest Independent Transmission System Operator, Inc.*, 115 FERC ¶ 61,108 (2006) (RSG Order).

region.² The Midwest ISO's Day 2 operations include, among other things, day-ahead and real-time energy markets and a financial transmission rights (FTR) market for transmission capacity.

3. On October 27, 2005, the Midwest ISO submitted proposed revisions to its TEMT. The Midwest ISO proposed three tariff changes: (1) to remove references to virtual supply from the provisions related to the calculation of RSG charges in section 40.3.3 of the TEMT; (2) to clarify the allocation of RSG charges in section 40.3.3.a.ii; and (3) to make generators that do not follow dispatch instructions eligible to receive RSG payments for the lesser of the energy actually produced or the instructed megawatts.

4. The Midwest ISO noted that section 40.3.3.a.ii of the TEMT requires RSG payments to generation resources that are available for dispatch in the real-time market.³ The payments help to ensure that resources that are made available as a result of the Reliability Assessment Commitment (RAC) process receive compensation at least equal to their start-up offers, no-load offers, and incremental energy costs, even if the resources are not dispatched. This helps ensure that adequate supply is available to meet real-time demand.

² *Midwest Independent Transmission System Operator, Inc.*, 108 FERC ¶ 61,163 (TEMT II Order), *order on reh'g*, 109 FERC ¶ 61,157 (2004) (TEMT II Rehearing Order), *order on reh'g*, 111 FERC ¶ 61,043 (2005) (Compliance Order III). The TEMT contemplates that all services provided pursuant to its terms and conditions will be provided by a Transmission Provider. The TEMT defines "Transmission Provider" as the Midwest ISO or any successor organization. See Midwest ISO FERC Electric Tariff, Third Revised Volume No. 1, section 1.320, Second Revised Sheet No. 133 (hereinafter, TEMT). For clarity, we will refer to the Midwest ISO wherever the TEMT refers to the Transmission Provider.

³ This section provides that a market participant will be charged the RSG charge when it withdraws energy, and such charge shall equal the product of the market participant's load purchased in real time, all virtual supply in the day-ahead markets and resource uninstructed deviation quantities times the per unit RSG charge. The per-unit RSG charge for a day will equal the aggregate RSG charge in that hour attributed to resources committed in the Reliability Assessment Commitment (RAC) process in the operating day divided by the sum of load withdrawn in the operating day, all virtual supply and deviations from dispatch instructions of all market participants withdrawing during the hour for that operating day. TEMT, Module C, Second Revised Sheet Nos. 577 - 78.

5. In the RSG Order, the Commission stated that parties to carved-out grandfathered agreements (GFAs) are not subject to RSG charges, and the Midwest ISO may not charge parties to carved-out GFAs for any deviation from their day-ahead schedules, as long as injections and withdrawals are balanced in real time. The Commission determined that any costs associated with schedule changes post day-ahead, when the carved-out GFAs allow for such changes, cannot be charged to the carved-out GFAs through uplift, per prior Commission precedent.⁴ Accordingly, the RSG Order required the Midwest ISO to refund, with interest, amounts charged to carved-out GFAs.

II. Requests for Rehearing

6. Requests for rehearing and/or clarification, motions to intervene out-of-time, and answers were filed by the parties listed in Appendix A.

III. Discussion

A. Procedural Matters

1. Out-of-time Interventions and Answers

7. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2006), we will deny the motions to intervene out-of-time in this proceeding for failure to demonstrate good cause warranting late intervention. The Commission has found that parties seeking to intervene after issuance of a Commission determination in a case bear a heavy burden. When late intervention is sought after the issuance of a dispositive order, the prejudice to other parties and burden upon the Commission of granting the late intervention may be substantial. Thus, movants bear a higher burden to demonstrate good cause for the granting of such late intervention. Movants have not met their burden of justifying late intervention.⁵

8. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2006), prohibits an answer to a request for rehearing. Accordingly, we will reject the answers.

⁴ *Midwest Independent Transmission System Operator, Inc.*, 111 FERC ¶ 61,042 at P 372-73 (2005) (GFA Rehearing Order), *order on reh'g*, 112 FERC ¶ 61,311 (2005).

⁵ *See, e.g., Midwest Independent Transmission System Operator, Inc.*, 102 FERC ¶ 61,250 (2003); *Florida Power & Light Co.*, 99 FERC ¶ 61,318 (2002); *Garnet Energy LLC*, 99 FERC ¶ 61,165 (2002).

2. FPA Sections 205 and 206 Arguments

9. In its October 27, 2005 filing, the Midwest ISO indicated that it considered some of its proposed tariff changes to be clarifications to its existing tariff, not new amendments. However, the Midwest ISO stated that, to the extent the Commission disagreed that the proposed revisions merely clarified the existing tariff, the Midwest ISO requested authority to make the changes pursuant to section 205 of the Federal Power Act (FPA).⁶

10. Constellation, DC Energy, MN Municipal and BP Energy contend that, under FPA section 205, the Midwest ISO must show that its proposal is just and reasonable, but not that it is more or less reasonable than an alternative. They contend that the Midwest ISO met the standards under section 205 of the FPA and the Commission's rejection of the proposed tariff revisions was arbitrary and capricious. DC Energy seeks clarification that the Commission did not institute an FPA section 206⁷ proceeding in this case.

11. The RSG Order treated the Midwest ISO's filing as revisions to the TEMT, rather than clarifications of it.⁸ As such, the Commission's rulings with respect to those revisions were pursuant to the Commission's authority under section 205 of the FPA. The Commission was not acting pursuant to section 206 of the FPA and, to the extent that may not have been clear, the Commission clarifies here that its actions were pursuant to section 205 of the FPA. And in ordering refunds, the Commission was interpreting the Midwest ISO's existing TEMT.

3. Notice Argument

12. MN Municipal argues that the notice of the proceeding issued by the Commission was not adequate because the nature of the proceeding changed. MN Municipal states that the notice did not place the public on notice that the proceeding had evolved into one in which the Midwest ISO could be compelled to recalculate prior charges that could result in significant, adverse financial consequences on market participants. MN Municipal argues that, because of the financial impact the RSG Order had on MN

⁶ 16 U.S.C. § 824d (2000).

⁷ 16 U.S.C. § 824e (2000).

⁸ Tariff provisions which the Commission rejected represented changes to the TEMT that were erroneously characterized as clarifications of it.

Municipal, it was entitled to actual notice, rather than public notice, of the filing. MN Municipal contends that because it was not given actual notice, it was not afforded due process.

13. The Commission is not persuaded by this argument. MN Municipal was provided notice of the filing. The Commission provided notice in accordance with its standard noticing procedures; that is notice of the filing was issued and published in the *Federal Register*.⁹ Also, as is customary, the entire filing was available at the Commission for inspection by those wanting to review it in detail. Also, the Midwest ISO posted the filing on its website.

14. Further, the Commission does not have the ability to identify at the time a filing is made, and to provide individual notice to, each party who could potentially be affected by the Commission's subsequent decision on that filing. Nor is the Commission required to do so. What the Commission did do – issue and publish notice of the filing – was sufficient. In any event, the proceeding did not “evolve,” as MN Municipal suggests, but rather, the Midwest ISO made its filing and the Commission issued a decision on that filing. MN Municipal's argument seems to suggest that where the Commission is contemplating issuing a particular decision, the Commission should pause midway and issue individual notices to any party (or potential party) who might be affected, so as to let them know what the Commission is considering doing, presumably so that they can then intervene and comment on what the Commission is contemplating doing. Our procedures properly do not provide for such a scenario. And given that the Commission often must act within 60 days of the date of the filing, an approach like that seemingly recommended by MN Municipal would be a practical impossibility.

15. In any event, since the Commission is reversing its decision with respect to refunds, as discussed below, this should negate any adverse financial consequences to MN Municipal.

4. Waiver of 60-Day Prior Notice Argument

16. In its October 27, 2005 filing, the Midwest ISO requested that its proposed tariff revisions be made effective ten days following notification by the Midwest ISO to the Commission that all necessary measures have been put in place to support its TEMT

⁹ See *Midwest Independent Transmission System Operator, Inc.*, 115 FERC ¶ 61,108 at P 9; 70 Fed. Reg. 67,471 (2005).

modification. To the extent necessary, the Midwest ISO requested waiver of the 60-day prior notice requirement. Our RSG Order acknowledged this request, but did not expressly grant or deny it.

17. WPS and Strategic Energy argue that the Commission erred when it did not expressly waive the 60-day prior notice requirement. They contend that market participants relied in good faith on the Midwest ISO's Business Practice Manuals which stated that virtual supply offers would not be included in the RSG charge calculation. They contend that they relied in good faith on the Business Practice Manuals and that it was the Midwest ISO's mistake that the manuals did not accurately reflect the TEMT. They contend that ignoring their good-faith reliance on the manuals is inequitable and contrary to maintaining stability in the markets. They argue that this constitutes extraordinary circumstances for which the Commission should grant waiver of the 60-day notice requirement.

18. Our RSG Order inadvertently failed to expressly address the 60-day waiver request. It was our intent, with respect to the conditional acceptance of the tariff provisions, to grant waiver and allow the effective date the Midwest ISO requested. Accordingly, to the extent necessary,¹⁰ the Commission is granting rehearing and waiving the 60-day prior notice requirement.

5. Motion to Lodge

19. E.ON filed a motion to lodge, requesting that the Commission add the following documents to the record in this proceeding: (1) the Megawatt daily article entitled "Midwest ISO Prices Converging Despite FERC Order," published on July 10, 2006; (2) the June 2006 Report of the Midwest ISO's Independent Market Monitor presented to the Midwest ISO Board of Directors on July 19, 2006; and (3) the Midwest ISO Staff Analysis of Virtual Market Activity and Price Convergence presented at the August 1, 2006 Midwest ISO Market Subcommittee Meeting. E.ON contends that these documents should be added to the record because they demonstrate that there has been no impact upon day-ahead and real-time price convergence in the Midwest ISO market as a result of decreased virtual trading activity since the issuance of the RGS Order.

¹⁰ In fact, since the tariff revisions did not go into effect prior to 60 days from the date of its filing, *i.e.*, the Midwest ISO did not provide notification that all necessary measures had been put in place such that the revisions could have been made effective on less than 60 days' notice, the Midwest ISO did not need such waiver.

20. Answers to the motion to lodge were filed by: Duke; DC Energy; WPS; Edison Mission; and EPIC Merchant Energy, LP, Black Oak Energy, LLC and SESCO Enterprises LLC (jointly referred to as EPIC). E.ON filed answers to those answers. The entities that filed answers request that the motion to lodge be denied. DC Energy contends that the documents are predicated on an erroneous interpretation of the RSG Order. Duke contends that the initial results reported in the documents are premature and introducing them into the record would be misleading. EPIC and WPS contend that the documents do not support the conclusion E.ON suggests. Edison Mission and WPS argue that the motion to lodge is an impermissible answer to a request for rehearing.

21. The Commission finds that E.ON's motion to lodge amounts to an answer to a request for rehearing. As stated above, Rule 713(d) of the Commission's rules of Practice and Procedure, 18 C.R.R. § 385.713(d) (2006), prohibits an answer to a request for rehearing. Accordingly, we will reject the motion to lodge.

B. Virtual Supply Offers in the Currently Effective TEMT

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

On any Day when a Market Participant actually withdraws any Energy the Market Participant shall be charged a Real-Time revenue sufficiency charge. The Market Participant's Real-Time revenue sufficiency guarantee charge for that Hour shall equal the product of: (i) the Market Participant's total Load purchased in the Real-Time Energy Market during the Operating Day (in MWh), all Virtual Supply for the Market Participant in the Day-Ahead Energy Market, and Resource Uninstructed Deviation quantities (MWh), and (ii) the per-unit Real-Time revenue sufficiency guarantee charge.¹¹

23. The Midwest ISO stated that, since its energy markets opened in 2005, notwithstanding the above-quoted language it had not considered virtual supply offers in the RSG charge calculation. It explained that virtual supply offers do not include actual energy deliveries; thus, they were not considered to be a generation resource that could be physically committed for reliability purposes in the RAC process. In addition, the Midwest ISO argued that including virtual supply in RSG calculations impedes the development of a virtual transactions market. It added that its Business Practice Manuals and TEMT training materials stated that virtual supply offers would not be included in

¹¹ TEMT, Module C, section 40.3.3.a.ii, Second Revised Sheet Nos. 577-78.

the RSG calculation. Although the Midwest ISO recognized that the TEMT had always provided that virtual supply offers are to be included in the calculation of RSG charges, it sought a waiver to permit the exclusion of virtual supply offers from the RSG charge without the need to make refunds. It also proposed to amend the TEMT in order to: (1) remove the reference to virtual supply offers; and (2) clarify that such transactions would not be included in calculating RSG charges and should not result in any recalculation and refunds back to the commencement of the energy markets.

24. The Commission found that, under the above-quoted section 40.3.3.a.ii, the RSG charge applied to virtual supply offers. It noted that it had concluded in the TEMT II Order that the allocation of real-time charges was reasonable because the proposed billing determinants allocate the uplift costs to those entities that cause higher costs for the region.¹² To the extent that the Midwest ISO did not charge virtual supply offers for RSG costs, the Commission found that the Midwest ISO had been violating the terms of the TEMT. Accordingly, the Commission ordered the Midwest ISO to recalculate the rate and to make refunds to customers, with interest, to reflect the correct allocation of RSG costs. The Commission rejected protestors' arguments that ordering refunds would amount to retroactive ratemaking and provide a windfall for other market participants.

25. Many parties have sought rehearing; they argue that the Commission's interpretation of the TEMT was in error because it did not give meaning to each provision of section 40.3.3.a.ii. They argue that the Commission, in applying RSG charges to virtual transactions, did not properly distinguish between virtual transactions that do not result in the withdrawal of energy from the grid, and transactions that do have such a result.

26. Several parties contend that the Commission inappropriately relied on the TEMT II Order and the filed rate doctrine to make its determinations in the RSG Order. They also allege that they justifiably relied on the Midwest ISO's Business Practice Manuals and training materials for an interpretation of section 40.3.3.a.ii.

1. Actual Withdrawals of Energy

a. Requests for Rehearing

27. A number of parties seek clarification as to whether any market participant that made virtual transactions must pay RSG charges, or whether section 40.3.3.a.ii applies

¹² RSG Order, 115 FERC 61,108 at P 26 (citing TEMT II Order, 108 FERC 61,163 at P 587).

only to those market participants that made actual withdrawals of energy. DC Energy, Edison Mission and Financial Marketers ask the Commission to confirm that, absent transactions in which market participants actually withdraw energy in real time, the RSG charge does not apply (retroactively or prospectively) to those participants' virtual supply offers. Edison Mission says that the Commission's use of "injection" and "withdrawal" illustrates the common acceptance that these terms refer to physical injections and withdrawals of energy. It concludes that only entities that physically withdraw energy – including virtual suppliers that do so – must pay RSG charges. Financial Marketers note that section 40.3.3.a.ii specifically includes market participants that make actual withdrawals, but is silent as to market participants that do not; as such, the first sentence of the section exempts from RSG charges market participants that submit virtual supply offers for a given day but do not make withdrawals in real time. Financial Marketers state that the RSG Order arguably agreed with this position.¹³ It adds, however, that the Midwest ISO's projected RSG charge allocation suggests that the Midwest ISO is improperly including virtual transactions made by market participants that submitted virtual supply offers for a given day but did not make withdrawals.

28. DC Energy and Edison Mission also argue that market participants who do not make physical withdrawals of energy in real time do not owe refunds. Edison Mission agrees with the Commission that the TEMT provides only for RSG charges to market participants that withdraw energy in real time. It says, however, that the Midwest ISO went further and chose not to impose RSG charges on any virtual suppliers. Whether or not the Commission agrees with the Midwest ISO's interpretation, Edison Mission says that there is no basis for finding that it was wrong for the Midwest ISO not to charge virtual suppliers that do not make actual withdrawals of energy in real time.

29. Edison Mission goes on to explain that the statement in the second sentence of section 40.3.3.a.ii, that RSG charges will include "all Virtual Supply for the Market Participant," means that the only virtual supply that should be included in the calculation is virtual supply that is bid for an entity serving physical load. Accordingly, Edison Mission asks the Commission to clarify that market participants who submitted virtual supply bids, but did not actually withdraw energy from the system to serve load, were not responsible for RSG charges and do not owe refunds in this proceeding.

30. The requests for rehearing also present diverse arguments as to the meaning of the second sentence of section 40.3.3.a.ii. DC Energy argues that an actual withdrawal of energy is a prerequisite to the application of the RSG charge. In the absence of such a

¹³ Financial Marketers' May 25 Request for Rehearing at 7 (quoting RSG Order, 115 FERC ¶ 61,108 at P 26 (2006)).

withdrawal, DC Energy believes that it is unnecessary to reach the second sentence of section 40.3.3.a.ii, regarding the calculation of the RSG charge. DC Energy states that, in the RSG Order, the Commission did not read the first sentence of section 40.3.3.a.ii to negate the reference to virtual supply in the second sentence; however, the Commission did “agree with commenters that the charge, per the terms of the TEMT, is only applied to market participants withdrawing energy in real-time.”¹⁴ DC Energy states that the Commission’s analysis appropriately, and in a way consistent with the canons of contract construction, read the first sentence of section 40.3.3.a.ii as a prerequisite to the second sentence.

31. Xcel, Cargill and Otter Tail argue that the RSG Order misinterpreted the TEMT when it found that virtual offers should be subject to real-time RSG charges despite the fact that they do not involve an actual withdrawal of energy. Xcel states that the order applied no real meaning to the first sentence of section 40.3.3.a.ii and instead found the second sentence dispositive. Otter Tail alleges that the Commission considered the second sentence of the section in isolation from the first, and in isolation from other sections of the TEMT that relate to the assessment of real-time RSG charges. All three entities state that this approach ignores fundamental rules of contract interpretation, which provide that all pertinent provisions must be considered together, giving effect to each word, clause and sentence to the extent possible.¹⁵ If the Commission had applied this rule, Xcel says that it would have found section 40.3.3.a.ii to address two different issues: (1) when real-time RSG applies to transactions; and (2) how applicable real-time RSG charges are calculated. In other words, Xcel says, the Commission should have interpreted section 40.3.3.a.ii so that real-time RSG charges only apply to market participants actually withdrawing energy. Cargill makes a similar argument, concluding. Otter Tail believes that the Commission would have found that including a reference to virtual supply in section 40.3.3.a.ii is inconsistent with the rest of the TEMT. Otter Tail argues that on rehearing, the Commission should reverse its conclusion that the second sentence of section 40.3.3.a.ii controls the other provisions of the TEMT, and instead give no effect to the reference to virtual supply.

32. Otter Tail next contends that section 40.3.3.a.ii is ambiguous, and that consequently, the Commission must examine the course of conduct between the Midwest

¹⁴ DC Energy Request for Rehearing at 10-11 (quoting RSG Order, 115 FERC ¶ 61,108 at P 26 (2006)).

¹⁵ Cargill Request for Rehearing at 6 (citing *Vreeland v. FPC*, 528 F.2d 1343, 1351 (5th Cir. 1976); *United States v. Missouri-Kansas-Texas R. Co.*, 194 F.2d 777, 778 (5th Cir. 1952)); Xcel Request for Rehearing at 8-9 (citing same cases).

ISO and the market participants to determine the meaning of the section. It argues that the parties' conduct demonstrates that virtual supply offers should not be assessed RSG charges; as such, the Commission should not interpret section 40.3.3.a.ii to apply real-time RSG charges to virtual supply offers.

33. Otter Tail adds that the Commission's prior orders recognize the distinction between physical and virtual transactions, and have approved allocating RSG-type charges to virtual transactions on a different basis than the allocation of such charges to physical transactions. It cites a recent Commission order that applied different uplift charges to virtual transactions and to physical transactions in ISO New England,¹⁶ and argues that the Commission should have applied the same policy analysis in this proceeding.

34. Duke argues that the first and second sentences of section 40.3.3.a.ii mean opposite things, and that the RSG Order incorrectly tried to harmonize them by stating that RSG charges should only be applied to market participants withdrawing energy in real time. Duke argues that this targets a null set, because no virtual transaction will ever involve an actual withdrawal. As such, Duke states that the tariff is ambiguous, and asks the Commission to acknowledge the ambiguity and give it appropriate weight in balancing the equities.

35. DC Energy argues that if the TEMT is ambiguous, it can only be reasonably construed to exempt all virtual supply offers from the RSG charge. It states that if one does not view the second sentence of section 40.3.3.a.ii as acting on the market participant (as defined in the first sentence), then there is ambiguity because of the inadvertent reference to virtual supply offers in the calculation methodology for the RSG charge. DC Energy argues that this ambiguity is resolved by the various Midwest ISO documents that did not apply RSG to virtual supply offers. It states that under the parole evidence rule, once a document is found to be ambiguous, extrinsic evidence may be used to clarify, but not contradict, that document. As the record of this proceeding demonstrates that at least two reasonable interpretations of section 40.3.3.a.ii are possible, the Commission must look to extrinsic evidence to determine the intent of the TEMT. DC Energy argues that the Business Practice Manuals, which is intended to provide background information and supplement the rates, terms and conditions of the TEMT, is the most logical source of such extrinsic evidence. The Manuals and the Midwest ISO's conduct demonstrate that the Midwest ISO did not intend for virtual

¹⁶ Otter Tail Request for Rehearing at 16 (citing *ISO New England, Inc.*, 113 FERC ¶ 61,055 at P 30-38 (2005) (*ISO New England*)).

supply offers to be assessed RSG charges; accordingly, DC Energy urges the Commission to find that any ambiguities in the filed rate must be resolved in favor of the Business Practice Manuals.

36. Edison Mission argues that the Commission's reliance on the filed rate doctrine was in error. Even if the filed rate was clear that some virtual supply would be included in the calculation of RSG charges, Edison Mission states that it also made clear that this would not include virtual supply for market participants that do not actually withdraw energy. The Commission's dismissal of the Business Practice Manuals also obscures the distinction among the different types of virtual bidders, Edison Mission says.

37. IMPA notes that the RSG Order found that RSG is only applied to market participants withdrawing energy in real time. It states that it did not withdraw energy in real time, and therefore alleges that it and other similarly-situated market participants should not be assessed RSG charges.

38. The Midwest ISO acknowledges that section 40.3.3.a.ii of the TEMT can be read to allocate real-time RSG charges to virtual supply offers; however, it states that this interpretation would be inconsistent with the requirement that real-time RSG charges should only be allocated to transactions that actually withdraw energy in real time. It adds that this interpretation would be consistent with the Commission's clarification that real-time RSG charges will not be retroactively allocated to virtual supply offers that do not actually withdraw energy in real time. Such an implementation, the Midwest ISO says, would result in an under-collection of real-time make-whole payment amounts that would need to be retroactively reallocated. The under-collection would result from the fact that the real-time RSG charge rate would decrease as a result of including virtual supply offers in the rate calculation, but the total amount of real-time RSG deviations would stay the same. Under the TEMT, under-collected real-time RSG charges would be allocated through uplift.

39. The Midwest ISO points out that, while the RSG Order relied on other parts of section 40.3.3.a.ii to conclude that virtual supply offers should be included in the RSG calculation, the phrase "actually withdraw" was part of the filed tariff. The Midwest ISO argues that it is reasonable to understand the inclusion of virtual supply offers in the RSG calculation as thus limited to those offers that actually withdraw energy.¹⁷ Virtual

¹⁷ Midwest ISO Request for Rehearing at 8-9 (citing *DTE Energy Trading, Inc. v. Midwest Independent Transmission System Operator, Inc.*, 111 FERC ¶ 61,062 at P 25 (2005); *City of Holland v. Midwest Independent Transmission System Operator, Inc.*, 111 FERC ¶ 61,076 at P 21 (2005)).

supply offers that did not actually withdraw energy justifiably relied on this interpretation, especially because the Midwest ISO's Business Practice Manuals and other operational guidance documents excluded virtual supply offers from the RSG calculation. The Midwest ISO concludes that it would be unfair to retroactively impose on such market participants RSG charges that the filed rate, as reasonably construed, imposed only on parties that actually withdrew energy.

40. Otter Tail argues that the references to virtual supply in section 40.3.3.a.ii do not make sense in light of the purpose of section 40.3.3.a, which is to assess charges for real-time energy market purposes. It argues that including virtual supply in section 40.3.3.a.ii could be interpreted as exposing market participants to RSG charges where no withdrawals occurred, and that this does not make logical sense. Otter Tail points out that if the reference is retained and given effect, real-time RSG charges will be applied to market participants who have virtual supply and also withdraw energy in real time, but not to market participants who have virtual supply but do not withdraw energy in real time. Otter Tail alleges that the Midwest ISO cannot have intended such a result, but that even if it did, such an interpretation is not just and reasonable.

41. Duke and WPS also argue that the RSG Order appears to distinguish between market participants who only participate in the financial/virtual markets and those who participate in only physical or both physical and virtual markets. They argue that it would be unfair, unlawful and unduly discriminatory to assess entities engaging in both physical and financial transactions the RSG for virtual activity when those who only engage in financial transactions would not be similarly assessed. Duke points out that the Commission justified imposing RSG charges on virtual transactions by concluding that they can be caused by virtual transactions, and that it would not make sense to key those costs to other, unrelated transactions. WPS advocates that, if the Commission does not eliminate the application of the RSG to virtual transactions, then it must clarify that virtual transactions are only subject to RSG charges if they can be related to a real-time withdrawal of energy. Duke states that the Commission justified retroactively resettling the markets based on the fact that applying RSG charges to virtual supply offers does not oppose the Commission's goal of establishing an efficient market mechanism, but it argues that this justification provides no independent basis for making retroactive adjustments. After all, Duke says, RSG charges by no means need be applied to virtual supply offers in order for the market to be considered efficient.

42. Cargill asks the Commission to clarify the scope of the RSG Order's application of real-time RSG liability in light of the "inherent inconsistency" between the assessment of real-time liability to virtual offers and the Commission's statement that the RSG

charge only applies to market participants withdrawing energy in real time.¹⁸ If virtual trades are subject to RSG costs that are only supposed to apply to transactions that withdraw energy in real time, Cargill wants to know what transactions the Commission believes actually withdraw energy in real time. Further, Cargill requests clarification of the scope of the pricing methodology that will apply to virtual offers if the RSG Order is not reversed; for example, whether the Commission will require the netting of real-time liability between virtual offers, virtual bids, and/or real-time withdrawals.

43. Some parties also ask whether virtual offers must clear the market, or be linked to specific pricing nodes, in order to be assessed RSG costs. DTE argues that if the first sentence of section 40.3.3.a.ii is to have any meaning, a market participant's real-time RSG cost responsibility for virtual offers must be linked to the pricing nodes where the market participant actually withdraws energy. Only then, DTE states, is it reasonable to assume that a market participant has created the need for additional real-time generation. By contrast, if a withdrawing market participant were assessed real-time RSG charges for virtual supply offers that clear at pricing nodes where the market participant had not withdrawn energy, this entity could find itself – by virtue of having made a withdrawal somewhere in the Midwest ISO footprint – paying costs for non-withdrawing entities that made virtual supply offers. In addition, DTE states that requiring market participants to pay RSG charges for virtual supply offers clearing at pricing nodes different from those at which energy is withdrawn would render the first sentence of section 40.3.3.a.ii meaningless, and the tariff section arbitrary and unlawful. DTE explains that this is because the issue of whether a market participant actually withdrew energy in real time would be irrelevant to determining the entity's RSG cost burden as applied to its virtual supply offers. DTE asserts that, unless the TEMT is interpreted in a way that relates the location at which energy is withdrawn and the location at which virtual supply clears the day-ahead market, then the TEMT is arbitrary and unduly discriminatory.

44. As we understand E.ON's request for rehearing, E.ON appears to argue that virtual transactions subject to RSG are those in which market participants submitted virtual supply offers that cleared a day ahead at a pricing node, and withdrew energy in real-time for the same volume of the hourly cleared day-ahead virtual supply offer, but in excess of the market participant's real-time injections at the same pricing node for the same hour. For purposes of calculating a market participant's refund obligation, E.ON argues that real-time injection volumes are measured at a pricing node for which the market participant submitted, and the Midwest ISO cleared, a day-ahead virtual supply offer as the market participant's: (1) cleared day-ahead load, less its real-time metered

¹⁸ Cargill Request for Rehearing at 8 (citing RSG Order, 115 FERC ¶ 61,108 at P 26 (2006)).

load; (2) cleared day-ahead physical export, less its real-time physical export; (3) real-time metered generation, in excess of its cleared day-ahead generation; and (4) real-time physical import, in excess of its cleared day-ahead physical import.

b. Discussion

45. Inasmuch as the language of section 40.3.3.a.ii specifically lists virtual supply as a component of the RSG settlement charge, we affirm our decision in the RSG Order to require virtual supply to be assessed RSG costs. We agree, though, that consistent with the tariff, virtual supply should be assessed RSG costs only on those days the market participant withdraws energy. In response to Cargill and Duke, we further clarify that it is reasonable to define withdrawing energy as physical withdrawal of energy at a pricing node. We disagree with Duke's assertion that this definition will target a null set of transactions; while virtual supply offers do not involve physical withdrawals, they may increase RSG costs when combined with a market participant's physical transaction. For similar reasons, we disagree with Duke and WPS that section 40.3.3.a.ii is unduly discriminatory. The RSG charge is assessed to market participants whose real-time activity deviates from their day-ahead schedules. In the case of a virtual participant, such a deviation would mean that the market participant engaged in physical transactions in real time.

46. We consider assertions by parties that the provision is illogical to be collateral attacks on the TEMT II Order, which approved the provision. No party protested the provision when it was first filed or requested rehearing when it was approved. The fact that several parties have identified themselves as liable under this provision indicates the provision has the necessary clarity to be implemented. Furthermore, we disagree with the arguments that the provision is illogical. The first sentence determines the applicability of the provision and the second sentence defines the components of the charge. We do not consider it illogical for parties withdrawing energy in the real-time market to pay an RSG charge based on their load, virtual supply and uninstructed deviations. All three components are activities that can affect RSG costs and therefore are appropriately included in the charge calculation.

47. As the tariff specifies, "[o]n any Day when a Market Participant actually withdraws any Energy the Market Participant shall be charged a Real-Time revenue sufficiency guarantee charge."¹⁹ We deny the requests for rehearing to the extent they argue that we should interpret the tariff differently based on the course of conduct

¹⁹ TEMT section 40.3.3.a.ii.

between the parties or the language of the Business Practice Manuals; the filed and accepted tariff is the governing document and not the Business Practice Manuals – the former has precedence over the latter and not the other way around.

2. TEMT II Order

a. Requests for Rehearing

48. Edison Mission takes issue with the Commission's reliance on the TEMT II Order to establish that the Commission had previously interpreted the TEMT as it did in the RSG Order. Edison Mission argues that paragraph 587 of the TEMT II Order assumes that some portion of the RSG charges would be allocated to virtual bidders, but it does not distinguish virtual bidders in general from virtual suppliers that do not actually withdraw energy. Instead, the TEMT II Order suggests that market participants that participate exclusively in the day-ahead market will not be responsible for any RSG charges, Edison Mission claims.

49. In a similar vein, Duke notes that the RSG Order relied on the TEMT II Order to justify its focus on the second sentence of section 40.3.3.a.ii. Duke contends, however, that the TEMT II Order does not cite, quote or refer to that sentence, or discuss the allocation of real-time RSG to virtual supply offers. While the Commission may have understood that RSG costs would be allocated to virtual supply offers, Duke states that that understanding was not clearly expressed. It argues that the Commission cannot rely on its unexpressed understanding of the tariff language at issue to conclude that there is no ambiguity.

50. Cargill argues that the TEMT II Order does not support the Commission's retroactive application of real-time RSG liability to virtual offers. While the TEMT II Order refers to virtual transactions' inclusion in the second sentence of section 40.3.3.a.ii, Cargill notes that the Commission explained that it accepted the section because the "billing determinants allocate the uplift costs to those entities that cause higher costs for the region."²⁰ Cargill indicates that while virtual offers may result in a RAC cost that is above zero, they lower the overall cost of Day 2 market operations. Therefore, Cargill argues that if the Commission was going to cite the TEMT II Order, the dispositive issue should have been whether virtual offers cause a higher cost to the region or involve a withdrawal of energy from the markets.

²⁰ Cargill Request for Rehearing at 7 (quoting TEMT II Order at P 587).

b. Discussion

51. We disagree with Edison Mission's assertion that the TEMT II Order suggests that market participants who transact exclusively in the day-ahead market will not be responsible for any RSG charges. It appears that Edison Mission has confused the Commission's discussion of day-ahead RSG with its discussion of real-time RSG in the TEMT II Order. The section of the TEMT II Order in which the Commission discussed RSG focused mainly on the day-ahead RSG that the Midwest ISO had proposed.²¹ With regard to this proposal, the order noted that "the [revenue] shortfall experienced by generators will be uplifted *to all market participants that are scheduled to purchase energy in the Day-Ahead Market*,"²² and finds that "the Midwest ISO has proposed a reasonable allocation of the day-ahead generator shortfall uplift costs because the parties expected to benefit from the commitment of these resources will be paying the costs of committing them."²³ There is no qualifying language anywhere in that discussion that limits the applicability of the RSG charges to market participants that transact exclusively in the day-ahead market.

52. We note, however, that at the end of paragraph 587 of the TEMT II Order, in a discussion of real-time RSG, the Commission indicates that "parties can avoid the charge by scheduling in the Day-Ahead Market instead of the Real-Time Market."²⁴ If Edison Mission is referring to this sentence, we acknowledge that it is inaccurate. Market participants can *reduce* their RSG charges by scheduling in the day-ahead market and not deviating from their schedules. As this order has already discussed in detail, however, the real-time RSG includes all virtual supply offers scheduled in the day-ahead market.

53. With regard to Duke, we do not think that it was necessary for the Commission to specify its interpretation of section 40.3.3.a.ii in the TEMT II Order. As the Commission found in the RSG Order (and reiterated above), that section includes virtual supply offers as a component of the calculation of the charge,²⁵ and as the Commission's understanding was no different from the tariff language, there was no need for the Commission to explain what the provision meant; citation to the tariff was sufficient.²⁶

²¹ TEMT II Order at P 581-91.

²² TEMT II Order at P 581 (emphasis added).

²³ *Id.* at P 587.

²⁴ *Id.* (emphasis added).

²⁵ RSG Order at P 26.

²⁶ TEMT II Order at P 582 n.341.

54. Cargill has provided no evidence that virtual supply offers in the day-ahead market lower overall costs for the region. As it admits, however (and as discussed below), virtual supply offers in the day-ahead market do increase costs because they require commitment of resources in the RAC process. It is therefore not inappropriate for the Midwest ISO to assess a charge for this service.

3. Reliance on the Midwest ISO's Interpretation

a. Requests for Rehearing

55. DC Energy states that customers engaging in virtual transactions where they were not withdrawing energy had no notice that they could be subject to RSG charges. Market participants were on notice of the Midwest ISO's interpretation of the TEMT through various Midwest ISO sources: (1) the Business Practice Manuals; (2) a published Frequently Asked Questions document; (3) training materials; (4) its practices; and (5) its instructions to market participants. DC Energy states that virtual market participants' expectations were consistent with the plain meaning of the TEMT, which the Midwest ISO had affirmed.

56. Edison Mission argues that it reasonably relied on the Midwest ISO's application of its tariff, and that it had no reason to expect that RSG charges would apply to its virtual supply offers. Through testimony, it argues that it structured its participation in the Midwest ISO markets based on the rules the Midwest ISO provided, and that it would not have submitted the same bids if it had known that it would be responsible for RSG charges.

57. Next, Edison Mission notes that the Commission respects a market participant's reliance on an RTO as a justification for its actions.²⁷ It notes that, consistent with the authoritative role the Commission has set for RTOs, section 38.1 of the TEMT assigns the Midwest ISO responsibilities that include developing and maintaining rules, practices and procedures for the energy markets; administering the energy markets; and addressing market participants' inquiries about market activities.²⁸ Edison Mission points out that

²⁷ Edison Mission Request for Rehearing at 14-15 (citing *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authority*, 114 FERC ¶ 61,165 at P 27 (2006)).

²⁸ *Id.* at 15-16 (citing TEMT, Module C, section 38.1.1.s, Sheet No 353).

wholesale markets could not function if market participants had to question every decision that an ISO or RTO made, or risk paying refunds based on an unexpected set of rules.

b. Discussion

58. Initially, we agree with market participants that, as a general matter, an RTO should be considered a credible source when it comes to an accurate interpretation of its own tariff.²⁹ As discussed further below though, we grant rehearing and conclude that refunds are not appropriate here. This action moots the need to address whether it was appropriate to rely on the Midwest ISO's interpretation of its tariff in this particular case.

4. The Midwest ISO's Burden of Proof

a. Requests for Rehearing

59. BP Energy notes that the Commission has encouraged the establishment of multi-settlement markets, and that the Commission wants parties to arbitrage the day-ahead market and the real-time market to promote price convergence. This is the role of virtual supply and load transactions, says BP Energy: these financial transactions clear in the day-ahead market, may be offset in the real-time market, and do not affect system dispatch; they simply serve to reduce the differential between day-ahead and real-time energy prices.

60. It is not incumbent upon the Midwest ISO to establish in a section 205 filing that virtual supply offers cannot cause RSG charges, argues BP Energy. It adds that the parties appear to agree that, in most circumstances, virtual supply offers do not cause RSG costs. BP Energy argues that the Midwest ISO demonstrated, through testimony, that *ex post* imposition of physical costs or charges on financial traders will increase transaction risk, chill arbitrage activity and undermine market efficiency. BP Energy concludes that this showing satisfied the Midwest ISO's burden of going forward with evidence, and that, if the Commission was not persuaded, it should have accepted and suspended the proposed tariff change and set it for hearing.

²⁹ *PPL EnergyPlus, LLC v. New York Independent System Operator, Inc.*, 115 FERC ¶ 61,383 at P 29 (2006) ("It is unfair to market participants to assume that interpretations made by NYISO in its own publications . . . cannot be regarded as coming from a credible source.")

61. BP Energy avers that there is no evidence that imposing RSG charges on virtual supply offers will enhance convergence between day-ahead and real-time markets, improve market efficiency or lead to a more equitable allocation of system costs. To illustrate its point, BP Energy notes that since the RSG Order was issued, total virtual market activity and the volume of cleared virtual transactions have both decreased.

b. Discussion

62. A public utility's burden in a section 205 proceeding is to establish that the tariff change it proposes is just and reasonable.³⁰ The Commission found in the RSG Order the Midwest ISO did not satisfy this burden when it proposed to amend TEMT section 40.3.3.a.ii.³¹ We are not persuaded that we erred in doing so.

63. BP Energy's arguments confuse market efficiency with the justness and reasonableness of rates. The lower the cost of virtual supply transactions, the greater will be market participants' incentive to engage in such transactions; however, as discussed below, virtual supply transactions do increase costs associated with the RAC process. Under traditional principles of cost causation, it is reasonable for virtual supply transactions to bear their share of those costs.

5. Retroactive Ratemaking

a. Requests for Rehearing

64. If the Commission concludes that the RSG charge applies to virtual supply offers of market participants that do not withdraw energy in real time, then DC Energy argues that this finding would violate the doctrine against retroactive ratemaking. DC Energy notes that the Commission may not "surprise buyers, who paid the tariffed rate for a service, by telling them that they must now pay an increased price for past services."³²

³⁰ "All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission . . . shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful." 18 U.S.C. § 824d(a) (2000).

³¹ RSG Order at P 48-49.

³² DC Energy Request for Rehearing at 13 (citing *Sithe New England Holdings, LLC v. FERC*, 308 F.3d 71, 78 (D.C. Cir. 2002) (*Sithe*)).

65. Financial Marketers also argue the RSG Order violates the filed rate doctrine and constitutes impermissible retroactive ratemaking. They state that “retroactivity is not authorized when a new rule is substituted for an old rule that was reasonably clear so that the settled expectations of those who relied on the old rule are protected,”³³ and note that the Commission may not surprise buyers by increasing the price for past services.³⁴

66. Edison Mission argues that an interpretation of the TEMT that requires entities who did not actually withdraw energy to pay an RSG charge constitutes a new rule. To the extent the RSG Order adopted such an interpretation, Edison Mission argues that the new rule should be effective prospectively only.³⁵

67. DTE notes that in determining whether to require retroactive rate adjustments in the face of a tariff violation, the Commission “must balance equity considerations and determine what is just and reasonable”³⁶ DTE argues that here imposing retroactive rate adjustments is unnecessary and inequitable and would also “give offense to equity and good conscience.”³⁷

b. Discussion

68. We have clarified above that the RSG charge applies only to market participants that actually withdrew energy on a particular operating day. Accordingly, we will dismiss as moot the requests for rehearing of DC Energy, Financial Marketers and Edison Mission to the extent that they allege the Commission has engaged in retroactive ratemaking. While DTE’s arguments are couched in a discussion of retroactive ratemaking, they address instead equitable considerations discussed in the previous section and we do not need to revisit them here.

³³ Financial Marketers May 25 Request for Rehearing at 9 (citing *Wisvest-Connecticut, LLC v. ISO New England, Inc.*, 104 FERC ¶ 61,262 at P 7 (2003)).

³⁴ *Id.* at 9-10 (citing *Sithe*).

³⁵ Edison Mission Request for Rehearing at 27 (citing *Pub. Serv. Co. of Colo. v. FERC*, 91 F.3d 1478, 1488 (D.C. Cir. 1996)).

³⁶ DTE Request for Rehearing at 9 (citing *New York Independent System Operator, Inc.*, 110 FERC ¶ 61,244 at P 64 (2005)).

³⁷ *Id.* at 12 (citing *Towns of Concord v. FERC*, 955 F2d 67, 75-76 (D.C. Cir. 1991)).

C. Refunds

1. Requests for Rehearing

69. Duke and Edison Mission argue that the Commission has previously refused to order refunds when an ISO violated its tariff. They argue that the Commission did not order refunds after NYISO violated tariff provisions requiring the independent pricing of spinning and non-spinning reserves, because market participants had received notice that a least cost pricing methodology could be employed, despite language in other sections of the tariff suggesting otherwise.³⁸ They add that the Commission also found that NYISO's actions did not truly implicate the filed rate doctrine's concerns, because no generator obtained a windfall from the violation and requiring a refund would have run counter to the Commission's goals of establishing an efficient market mechanism for generator dispatch.³⁹

70. Citing *Bangor* and *Sithe*, Duke and Edison Mission also argue that the Commission usually does not order bid-based energy markets operated by RTOs to recalculate prices due to tariff violations, because market participants have relied on prior RTO actions. In *Bangor*, Edison Mission claims the Commission did not require a billing adjustment after ISO-NE acknowledged that the design of its dispatch software was inconsistent with the market rule, because retroactively changing prices when no notice was given by ISO-NE that such a disruption might occur would be fundamentally unfair to market participants and would do far more harm to wholesale electricity markets than was appropriate in light of the circumstances.⁴⁰ In *Sithe*, Duke and Edison Mission claim the Commission rejected ISO-NE's proposed administrative Installed Capability deficiency charge of \$0.17/kW-month but allowed the proposed rate, rather than the filed

³⁸ *New York Independent System Operator, Inc.*, 91 FERC ¶ 61,218 (2000), *reh'g denied*, 97 FERC ¶ 61,155 (2001), *reh'g denied*, 99 FERC ¶ 61,125 (2002), *petition for review granted in part, denied in part sub nom. Consol. Edison Co. of New York, Inc. v. FERC*, 347 F.3d 964 (D.C. Cir 2003), *order on remand*, 110 FERC ¶ 61,244, *reh'g denied*, 113 FERC ¶ 61,155 (2005), *appeal docketed sub nom. Consol. Edison Co. of New York, Inc. v. FERC*, No. 06-1025 (D.C. Cir. filed Jan. 13, 2006).

³⁹ 110 FERC ¶ 61,244 at P 66-70.

⁴⁰ *Bangor Hydro-Electric Co. v. ISO New England, Inc.*, 97 FERC ¶ 61,339 at 62,590 (2001) (*Bangor*).

rate, to apply from August 1, 2000 until April 1, 2001, because the ISO had notified market participants of the \$0.17 charge and market participants relied on the proposed charge.⁴¹

71. Duke argues that the Commission has a precedent of exercising great restraint before retroactively resettling market outcomes on a market-wide basis, allowing refunds in discrete cases involving incorrect invoices,⁴² simple data entry error, or only a few isolated parties.⁴³ Otter Tail contends that the Commission should not order retroactive RSG charge reallocation in this case, because it would violate the Commission's policy against retroactively applying changes in rate design and adjusting customer billing, where customers cannot modify their previous economic decisions.⁴⁴

72. Duke argues that the Commission is loathe to unsettle market results even in circumstances of clear tariff violations or of allegedly unjust and unreasonable rates, recognizing that such a remedy destroys market confidence, potentially inflicting far more damage than the original offense. Duke claims that the Commission approved a prospective bid cap to address prices resulting from flawed energy and ancillary services in NYISO markets. The Commission did not require retroactive bid caps or order refunds, finding that such remedies would create substantial uncertainty and undermine NYISO markets, overlook market participants' inability to revisit past economic decisions, require complex refund computations, and encourage needless litigation.⁴⁵

73. Duke argues that the Commission has applied its discretion and correctly refused any broad retroactive resettlement of market outcomes for periods before a lawful refund effective date. In *San Diego*, Duke claims, the Commission ordered broad resettlement of organized market clearing prices in refund proceedings arising out of the California

⁴¹ *ISO New England, Inc.*, 93 FERC ¶ 61,290 (2000), *reh'g granted in part and denied in part*, 94 FERC ¶ 61,237 (2001), *petition for review denied*, *Sithe New England Holdings, LLC v. FERC*, 308 F.3d 71 (D.C. Cir. 2002) (*Sithe*).

⁴² *See, e.g., IDACORP Energy L.P. v. FERC*, 433 F.3d 879, 882-83 (D.C. Cir. 2006), (*denying review in part of Cities of Anaheim v. California Independent System Operator*, 106 FERC ¶ 61,205 (2004) (*Cities of Anaheim*)).

⁴³ *See, e.g., Exelon Corp. v. PPL Electric Utilities Corp. and PJM Interconnection, LLC*, 114 FERC ¶ 61,298 at P 20 (2006), (*denying reh'g of 111 FERC ¶ 61,065 (2005)*).

⁴⁴ *Union Electric Co.*, 58 FERC ¶ 61,247 at 61,818, *order on reh'g*, 60 FERC ¶ 61,065 (1992); *Connecticut Light and Power Co.*, 15 FERC ¶ 61,056 at 61,124 (1981).

⁴⁵ *New York Independent System Operator, Inc.*, 92 FERC ¶ 61,073 at 61,306-07 (2000), *reh'g denied*, 97 FERC ¶ 61,154 (2001) (*NYISO*).

energy crisis, but only after a prospectively-established refund effective date.⁴⁶ Duke contends that in *San Diego* refunds were predicated on findings that sellers—not the California ISO—had violated the terms of their market-based authority or otherwise engaged in deceptive practices. Duke also argues that, in seller-specific proceedings examining whether individual sellers violated their tariff provisions, the remedy was disgorgement of profits, not market resettlement.⁴⁷

74. Edison Mission asserts that the Commission must evaluate whether a refund will advance the statutory purposes of the Federal Power Act,⁴⁸ by examining the “reasonable expectations” or “economic plans” of those affected by the violation of the filed-rate doctrine.⁴⁹ Ameren argues that the TEMT provided all market participants with notice regarding the calculation of RSG charges. Cargill, Edison Mission, Otter Tail, and Xcel contend that refunds are inequitable, because, based on their interpretation of section 40.3.3.a.ii, market participants conducted their business operations with the reasonable expectation that virtual transactions would be excluded from RSG charges, because they do not result in actual withdrawals of energy.

75. Constellation asserts that, because section 40.3.3.a.ii is indecipherable, market participants could not have received notice of how RSG charges were to be allocated, and could not have avoided uneconomic transactions. Duke argues that the ambiguous language of the TEMT supports differing interpretations, lending support to leaving past virtual transactions unaffected by RSG charges. DC Energy contends that the court found in *Koch* that the Commission’s decision to order refunds was an abuse of discretion, because the tariff was ambiguous.⁵⁰ Constellation, DC Energy, and Duke claim that market participants reasonably relied on Midwest ISO’s interpretation given in its Business Practice Manuals and subsequent administration of its TEMT, because of the ambiguous language in section 40.3.3.a.ii regarding virtual transactions.

76. Cargill and Xcel argue that the Commission recognizes that market participants must make decisions based on the “sufficient and accurate information” presented to

⁴⁶ *San Diego Gas & Electric Co.*, 93 FERC ¶ 61,121 at 61,370 (2000).

⁴⁷ *American Electric Power Service Corp.*, 103 FERC ¶ 61,345 at P 12 (2003).

⁴⁸ *Koch Gateway Pipeline Co. v. FERC*, 136 F.3d 810, 817 (D.C. Cir 1998) (*Koch*).

⁴⁹ *Towns of Concord, Norwood, & Wellesley v. FERC*, 955 F.2d 67, 75 (D.C. Cir. 1992) (*Towns of Concord*).

⁵⁰ *Koch*, 136 F.3d at 818.

them,⁵¹ and it would be inequitable to penalize market participants for reasonably relying in good faith on information supplied to them by the Midwest ISO's Business Practice Manuals and staff. While acknowledging that the Business Practice Manuals do not take precedence over the TEMT, several commenters, including Cargill, Constellation, Otter Tail, and Xcel, contend that the Business Practice Manuals exempt virtual offers from real-time RSG liability and were the best resource available to interpret the TEMT, because they represent Midwest ISO's and the collective stakeholder interpretation of 40.3.3.a.ii. Duke asserts that Midwest ISO's representations constituted notice to market participants that RSG charges were not applicable to virtual transactions.

77. Edison Mission argues that one of the equitable factors the Commission must consider is whether the tariff violation was made in bad faith.⁵² Several commenters state that market participants reasonably relied in good faith on representations that virtual offers are excluded from real-time RSG liability made by Midwest ISO via phone calls, training seminars, or other means, and should not be held culpable or penalized for Midwest ISO's tariff violation. Cargill contends that penalizing market participants for relying on the Midwest ISO would undermine faith in the market.

78. Duke, Hoosier, and Constellation assert that the Commission should not penalize market participants, because the Midwest ISO is responsible for the tariff violations, and market participants had no control over Midwest ISO's implementation of the TEMT. Duke argues that ordering refunds would cause the entire cost of Midwest ISO's tariff violation to be borne unfairly by market participants who did nothing wrong.

79. Citing *Gulf*⁵³ and *Koch*,⁵⁴ Edison Mission asserts that the level of potential refunds in this case -- \$250 million, as estimated by Midwest ISO⁵⁵ -- is inflated, because market participants would have adjusted their bids if they had known that the RSG charge applied. Constellation, Hoosier, and Otter Tail argue that refunds are inequitable, because market participants engaged in virtual transactions with the expectation that virtual supply offers would not be included in the allocation of RSG and may have

⁵¹ *Southern Natural Gas Co.*, 79 FERC ¶ 61,280 at 62,209 (1997).

⁵² *Towns of Concord*, 955 F.2d at 76; *Borough of Ellwood City*, 583 F.2d at 648; *Koch*, 136 F.3d at 818-19; *Minnesota Power and Light Co. v. FERC*, 852 F.2d 1070, 1073 (8th Cir. 1988) (*Minnesota Power*); *Central Illinois Public Service Co.*, 941 F.2d 622, 630 (7th Cir. 1991).

⁵³ *Gulf Power Co. v. FERC*, 983 F.2d 1095, 1098 (D.C. Cir. 1993) (*Gulf*).

⁵⁴ *Koch*, 136 F.3d at 818.

⁵⁵ Midwest ISO Motion for Stay at 10.

altered their volume of virtual transactions if they had known that RSG charges would be assessed. Cargill contends that the Commission should have only acted prospectively, because market participants are now subject to unanticipated costs, which undermines faith in the market. Constellation, Duke, and DC Energy assert that customers are unable to revisit previous economic decisions to reflect unexpected RSG charges,⁵⁶ unfairly turning many virtual supply offers into uneconomic transactions.

80. DC Energy, Duke, and Edison Mission argue that the Commission must consider whether Midwest ISO's failure to follow its tariff resulted in an inequitable windfall.⁵⁷ Edison Mission asserts that market participants engaging in virtual transactions did not receive a windfall, because they structured their transactions based on the market rules presented to them by Midwest ISO. Also citing *Koch*, DC Energy contends that market participants did not receive a windfall in this case, because many market participants would have changed their bidding behavior if they had been given notice that the RSG charges would apply to them. Hoosier argues that there is no offense to equity or good conscience if the Commission does not order refunds, because no parties have been unjustly enriched, the charges imposed have not been anti-competitive or discriminatory, and the Midwest ISO has not been over-compensated for expenses incurred in making guaranteed payments to generation resources.

81. Ameren asserts that, consistent with the filed rate doctrine, Midwest ISO must collect necessary charges from market participants who engaged in virtual transactions and received a windfall through the avoidance of RSG charges in order to provide refunds to make whole those market participants who were unjustly harmed by paying a disproportionate share of RSG charges.

82. Several commenters claim that the Commission cannot equitably order refunds if the end result of a tariff violation yields net benefits to ratepayers.⁵⁸ Constellation, DC Energy, and Edison Mission contend that reallocating RSG costs would be unjust and unreasonable, because virtual transactions provide important system-wide benefits to Midwest ISO markets and electric consumers, including liquidity and price convergence

⁵⁶ *NYISO*, 92 FERC at 61,307.

⁵⁷ *Koch*, 136 F.3d at 818; *Gulf*, 983 F.2d at 1100.

⁵⁸ *Gulf*, 983 F.2d at 1100; *Minnesota Power*, 952 F.2d at 1073-1074; *Louisiana Public Service Commission, v. FERC*, 174 F.3d 218, 225 (1999) (*Louisiana Public Service Commission*) (explaining a quotation from *Entergy Services*, 80 FERC ¶ 61,197 at 61,787 (1997)).

between the Day-Ahead and Real-Time Markets. Edison Mission specifically asserts that the avoidance of RSG charges provided system-wide benefits while encouraging the virtual supply market.

83. Edison Mission contends that, consistent with *Gulf*⁵⁹ and *Koch*,⁶⁰ the Commission must consider whether a refund is a proportionate remedy to the error Midwest ISO committed. Edison Mission argues that the level of potential refunds in this case - \$250 million, as estimated by Midwest ISO⁶¹ -- is inequitable, because it is dramatically disproportionate to the nature of the violation. Constellation argues that reallocating RSG costs to virtual supply offers would impose severe economic harm to market participants who engaged in virtual transactions. Otter Tail similarly contends that the assessment of RSG charges with respect to virtual supply imposes a substantial financial burden. However, Ameren claims that failing to require full refunds in this case because of the large dollar impact, while requiring refunds if the amount of the refunds is small in other cases, is illogical and contrary to the requirements of the filed rate doctrine.⁶²

84. Ameren also contends that refunds are an appropriate remedy, because they will make whole market participants who were harmed by the Midwest ISO's failure to follow its TEMT, and correctly allocate RSG charges in a manner that places all market participants in the same position they would have been had the Midwest ISO done as its tariff required.

85. Hoosier argues that refunds will not make injured parties whole, but will instead create random winners and losers, depending on choices made based on a mistaken interpretation of the TEMT. Hoosier claims that retroactive resettlement cannot recreate the results that would have been obtained if virtual offers had been allocated RSG charges, because market participants cannot retroactively change their market behavior.⁶³

86. Duke contends that market resettlement is an inequitable remedy, because resettlement will not reflect the reduced convergence between day-ahead and real-time prices that may have occurred, because fewer virtual transactions may have happened.

⁵⁹ *Gulf*, 983 F.2d at 1098.

⁶⁰ *Koch*, 136 F.2d at 818.

⁶¹ Midwest ISO Motion for Stay at 10.

⁶² 16 U.S.C. § 824d; *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 (1981).

⁶³ *California Independent System Operator Corp.*, 84 FERC ¶ 61,121 at 61,664 (1998).

Also, resettlement will not reflect that the value of FTRs may have been different, because, if day-ahead prices would have been altered, congestion between various locations would also have been different.

87. Several commenters assert that the Commission should consider whether retroactive resettlement and refunds are contrary to the Commission's regulatory intent when determining the appropriate remedy. Edison Mission argues that charging virtual supply transactions for RSG interferes with an efficient energy market. Hoosier asserts that ordering refunds would demonstrate to market participants that they cannot depend on the finality of prices, thereby interfering with the efficient functioning of the virtual market. Xcel contends that retroactive application of real-time RSG liability creates tremendous market uncertainty, because it unpredictably changes the evaluation of risk and market status of market participants, thereby undermining faith in the market and driving away market participants. Constellation and Duke claim that reallocating RSG costs risks destroying the economics of important virtual transactions, as demonstrated by the reduction in virtual transactions following the RSG Order.

88. Ameren argues that the Commission is compelled by the filed rate doctrine to provide refunds and should reject arguments claiming that the burden of providing refunds justifies allowing a public utility to avoid paying refunds that are due.⁶⁴

89. Constellation contends that refunds are not just and reasonable because of the complexity and costs associated with resettling and the possibility of inhibiting Midwest ISO's ability to perform other essential tasks.⁶⁵ Constellation also asserts that resettling the market would impose costs to market participants for monitoring and influencing the outcome, and would likely result in additional costs to Midwest ISO to the extent that affected parties pursue damages. Duke cites *Cities of Anaheim* to argue that the Commission frequently allows retroactive refunds involving only "*de minimis*" amounts.⁶⁶

90. Midwest ISO requests that the Commission exercise its discretionary refund authority to not require the Midwest ISO to pay interest on refunds. Midwest ISO argues that the equities of this case favor non-imposition of interest, because the Midwest ISO committed a good faith error. Unlike proposed tariff provisions conditionally

⁶⁴ See *Midwest Independent Transmission System Operator, Inc.*, 112 FERC ¶ 61,105 at P 11 (2005).

⁶⁵ *Puget Sound Energy, Inc.*, 103 FERC ¶ 61,348 at P 53 (2003); *Williams Natural Gas Co.*, 86 FERC ¶ 61,098 at 61,364 (1999).

⁶⁶ *Cities of Anaheim*, 106 FERC ¶ 61,205 at P 19 (2004).

implemented subject to refund, Midwest ISO contends that, in this case, refunds should be regarded as erroneous billings that are settled and resettled in due course and lack any accompanying obligation to pay interest. Because it is a non-profit entity and any interest on refunds would need to be unfairly uplifted to other market participants, Midwest ISO contends that it should not be required to pay interest. Midwest ISO asserts that calculating appropriate interest payments would be extremely complex, difficult to accurately determine, and possibly more costly to implement than the total amount of interest to be paid. Midwest ISO also requests that the Commission clarify the applicable interest rate on any refund payments.

91. WPS and Strategic argue that, because the Midwest ISO will need to devote significant resources to the re-billing process, Midwest ISO should be permitted the flexibility to design alternative methods to carry-out Commission refund requirements, including collecting amounts to be refunded through an uplift-type charge or similar mechanism. Ameren requests clarification that Midwest ISO must provide refunds and that the Midwest ISO is entitled to collect the necessary amounts from the market participants who benefited from its failure to follow the TEMT.

2. Discussion

92. We will exercise our discretion and we will grant rehearing of our decision to require the Midwest ISO to provide refunds to customers.

93. The Commission enjoys broad remedial discretion, "even in the face of an undoubted statutory violation, unless the statute itself mandates a particular remedy."⁶⁷ As courts have noted many times, "the breadth of agency discretion is . . . at [its] zenith when the action assailed relates primarily not to the issue of ascertaining whether conduct violates the statute, or regulations, but rather to the fashioning of . . . remedies."⁶⁸

94. In *Towns of Concord*, the court stated that "customer refunds are a form of equitable relief, akin to restitution, and the general rule is that agencies should order restitution only when money was obtained in such circumstances that the possessor will

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

⁶⁸ *Id.* at 1043 (citing *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967)); *Louisiana Public Service Commission*, 174 F.3d at 225.

give offense to equity and good conscience if permitted to retain it."⁶⁹ In *Louisiana Public Service Commission*, the court stated that a refund is not appropriate if the end result of a tariff violation is not "unjust, unreasonable, or unduly discriminatory."⁷⁰ Here, market participants relied upon statements made by the Midwest ISO in its Business Practice Manuals that virtual transactions would not be allocated RSG charges. While we recognize that the Midwest ISO's Business Practice Manuals do not take precedence over the TEMT, we also believe that it is unfair to market participants to assume that interpretations made by the Midwest ISO "in its own publications...cannot be regarded as coming from a credible source."⁷¹ Midwest ISO market participants engaged in virtual transactions with the reasonable expectation that virtual transactions would not be allocated RSG charges. As such, there is nothing in the record to suggest that the avoidance of RSG charges by the Midwest ISO market participants resulted in an inequitable windfall for them or for the Midwest ISO.⁷²

95. Moreover, the Commission has declined refunds in instances when refunds "would create substantial uncertainty in the . . . markets and would undermine confidence in them," and when "customers cannot effectively revisit their economic decisions."⁷³ We find that ordering refunds would create substantial uncertainty and undermine faith in the Midwest ISO's markets. Ordering refunds, thus potentially rendering previous virtual transactions back to April 2005 uneconomic, would also be an unfair and inequitable remedy, because market participants cannot revisit economic decisions (particularly given that they were made on the basis of the Midwest ISO's Business Practice Manuals). While we take seriously concerns that some market participants may have paid more than their share of RSG charges, we find that it is nevertheless appropriate to decline refunds. However, we will prospectively allocate RSG charges to virtual transactions consistent with the TEMT, as described elsewhere in this order, to prevent future inequity.

⁶⁹ *Towns of Concord*, 955 F.2d at 75.

⁷⁰ *Louisiana Public Service Commission*, 174 F.3d at 223 (court upheld Commission's discretion not to order refunds for a tariff violation in a case in which "the Commission thought it inequitable to order a refund when the predicate tariff violation had conferred benefits on the system").

⁷¹ *PPL EnergyPlus, LLC v. New York Independent System Operator, Inc.*, 115 FERC ¶ 61,383 at P 29 (2006) (*PPL Energy*).

⁷² See *Koch Gateway Pipeline Co. v. FERC*, 136 F.3d 810 (D.C. Cir. 1998).

⁷³ *NYISO*, 92 FERC at 61,307.

96. However, we also recognize that, when publishing informational documents for its market participants, the Midwest ISO “has a responsibility to ensure that these documents are consistent with the Services Tariff and procedures.”⁷⁴ Future disregard of the filed rate may warrant appropriate remedies, including penalties.

D. Prospective Treatment Of Virtual Supply Offers

97. In its October 25 filing, the Midwest ISO proposed to not assess RSG charges to virtual supply offers, since they do not involve actual energy deliveries and thus should not be considered as committable resources in the RAC process. The RSG Order found that virtual supply can affect RSG costs and therefore rejected the Midwest ISO proposal to prospectively eliminate entirely virtual supply transactions from the calculation of the RSG charge.⁷⁵

1. Requests for Rehearing

98. Edison Mission faults the RSG Order for basing its finding on a circumstance that amounts to a supposition without substantial evidence bearing on whether the example developed by Ameren and cited in the RSG Order⁷⁶ has occurred, or could be expected to occur, and for not providing a reasoned explanation connecting cost causation to an amount of cost causation or an analysis of which virtual suppliers cause RSG costs. Financial Marketers agree that the RSG Order did not identify evidence that virtual supply causes any real costs to be incurred. Strategic Energy states that virtual offers do not increase RSG costs because they do not result in the dispatch of out of merit generation that must be compensated via the RSG charge. DC Energy contends that the affidavit of Dr. Andrew Stevens disproves the Ameren analysis and therefore there is no basis to conclude that virtual supply offers cause an increase in RSG costs. Similarly, Duke states that since the Commission did not address the criticisms of the Ameren analysis, there is a material factual dispute about whether virtual offers can cause RSG charges to be incurred. Cargill and Xcel assert that while virtual offers may cause RAC costs to be incurred, virtual offers lower overall market costs because they prevent more expensive physical generation resources from setting the clearing price for the Day-Ahead market. Cargill claims this ability to lower costs is unique to virtual offers and therefore should result in separate rate treatment for virtual transactions.

⁷⁴ *PPL Energy*, 115 FERC ¶ 61,383 at P 29.

⁷⁵ RSG Order at P 48.

⁷⁶ RSG Order at P 38.

99. Edison Mission cites to the affidavit of Dr. William Hogan that claims only a portion of RSG costs could be attributable to the effect of virtual supply offers and that the direction of the impact is uncertain. Dr. Hogan concludes that virtual supply offers have a limited or no cost causation impact, based on his analysis of market models, and therefore there is no justification for an assignment of RSG costs to all virtual supply offers.

100. DC Energy also claims the RSG Order was not the result of reasoned decision-making since it did not address the negative impacts of assessing RSG charges on virtual supply offers, as detailed in the affidavit of Dr. McNamara and Dr. Andrew Stevens. In his affidavit submitted by Edison Mission, Dr. Hogan further asserts that if virtual supply bids are charged RSG costs, virtual supply bidding will decrease substantially since these bids are highly elastic and that RSG costs will likely move from the real-time RSG charge to the day-ahead charge. Loss of virtual transactions could result in less price convergence, decreased market liquidity, increased volatility and therefore greater risk and less hedging, according to Dr. Hogan. A number of commenters⁷⁷ note the same negative impacts and point to the decrease in virtual market activity and price divergences between day-ahead and real-time markets since the RSG Order as evidence of harm to virtual markets.

101. BP makes a similar point, claiming the Midwest ISO met its FPA Section 205 burden by showing its proposal was just and reasonable since the proposal balanced multiple factors to reach a zone of reasonableness.⁷⁸ Inasmuch as the Midwest ISO provided expert testimony that the imposition of physical costs on financial traders will significantly increase transaction risk, chill arbitrage activity and thereby undermine market efficiency, it met its evidentiary burden, according to BP.⁷⁹ Otter Tail argues the RSG Order should have given reasoned consideration to all factual and policy issues that may affect cost allocation. Similarly, Strategic Energy and WPS argue that the Commission must gather the facts and evidence from all sides of the issues in order to make a reasoned determination of the proper components of the RSG charges. Strategic

⁷⁷ DC Energy, Financial Marketers, Xcel, Constellation, Strategic Energy, WPS, Otter Tail, the Midwest ISO and Duke. The Midwest ISO also requests a technical conference to determine the impact of assigning RSG costs to virtual transactions.

⁷⁸ *Permian Basin Area Rate Cases*, 390 U.S. 747, 770 (1968).

⁷⁹ Otter Tail agrees, noting that court precedent only requires the utility proposal to be reasonable standing on its own. *Cities of Bethany, et al. v. FERC*, 727 F.2d 1131, 1136 (D.C. Cir. 1984).

Energy claims the Commission erred by not establishing a FPA section 206 investigation. Similarly, Edison Mission claims the RSG Order ignored the potential effects of its finding on the efficiency of the markets and therefore overall consumer welfare.

102. Duke contends the harm caused by losing the benefits of virtual transactions outweighs the claim that some virtual supply transactions could theoretically trigger the RSG charge. Similarly, Otter Tail claims the appropriate standard, adopted by the Commission in ISO New England and the California ISO, is whether the benefits that virtual transactions provide the market would be sufficiently weakened by the allocation of RSG charges to virtual transactions to warrant exempting them, in whole or in part, from RSG charges. Ameren disagrees, stating a discriminatory allocation of costs places undue risks on physical suppliers by unfairly relieving virtual players of risks and no allocation of costs creates perverse incentives and gaming opportunities.

103. Edison Mission asserts the RSG Order erred by reversing the Commission's earlier finding that it is reasonable to assess the RSG charge only to load and not to virtual suppliers, as has been done in other power pools.⁸⁰ Cargill, Xcel and Otter Tail fault the RSG Order for not following Commission precedent that recognized virtual transactions provide important benefits to the market and application of unduly burdensome market costs may jeopardize those benefits and therefore justifies different rate treatment.⁸¹ DC Energy cites to Commission precedent not assigning costs to virtual transactions⁸² and asks for the same treatment from the Midwest ISO.

104. Financial Marketers take exception to the equal weight assigned to virtual supply in the cost allocation of RSG costs, noting that this allocation conflicts with Commission precedent regarding cost allocation to virtual transactions.⁸³ Financial Marketers claim this departure from past precedent is unlawful, absent adequate explanation. Financial Marketers assert that the Commission can not apply one rule for virtual transactions in

⁸⁰ TEMT II Order at P 587.

⁸¹ *ISO New England, Inc.*, 113 FERC ¶ 61,055 at P 30 and 33 (2005).

⁸² *ISO New England, Inc.*, 113 FERC ¶ 61,341 at P 43-44 (2005) (“...Virtual traders will provide these valuable market functions only when their participation in the market can be expected to be profitable, and that the application of the same charges to virtual transactions and to physical transactions would seriously limit or eliminate this contribution by imposing significant costs on financial trades...”).

⁸³ *ISO New England Inc.*, 110 FERC ¶ 61,250 (2005).

the Midwest ISO and another in other ISOs. Also, Financial Marketers contend the RSG Order is contrary to Commission precedent that found virtual transactions impose no additional costs in the real-time market.⁸⁴ Financial Marketers also claim the RSG Order ignores Commission precedent recognizing that the imposition of costs on virtual transactions will cause decreases in trading, thereby reducing their contribution to fixed cost recovery and increasing costs to other market participants.⁸⁵

105. Constellation cites to the same precedent and argues that the ISO-NE and Midwest ISO charges cannot be distinguished because they are both significant and volatile, thereby deterring virtual transactions. According to Constellation, since the Commission found it just and reasonable to exempt virtual transactions from similar uplift charges in ISO-NE, it must find the Midwest ISO's proposal to likewise be just and reasonable. Constellation argues that it would be arbitrary and capricious decision-making for the Commission to rule otherwise. Constellation further points out that virtual transactions will be discouraged whenever the potential difference between day-ahead and real-time clearing prices is not large enough to cover possible RSG charges.

106. Duke asserts that if the Commission does not grant rehearing on this issue that it should allow virtual offers or bids to be offset by their respective resources or physical loads at the same node in the same time interval and by the same market participant and only apply the RSG charge to the net load.

107. Otter Tail requests that the Commission clarify that in the event RSG charges are assessed, they should be assessed only against the amount by which a market participant's virtual supply offers exceed its virtual bids, since such an interpretation is consistent with the language of proposed section 40.3.3.a.ii and cost causation principles since virtual supply offers can only result in increased RAC costs to the extent they are not offset by virtual bids, according to Otter Tail. Strategic Energy and WPS argue that application of the RSG charge should be based on the net amount of virtual supply offers and virtual demand bids in the event RSG costs are assigned to virtual transactions.

2. Commission Determination

108. The premise of the RSG Order requirement to assign RSG costs to virtual supply offers prospectively is that virtual supply offers accepted in the day-ahead market can require the commitment of physical resources in the RAC process, and due to the RAC

⁸⁴ *ISO New England Inc.*, 111 FERC ¶ 61,442 (2005).

⁸⁵ *ISO New England, Inc.*, 113 FERC ¶ 61,055(2005).

rules, this may cause RSG costs to be incurred. We applied principles of cost causation to require that RSG costs caused by virtual suppliers be charged to virtual suppliers. Cost causation is traditionally the basis for ratemaking, and disregard of cost causation can result in unjust and unreasonable rates.⁸⁶ Accordingly, our RSG Order properly evaluated whether virtual supply offers cause RSG settlement costs and assigned them such costs when they do. We reaffirm both determinations against, on the one hand, arguments that virtual suppliers do not cause RSG costs, and on the other hand, arguments that they do cause such costs but that they provide market benefits such that the principle of cost causation should be abandoned.

109. We turn first to the arguments over examples that show how virtual suppliers can cause RAC costs (based on the RAC rules currently used by the Midwest ISO) and hence RSG costs. Inasmuch as the Midwest ISO acknowledged that the Ameren example was an accurate analysis of the RAC process,⁸⁷ the Commission's reliance on that illustration as a basic example of the impact of virtual supply offers on RAC and RSG costs was appropriate and therefore corroborates the conclusion of the RSG Order. In his testimony, Dr. Hogan also appears to conclude that in markets with RAC rules similar to the Midwest ISO, virtual suppliers could cause RSG costs (although, as discussed below, he argues that the determination of those costs will be difficult).

110. We therefore disagree with the argument made by a number of parties that the Ameren example does not reflect actual market outcomes and that virtual transactions typically do not result in out of merit unit commitment through the RAC and real-time market. Our reference to the Ameren example in the RSG Order was not predicated on it being a fully articulated representation of MISO market rules and settlements, but simply to show that by displacing day-ahead supply offers by physical generators, a virtual supplier could affect RAC costs and real-time RSG costs. (However, as we discuss below, the process of determining cost causation will be complicated, requiring an empirical analysis of the impact of accepted virtual supply offers on market settlements).

111. We clarify for Edison Mission that virtual supply offers can cause RAC and RSG costs whether they are made by financial trader market participants or other market

⁸⁶ *Cincinnati Gas & Electric Co.*, 71 FERC ¶ 61,380 at 62,478 n.30 (1995), citing *Town of Norwood*, 962 F.2d at 25 and *Union Electric Co v. FERC*, 890 F.2d 1193, 1198 (D.C. Cir. 1989).

⁸⁷ See Midwest ISO's Answer at 5 (December 5, 2005).

participants with physical load and generation. We find no basis to differentiate among virtual supply offers since any accepted virtual supply offer could result in physical unit commitment to meet the physical needs of the real-time energy market.

112. Our review of Dr. Hogan's analysis does not change our finding. We interpret Dr. Hogan's findings to suggest that, in the case where virtual offers and bids exist in the day-ahead market and there is subsequently what he calls "partial" RAC commitment, namely a RAC commitment that minimizes start-up and no-load offer prices to meet the difference between day-ahead bid-in load and the ISO's next day load forecast (similar to the RAC procedure in the Midwest ISO), the effect of the virtual offers should be to reduce the total cost of meeting load but also to shift RSG costs (that would otherwise take place in the day-ahead market) to the real-time market. Cargill and Xcel make similar arguments. We agree that in an efficient market with well-designed rules, virtual suppliers should have this effect and that this result contributes to market efficiency. For this reason, we support the participation of virtual suppliers in the day-ahead market. However, we do not agree that the presence of net benefits due to the participation of virtual suppliers should relieve them of responsibility for costs that they cause in the markets. Those costs are paid by others and we are concerned that in the absence of appropriate RSG cost causation rules, there would be inappropriate incentives for efficient offers by virtual suppliers. We discuss this in more detail below.

113. Moreover, we do not agree with Dr. Hogan, and empirical evidence would seem to support us, that "any charge assigned to virtual supply would reduce the offers to zero;" Dr. Hogan's arguments and their implications for cost causation are addressed below. In any case, it is not clear whether this conclusion of Dr. Hogan's follows from the assumptions stated in his analysis or is intended to apply generally. Regardless, we consider the volume of virtual activity since the RSG Order to be evidence that RSG costs can be assessed on virtual offers without dramatically reducing virtual transactions. We note that the Midwest ISO's analysis indicates that the levels of virtual activity since the issuance of the RSG Order continue to be robust.⁸⁸ We also note that the PJM market assigns RSG-type costs to virtual offers and no party has made the case that the PJM market operates inefficiently as a result.

114. We take exception to the claim that the RSG Order was not reasoned decision-making. As we make clear above, the RSG Order considered the Midwest ISO proposal

⁸⁸ The Midwest ISO's analysis indicates that, even at its lowest volume, the virtual market represented over 150,000 MWhs/day of activity, and characterized that level as robust. *See* RSG Order Impact On Virtual Market – Report to Midwest ISO Market Subcommittee, Midwest ISO, (July 11, 2006), (Midwest ISO Documents).

to be deficient since it ignored cost causation. Therefore, we consider our decision in that order to be reasoned, and reflective of the facts available to the Commission. As we stated in the RSG Order, we do not consider the premise that virtual transactions provide benefits to be pertinent to the determination of cost causation, but rather may have bearing on the ultimate cost allocation the Commission approves.⁸⁹ And it is only when the Commission has a cost allocation proposal before it that it can make a determination whether that proposal is unduly discriminatory.

115. Dr. Hogan argues for a cost causation principle that is based on “total costs and benefits” rather than “the partial analysis of the direct effect on a particular settlement component.” He argues that to minimize distortions relative to the efficient market solution, RSG costs should be assigned to the most inelastic, or price insensitive, bids or offers in the market. This would be because the assignment of uplift costs to such bids or offers would change their behavior less than assignment of such costs to more price sensitive participants. Since he characterizes virtual suppliers’ offers as highly elastic or price sensitive, it follows that they not be assigned RSG costs. Other parties also make the argument that assessing RSG charges has negative impacts on virtual trading and on the market since virtual trading is highly elastic.

116. We agree that assigning RSG costs to virtual suppliers could induce them to change their behavior and could even cause some virtual suppliers to leave the market. However, Dr. Hogan does not address market distortions that could result from not assigning virtual suppliers RSG costs that result from their behavior. In particular, not assigning any RSG costs to virtual suppliers could provide incentives for them to engage in offer behavior that decreases the net benefits of their market activity at no cost to themselves, namely by shifting RSG costs to others. Having some incentive to do so and actually doing so are two different matters, and as noted above since the RSG Order the virtual market has remained relatively robust. We agree with Dr. Hogan that virtual suppliers that also serve load are more likely to have an incentive to shift RSG costs to others, but we believe that virtual suppliers that do not serve load are also able to do so. We thus prefer to follow the traditional ratemaking principle of cost causation by assigning RSG costs that are derived from offers and bids (as opposed to, *e.g.*, forecast error) to those parties that cause them and to ensure that the market equilibrium that follows from this rule minimizes the incentives to shift costs using virtual offers and bids.

117. To ensure that cost responsibility follows cost incurrence, as required by traditional rate-making principles, we require the Midwest ISO to propose a charge that assesses RSG costs to virtual supply offers based on the RSG costs they cause. To

⁸⁹ RSG Order at P 48.

develop this charge, the Midwest ISO should identify those costs caused by virtual supply offers, as determined by an analysis of the energy market with virtual supply offers compared to the energy market without virtual supply offers. Specifically, the Midwest ISO proposal should calculate the RAC and real-time start-up, no-load and production costs not recovered by real-time revenues for each day -- in one case with virtual supply offers and another case assuming no virtual supply offers. As noted by Dr. Hogan, it is important to separate the RSG costs that might be due to virtual supply from those due to other factors, in particular forecast errors by the ISO. The Midwest ISO thus should adjust the real-time load so that it is equal to the day-ahead load, thereby avoiding attribution of higher cost units to virtual supply offers when they in fact were caused by changes in load forecasts. Once the costs have been identified, the Midwest ISO should divide the costs attributed to virtual supply offers, *i.e.*, the difference between the case with virtual supply offers compared to the case without virtual supply offers, by the virtual supply offer MW thereby yielding a \$/MW charge.

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

119. The Midwest ISO will be required to submit a compliance filing within 60 days of the date of this order. Since we are requiring an analysis, a technical conference on allocation, as recommended by the Midwest ISO, would be premature at this time. We will re-evaluate the need for a technical conference following the receipt of the analysis and comments.

120. The Commission's decisions in ISO-NE on RMR costs do not bar us from arriving at a different decision here. Those cases addressed different circumstances, namely very large cost allocations to virtual transactions and the proven harm these allocations caused to the viability of virtual trading and the energy market.⁹⁰ Here, there is no allocation of settlement costs to virtual transactions and we are yet to establish a cost allocation, let alone evaluate its impact on the market. Furthermore, the ISO-NE decisions do not represent the only reasonable answers, inasmuch as the Commission has accepted tariffs for PJM that include an allocation of RSG-type costs to virtual transactions

⁹⁰ *ISO New England Inc.*, 113 FERC ¶ 61,055 at P 36 (2005) (“...there was evidence that the application of the high \$0.584 per-bid charge to arbitrageurs would reduce their participation in the market...”; “...as-filed TU charge had caused approximately 80 percent of all high-volume financial trading in New England to cease.”)

121. Contrary to Edison Mission's assertion, the TEMT II Order did not find it reasonable to assess the RSG charge only to load. That order simply referenced RSG allocations in other energy markets and made no determination of their reasonableness.

122. We disagree with the conclusion of commenters that RSG costs should only apply to virtual supply offers net of virtual bids. As our example above illustrates, virtual supply offers result in unit commitment and the incurrence of RSG costs irrespective of virtual bid activity. With respect to the tariff revisions proposed by the Midwest ISO for RSG charges,⁹¹ we clarify that those provisions will not go into effect until we accept an appropriate allocation of costs to virtual supply offers.

a. Allocation of RSG Charges to Market Participants

123. The RSG Order clarified that per the terms of the TEMT, the assignment of RSG costs should be to market participants that withdraw energy in the real-time energy market.⁹²

124. The Midwest ISO interpreted the currently effective section 40.3.3.a.ii to mean that imports from neighboring regions are withdrawals of energy and therefore should be included in the allocation of RSG charges. The RSG Order disagreed, stating that the phrase "actually withdraws Energy" the TEMT refers to the withdrawal of energy at nodes or sink points and ordered refunds with interest for amounts charged to imports from the start of the energy markets.⁹³

125. Prospectively the Midwest ISO proposed to clarify that four types of market participants should be subject to RSG charges, as follows: (1) those serving load within the Midwest ISO region; (2) those importing energy into the Midwest ISO region; (3) those exporting energy outside the region; and (4) market participants that inject energy.⁹⁴ The Midwest ISO explains that each of these four categories of market participant transactions are responsible for causing RSG costs and, thus, should bear a proportionate share of the real-time RSG payments made to generation resources. The RSG Order accepted the Midwest ISO proposal, conditional upon revising the calculation

⁹¹ TEMT, Volume No. 1, Superseding First Revised Sheet No. 576, Superseding Second Revised Sheet No. 577, 578, and Original Sheet No. 578A.

⁹² RSG Order at P 26.

⁹³ RSG Order at P 77.

⁹⁴ Midwest ISO October 27, 2005 filing at 4.

to eliminate double-counting of reductions of real-time injections and replacement of those amounts with imports, and the filing of a new tariff proposal that includes virtual supply offers in the RSG charge calculation.⁹⁵

126. The RSG Order also required the Midwest ISO to add the term “day-ahead” before internal bilateral transactions to clarify which bilateral transactions are affected by this section and to continue assessing the RSG charge on a daily basis, rather than an hourly basis, thereby keeping the charge as low as possible and avoiding problems with hourly charges such as occurred in the ISO-NE market.⁹⁶

1. Requests For Rehearing

127. Constellation argues that refunds are not possible since the currently effective provisions of the TEMT in section 40.3.3 are unclear on how costs would be allocated and include words and concepts that are not in the text and therefore not approved by the Commission. Constellation contends there is no definition of virtual supply in the TEMT, nor does section 40.3.3 provide clarity on which virtual supply offers would be allocated costs. Constellation also claims that provisions in section 40.3.3.a.ii are internally inconsistent and would lead to significant over-recovery of RSG costs. Constellation states that it does not make sense to treat similarly situated virtual traders differently solely on the fact that some operate wholly in the financial markets and some operate in both markets.

128. Duke argues the Commission erred in the RSG Order when it did not interpret imports in the currently effective tariff to mean withdrawals of energy and therefore should be assigned RSG costs.⁹⁷ Duke contends imports are not just withdrawals from neighboring regions, as the Commission concluded, but can be the equivalent of a physical withdrawal of energy or an export. Duke further contends that imports can cause and exacerbate RSG costs. Duke states the Commission is inconsistent when it bases its decisions on virtual supply offers on cost causation, yet ignores cost causation impacts of imports.

129. Ameren requests the Commission to clarify that the obligation to pay RSG charges in the currently effective tariffs applies to all market participants that cause RSG charges

⁹⁵ RSG Order at P 84 - 85.

⁹⁶ RSG Order at P 87.

⁹⁷ RSG Order at P 77.

that increase real-time production costs,⁹⁸ not just market participants that physically withdraw energy in real-time markets, in order to make the provision consistent with cost causation principles. Ameren notes that the definition of energy in the TEMT encompasses virtual bids and offers and therefore the withdrawal of energy is not limited to physical withdrawal. Ameren contends that the derivation of the charge (based on a market participant's total load purchased in the real-time market, virtual supply offers and resource uninstructed deviation quantities) applies regardless of whether the participant physically withdraws energy. According to Ameren, failure to allocate RSG charges on the same basis used to develop the charge will result in a mismatch for rate design purposes between the determination of the charge and the allocation of the charge. Ameren further argues that allocation of the RSG charge to only market participants withdrawing physical energy leads to a revenue shortfall that must be uplifted to the whole market or to one group of market participants that subsidizes others and means the charge will not be assigned to purely financial market participants, resulting in undue discrimination.

130. Hoosier requests the Commission to clarify that withdrawal refers to the net demand for energy at a node, such that a virtual supply offer in the day-ahead market and a buying back of an identical amount at the same node in real-time would result in a zero net virtual supply offer and therefore no cost allocation to the virtual supply offer. Indiana Municipal makes a similar argument, stating that its transactions are exempt from RSG charges because they did not result in a withdrawal of energy in real time. Such a clarification would be consistent with the practice in PJM and the conclusion in the RSG Order that the RSG charge should be based on a market participant's net impact on the unit commitment process, according to Hoosier and Indiana Municipal. Hoosier also requests the Commission to clarify that the TEMT definition of energy encompasses virtual energy in real time, since energy is defined to include bids and offers in the TEMT definition, thereby making virtual transactions subject to allocation of RSG charges.

131. E.ON contends the Commission should assign refund obligations to the portion of every cleared day-ahead virtual supply offer not subsequently covered by real-time energy injections by the same market participant at the same pricing node. E.ON defines real-time energy injections as the following: (a) the volume of real-time metered load below the cleared day-ahead load; (b) the volume of real-time physical exports below the cleared day-ahead physical export; (c) the volume of real-time metered generation less than the cleared day-ahead generation; and (d) the volume of real-time physical imports in excess of the cleared day-ahead physical import.

⁹⁸ Ameren defines real-time production costs to be the sum of the real-time LMP and real-time RSG charges.

132. Constellation argues that any reallocated RSG costs should be allocated only on the amount that virtual supply offers are uncovered by real-time internal bilateral transactions, as submitted through the Midwest ISO financial scheduling software, in recognition of the language of section 40.3.3 that requires consideration for real-time internal bilateral transactions in the settlement of the real-time energy market.

133. The Midwest ISO asserts the requirement of the RSG Order to eliminate double-counting in proposed section 40.3.3 fails to recognize that the supply of energy at a specific location in a nodal market does not result in an equivalent replacement of a deviation from a scheduled withdrawal or injection of energy at another location. The Midwest ISO also contends that implementation of netted transactions is difficult to implement since many market participants operate multiple generation and load assets and schedule both imports and exports for a variety of commercial reasons that are not specifically related to offsetting schedule deviations. The Midwest ISO further notes that the scheduling of replacement imports cause RSG costs, unless the scheduling of the import occurs prior to the commitment of a resource to replace the shortfall of generation in the intra-day RAC process.

134. Duke also requests clarification on double-counting, noting that the example in the RSG Order is simplistic and does not reflect that imports often displace generators after they have already started and incurred costs and before they have recovered start-up costs. In these situations, generators will not be kept whole unless they receive RSG payments. Duke also faults the RSG Order for not specifying which of the two charges – the generator or import charge – should be eliminated to prevent double counting. WEPCO asks the Commission to clarify that the reference to imports in the RSG Order⁹⁹ meant both real-time and day-ahead imports since all demand should be treated the same. WEPCO asserts that deviations in imports between day-ahead and real-time should be assessed the RSG charge. Xcel requests that the Commission direct the Midwest ISO to delay the submission of a compliance filing until stakeholder discussions are completed.

135. Ameren requests the Commission to clarify that, in the event the market participant takes actions to offset its deviation, such as replacing a resource unit that has an unscheduled outage with another unit, so that the Midwest ISO does not need to commit any generation in the RAC process, the market participant will not have to pay any RSG charges associated with the deviation. Ameren further requests the Commission to clarify that a market participant is only required to pay RSG costs to the extent its actions cause a net overall increase in costs by requiring additional units to be committed through the RAC process, thereby recognizing that the use of imports may

⁹⁹ See RSG Order at P 77.

result in lower overall costs if fewer or less expensive units need to be committed through RAC. As support for its request, Ameren cites to an example of real-time imports that reduce the real-time LMP by a greater amount than the RSG cost increase associated with the committed unit that is replaced by imports and therefore potentially incurring revenue insufficiency costs.

136. Constellation requests that the Commission clarify that all deviations should not be considered double-counted, lest the RSG Order create an economically inefficient bias towards imported energy over self-committed generation by market participants.

137. The Midwest ISO also states that the term “real-time” should modify internal bilateral transactions in section 40.3.3.a.i since that provision addresses the incremental MWs on which real-time charges and credits are calculated and that its answer on December 2, 2005 to modify the phrase with “day-ahead” was in error. Ameren agrees, noting the term “real-time” makes the provision consistent with section 40.3.3.b.i.

138. With respect to daily calculation of the RSG charge, the Midwest ISO believes that section 40.3.3.a properly calculates real-time RSG charges on an hourly basis, which are then aggregated and settled on a daily basis, consistent with section 40.3.3.a.ii. Ameren contends that determining the costs to be recovered by a generator on a daily basis but assessing the charge to market participants on an hourly basis is consistent with section 40.3.3.b.ii, noting that the mechanics of the calculation utilize the hours associated with the RAC commitment process. Constellation states it makes no sense to base an hourly charge on energy purchased during the day. WEPCO requests the Commission to clarify that its directive for daily determination of the RSG charge was in error and that it meant the daily calculation should apply to the RSG make whole payment.

2. Commission Determination

139. All transactions in the real-time market are physical. Non-physical transactions, such as virtual offers and bids, are restricted to the day-ahead market. Real-time settlement in currently-effective section 40.3.3 is based on quantity deviations from day-ahead schedules, including virtual offers and bids. In other words, settlement is based on the difference between real-time or physical injections and withdrawals, and the day-ahead schedules. Eligibility for RSG charges in the currently-effective tariff is based on whether the market participant is actually paying for real-time energy (and therefore paying the ex post LMP), *i.e.*, making a physical withdrawal; RSG charges are then allocated to that customer based on the costs that result from factors that cause additional unit commitment (load, virtual supply offers and resource deviations).

140. We consider these provisions clear enough to implement, and note the Midwest ISO has not indicated in any of its filings that it does not know how to allocate costs and determine a refund. We find nothing inconsistent in a tariff provision that makes market participants eligible for RSG costs based on their purchase of energy in the real-time market and then allocating their share of RSG costs based on factors that would cause unit commitment after the day-ahead market closes and would result in start-up, no-load and production costs that are guaranteed and therefore may be recovered in the RSG charge to the extent the LMP energy market price does not recover those costs. This provision ensures that market participants buying energy in the real-time market pay the full cost for their purchases including unit commitment costs not recovered in the energy charge.

141. We affirm our finding in the RSG Order that the appropriate definition of withdrawing energy means physically withdrawing energy, per the use of the term withdrawal throughout the TEMT. We are not persuaded by the fact that the TEMT definition of energy includes bids and offers. These activities are market positions and are separate and distinct from the actual physical withdrawal of energy in the real-time market. Their incorporation into the definition of energy ensures that the term encompasses all the activities market participants will undertake in the energy market.

142. We clarify the Commission determination regarding imports in the RSG Order. While we continue to agree with Constellation¹⁰⁰ that imports are not withdrawals, per the definition of withdrawals above, and therefore imports should not determine eligibility for RSG charges, resource deviations – one of the RSG charge allocations -- include resources outside the Midwest ISO¹⁰¹ that provide imports. Hence, the correct interpretation of the currently-effective tariff is that for those market participants physically withdrawing energy in real-time and therefore paying the RSG charge, part of their allocation of RSG costs should be based on resource deviations, including resources outside the Midwest ISO that provide imports. To the extent the Midwest ISO has been assessing the RSG charge incorrectly since market start, i.e., to market participants not withdrawing energy in real-time, we affirm our requirement that the Midwest ISO

¹⁰⁰ See RSG Order at P 54.

¹⁰¹ The Midwest ISO TEMT defines a Resource to include Generation Resources that include electric facilities accessible to the Transmission Provider Region through transmission service contracted by the Market Participant from another transmission provider for delivery to the border of the Transmission Provider Region. Midwest ISO TEMT, Second Revised Sheet No. 80 and 120, Superseding First Revised Sheet No. 80 and 120.

provide refunds with interest. With respect to refunds, we face a circumstance in which the Midwest ISO has been assessing RSG charges for imports based on its own interpretation, without reference to the tariff or Business Practice Manual, of whether RSG charges should apply. Unlike the situation with respect to virtual supply offers, we cannot characterize this action to be an operating practice. Rather, in this circumstance, market participants did not have an expectation based on the language of the TEMT that charges would be assessed for imports. For this reasons, we do not consider a prospective-only remedy sufficient.

143. We do not consider our findings on imports to be at odds with our acceptance of a prospective provision to allocate a portion of RSG costs to imports, as Duke claims. The Commission determined the currently-effective tariff provision to be just and reasonable, and therefore the sole issue before us in this proceeding is simply the proper interpretation of the currently-effective tariff. In this ruling, moreover, the Commission does not determine the reasonableness of other allocations.

144. We consider arguments that the currently effective provision results in undue discrimination or is not consistent with cost causation to be collateral attacks on the Commission decision approving the TEMT.¹⁰² No parties requested rehearing on those provisions when they were approved. Also, we note that no party has raised any complaints in the year and a half since market start on their bills that have been calculated on this basis. The sole issue before the Commission is not whether there is a better allocation or another method that may be just and reasonable, but rather whether the currently approved and effective tariff has been implemented according to its terms.

145. We do not share Ameren's concerns that the rate calculation will result in shortfalls. The RSG charge in each hour includes all the costs associated with unit commitment in the RAC process divided by load, virtual supply offers and resource deviations. These costs are then allocated to each market participant based on its share of the charge divisor, namely load, virtual supply offers and resource deviations.¹⁰³ As long as the divisor and the market participant allocation have the same definition, the charge will recover all costs.

¹⁰² See *supra* note 2.

¹⁰³ See TEMT, Superseding First Revised Sheet No. 578.

146. We do not find any basis in the currently-effective tariff to support Hoosier's interpretation that withdrawals refer to net demand for energy including the net impact of virtual transactions, or E.ON's position that the assignment of refunds should be based on the portion of virtual supply offers not covered by reductions in real-time load, generation and exports and increased imports, or Constellation's claim that virtual supply offers should be net of the impact of internal bilateral transactions. As discussed above, withdrawal refers to physical withdrawal only and the calculation of the RSG charge in section 40.3.3.a.ii is based on all virtual supply for the market participant in the day-ahead energy market, and does not reference net or adjusted calculations. We note that the reference to bilateral transactions in section 40.3.3 is simply a statement that the real-time energy balancing market is settled based on deviations from day-ahead schedules with consideration for real-time internal bilateral transactions and is not part of the calculation of the RSG charge in subsection (a).

147. We now turn to issues relating to the Midwest ISO's proposed tariff revisions. We agree with the Midwest ISO that the Midwest ISO energy market is a locational energy market and, therefore, the injection of supply at one location cannot replace reduced imports at another location. Hence, both reduced imports at one location and increases in real-time generation at another location can result in the incurrence of RSG costs at both locations to the extent those costs are not recovered through the real-time LMP.

148. Also, in response to Ameren's request for clarification, the fact that a market participant replaces a resource unit that has an unscheduled outage at one location with another unit at another location may not reduce unit commitment costs at the former location and, therefore, still requires the payment of RSG charges. Also, to the extent the new unit deviates from its schedule, RSG costs may be incurred at the latter location if start-up, no-load and production costs of other committed units are not recovered in the LMP. For these reasons, we grant rehearing on this issue and we will not require the modification to tariff sheets specified in the RSG Order.¹⁰⁴

149. Market participants must pay RSG charges when LMP energy prices do not recover the costs of unit commitment, thereby ensuring market participants pay the full cost of energy in real-time. Responding to Ameren's request for clarification, the fact that a market participant's imports may reduce the LMP at a location does not change this requirement. There may be additional unit commitment costs not recovered in the LMP and therefore the market participant must pay those costs. To do otherwise, *i.e.*, only

¹⁰⁴ RSG Order at P 85.

charge the LMP price for market participants that import low-cost energy, would subsidize those market participants by not requiring them to pay for the full cost of energy in the real-time energy market.

150. We grant rehearing of the RSG Order's requirement to add the term "Day-Ahead" to modify the term "internal bilateral transactions" in proposed section 40.3.3.a.i.¹⁰⁵ We agree with the Midwest ISO that the appropriate modifying term is "Real-time", so that the real-time energy LMP is applied to volumes withdrawn that exceed day-ahead schedules and internal bilateral transactions. While internal bilateral transactions are scheduled in the Day-Ahead market, the actual amounts purchased and sold under this schedule, and therefore exempt from real-time pricing, occur in real-time. With this revision, sections 40.3.3.a and b, describing real-time charges and credits respectively, have parallel descriptions of real-time energy costs and credits. We require the Midwest ISO to make this revision in a compliance filing within 30 days of the date of this order.¹⁰⁶

151. We grant rehearing on the requirement of the RSG Order that RSG charges be calculated on a daily basis.¹⁰⁷ We consider the Midwest ISO proposal for section 40.3.3.a.iii, to assess the charge based on an hourly analysis that is aggregated to a daily settlement amount, to be appropriate. Inasmuch as the amounts that must be recovered through RSG charges are calculated on an hourly basis, *i.e.*, the difference between the hourly LMP and the cost of unit commitment for that hour, an assessment of the charge on the same hourly basis appropriately matches cost responsibility with cost incurrence. We clarify that the reference to the TEMT II Order in the RSG Order on daily calculations referred to the make whole payment in subsection (b) of section 40.3.3, and not to the charges in subsection (a).

E. Encouraging Market Participants to Follow Dispatch Instructions

1. Dispatch Instructions

152. In the RSG Order, the Commission concluded that the Midwest ISO is calculating the RSG charge on the difference between actual output and the dispatch instruction, and

¹⁰⁵ RSG Order at P 85.

¹⁰⁶ We see no reason for delaying the compliance filing requirement, as requested by Xcel. To the extent stakeholders and the Midwest ISO have additional revisions to the TEMT, the Commission will process the filing expeditiously.

¹⁰⁷ RSG Order at P 87.

therefore is generally following its currently effective tariff.¹⁰⁸ However, the Commission determined that stating that the RSG charge is calculated on the difference between actual output and the set point is a more accurate description,¹⁰⁹ and therefore the TEMT would benefit from additional language clarifying that the charge is calculated based on the difference between actual output and the dispatch instruction as well as the difference between actual output and the set point, thereby addressing the circumstance in which the generator does not meet the initial conditions required to be certified as an on-line resource.

153. The Commission also required the Midwest ISO to revise its tariff so that market participants will not be assessed an RSG charge for differences caused by lags in state estimator and Unit Dispatch System (UDS) tracking of market participant unit output that follows dispatch instructions, such as when a unit goes off-line.

154. With respect to eligibility for RSG credits, the Commission did not agree with the Midwest ISO's interpretation of its currently effective tariff to mean that resources that do not follow the dispatch instruction should be denied recovery of production costs. The Commission concluded that section 43.3.3.b.ii provides that resources will receive a credit for the difference between start-up and production costs compared to revenues received in the real-time market and that nothing in the provision precludes recovery of production costs. Therefore, the RSG Order required that the Midwest ISO refund those amounts incorrectly withheld from resources, with interest. The RSG Order specified those circumstances where the currently-effective tariff allows the denial of RSG credits, and those circumstances the tariff does not allow the Midwest ISO to deny RSG credits and required the Midwest ISO to provide credits to generators that have been wrongly denied eligibility, from market start

155. The Commission also accepted the proposed tariffs to limit RSG eligibility to generation that follows dispatch instructions and required the Midwest ISO to establish tolerance bands for the restriction on RSG credit eligibility in order to afford the same treatment to resources with costs above revenues as is provided to other market participants paying the uninstructed deviation penalty.

¹⁰⁸ RSG Order at P 78.

¹⁰⁹ The Midwest ISO Business Practice Manuals for Market Settlements states in relevant part that "the Midwest ISO sends a dispatch signal to each generator identifying the expected megawatt output that it is expected to be generating in the next five minutes. Over the course of the hour these dispatch signals are integrated into an hourly dispatch set point used for settlement." Version 8, p. A-220.

a. Requests for Rehearing

156. Williams Power asserts that making market participants liable for RSG charges for, among other reasons, deviations from dispatch instructions, implies that actual metered data points are compared uniformly. However, Williams Power notes that the Midwest ISO states in its Business Practice Manual that the determination whether a market participant followed its dispatch instruction is based on “the hourly State Estimator data, not on actual meter data.”¹¹⁰ Williams Power notes that in the RSG Order the Commission agreed that a more accurate description of how the Midwest ISO calculated RSG would be the difference between actual output and the set point.¹¹¹ Williams Power seeks rehearing that the Midwest ISO complies with the TEMT by calculating RSG charges based on the difference between a unit’s actual metered output and the Midwest ISO’s dispatch instruction. Williams Power also requests that the Commission reconsider its conclusion that such set point calculations can be validated by market participants.¹¹² According to Williams Power, the Commission should direct the Midwest ISO to compare actual metered data to its actual dispatch instruction as it was conveyed to the generator, and recalculate settlements dating back to April 1, 2005 and refund any monies with interest owed to market participants.

157. Williams Power also argues that the Midwest ISO approach to deny make whole payments, *i.e.*, RSG credits, because the unit is not following dispatch,¹¹³ which will be determined by whether “[t]he Resource’s hourly integrated State Estimator Observed MWs (not actual metered volumes) is within a Tolerance Band”¹¹⁴ has resulted in Williams Power being wrongly deemed to be ineligible for RSG credits. Williams Power argues that if the ISO’s five-minute dispatch signal, instead of the ISO’s generation set point volume (*i.e.* from the state estimator), had been used then its unit would be eligible for RSG credits. Additionally, Williams Power asserts that the fact that the Midwest ISO uses integrated, calculated state estimator values, rather than its actual five-minute dispatch signals, for its determination of whether a generator followed the Midwest ISO’s dispatch instruction also manifests itself in the Midwest ISO’s flawed calculation of uninstructed deviation penalties.

¹¹⁰ Settlements Business Practice Manual RSG Supplement, Attachment C at C-33.

¹¹¹ RSG Order at P 78.

¹¹² *Id.* at P 79.

¹¹³ See Midwest ISO’s October 27, 2005 filing at 9-10.

¹¹⁴ Settlements Business Practice Manual RSG Supplement, Attachment C at C-21-22.

158. According to the Midwest ISO, the provision of RSG payments should be deemed appropriate only for production costs caused by – *i.e.*, incurred in the course of following, not violating – dispatch instructions. The Midwest ISO asserts that it would be inappropriate to give to parties deviating from dispatch instructions RSG payments meant to compensate production cost under-recoveries caused, in part, by the failure of others that also depart from dispatch instructions. In addition, the Midwest ISO claims that if a resource’s production costs are unrelated to, and/or caused by deviation from dispatch instructions, the award of full RSG payments for such costs would lead to unjust enrichment.

159. The Midwest ISO believes that the RSG Order’s directives relating to the retroactive payment of production costs and determination of eligibility for such retroactive payment could be read to suggest that no tolerance band or cap should be set on the level of a resource’s output. The Midwest ISO states that this suggests that it should pay resource production costs to any level that the resource chose to produce energy, irrespective of the Midwest ISO’s dispatch instruction. According to the Midwest ISO, this decision results in increased production costs up to the resource’s actual output, rather than the Midwest ISO’s dispatch instruction.

160. The Midwest ISO asserts the Commission is directing the Midwest ISO to pay generation resources that over-generate in an amount up to the resources’ actual output, thereby requiring the Midwest ISO to pay resources for costs that are not a result of any Midwest ISO commitment or dispatch process.

161. In addition, the Midwest ISO seeks clarification that the Commission did not intend for the Midwest ISO to make resources whole for costs not incurred as a result of a Midwest ISO commitment and dispatch process. Rather, the Midwest ISO requests clarification that the Commission, in the RSG Order, intended to direct the Midwest ISO to determine retroactive production cost eligibility only for those costs incurred as a result of a Midwest ISO commitment and dispatch process. In this instance, the Midwest ISO will refund to resources that were committed in a Midwest ISO commitment process only those production costs up to the lesser of the generation resources’ actual output or the Midwest ISO’s dispatch instruction within the commitment period.

162. The Midwest ISO also seeks rehearing on the interpretation of the defined term “Transmission Provider Commitment Period.”¹¹⁵ The Midwest ISO affirms that the TEMT states that the Real-Time RSG credit is provided to resources that do not recover their start-up and production costs for the hours during the transmission provider

¹¹⁵ RSG Order at P 116. *See also* TEMT section 1.322.

commitment period.¹¹⁶ According to the Midwest ISO, the instruction that is delivered to a resource to synchronize with the transmission system specifically includes commitment start and commitment stop times, which establish the beginning and end of the commitment period. The commitment start time incorporates a sufficient start-up period, based on the offer characteristics submitted for the resource. The definition thus does not permit a resource to synchronize at any time and be deemed to be operating within the commitment period.

163. The Midwest ISO seeks clarification of the RSG Order to the extent that it may be interpreted by some parties to require the Midwest ISO to either “double pay” certain resources’ start-up and production costs, or to pay certain resources’ start-up and production costs that were not incurred as a result of a Midwest ISO commitment process. According to the Midwest ISO, such interpretation would be inconsistent with the Commission’s directive that resources should not receive RSG credits for costs that they do not incur. The Midwest ISO contends, however, that a resource can operate prior to the commitment period. If it does so, however, the Midwest ISO argues that it should not be entitled to the production cost guarantee provisions during the period of time outside the commitment period.

164. With respect to the retroactive payment of start-up costs, the Midwest ISO will refund to resources those start-up costs that have been improperly denied, from market start. To the extent that a resource falls under one of the following scenarios, the Midwest ISO states that it should be denied start-up costs because such costs were not incurred as a result of a Midwest ISO commitment process, consistent with the Commission’s RSG Order:

- (1) Resource remained on-line from a previous discontinuous commitment period – because the resource is already on-line and does not incur additional start-up costs to remain on-line.
- (2) If the commitment period is contiguous with a must-run period, and the must-run decision was made prior to the commitment period decision. In this case, the resource is already on-line and does not incur additional start-up costs to remain on-line. Timing is important because the commitment process can recognize whether the unit is already online or offline and thus whether the unit requires or does not require a start-up payment.
- (3) A contiguous commitment period starts prior to the beginning of the day. In this case the resource will recover its entire eligible start-up costs only in the same day that the commitment period began.

¹¹⁶ TEMT section 40.3.3.b.ii.

- (4) The Real-Time commitment period is contiguous with a Day-Ahead commitment period. In this case the resource is awarded its entire eligible start-up costs in the Day-Ahead production cost and does not incur additional start-up costs to remain on-line.

165. Ameren believes that the Commission should clarify that a generator is only eligible to receive RSG payments to the extent that it operates in accordance with the Midwest ISO's instructions and directives issued through the RAC process, and follows the Midwest ISO's dispatch instructions. While a generator that operates outside of the instructions and directives may be entitled to be paid for this power at the applicable market price, Ameren asserts that it should not receive compensation through RSG payments when it operates outside of the commitment period directed by the Midwest ISO or in a manner inconsistent with its capabilities represented at the time of commitment. Ameren is concerned with statements made in the RSG Order¹¹⁷ that, unless clarified, Ameren believes are susceptible to manipulation or gaming through which a generator would be improperly compensated for its incremental energy costs for synchronizing to the grid prior to the period directed by the Midwest ISO. Ameren notes that providing such a generator with RSG payments (in particular, for its incremental energy costs) would be inconsistent with the intent of allowing RSG payments, which is to compensate generators for providing reliability support, could potentially increase overall market cost, and may affect reliable operations for the Midwest ISO or result in the Midwest ISO operating more conservatively. Therefore, the Commission should clarify that the RSG commitment period begins at the time Midwest ISO directs the unit to be on-line and synchronized to the grid. Similarly, Ameren states that the Commission should clarify that a generator will not receive compensation to the extent it fails to follow the Midwest ISO's dispatch instructions or meet its commitment.

166. Duke is concerned with the RSG Order where it found that all generators are eligible to receive recovery of start-up, no-load and incremental energy costs after they have been committed in the RAC process, including units starting earlier than the specified start window.¹¹⁸ The Commission directed the Midwest ISO to provide credits to those units that were denied eligibility on that basis, which Duke believes may be interpreted as allowing compensation for a unit regardless of how far ahead of its commitment window the unit actually is available. According to Duke, such a broad application would encourage units to start as early as possible in order to receive additional revenue during periods when they are not needed and thereby cause RSG costs

¹¹⁷ *Id.* P 116.

¹¹⁸ *Id.*

to increase. Therefore, Duke seeks clarification that, in requiring compensation for a unit starting earlier than the requested start time, the Commission did not intend that units be compensated regardless of how many hours ahead of time the unit is started.

167. WEPCO asserts that since market start-up the Midwest ISO has been unable to track fast-ramping units. WEPCO notes that the RSG Order recognizes there is a lag in state estimator and UDS tracking of market participant output and required the Midwest ISO to modify its tariff to state that RSG charges will not be assessed for differences caused by such lags.¹¹⁹ However, WEPCO believes that the RSG Order is not explicit as to whether the Midwest ISO may withhold RSG credits to generators because of those same lags. Of the three-part offer (start up, no load and incremental energy), WEPCO asserts that the current calculation does not start calculating incremental energy until the UDS solves, which is 10-15 minutes after the unit is online. According to WEPCO, this issue is present in both the retroactive and prospective proposals and has had a significant dollar impact on WEPCO. WEPCO believes the Commission intended to prohibit the Midwest ISO from withholding generator payments on this basis, both retroactively and prospectively. WEPCO states that the Commission did determine that it was reasonable for the Midwest ISO to use state estimator data in calculating the RSG credit. However, in doing so, WEPCO claims it did not mention that the calculation for incremental energy does not begin until the UDS solves, *i.e.*, at least 10 minutes after a unit is online. WEPCO believes that the Commission should clarify that the Midwest ISO must not withhold payments for this 10-minute delay.

168. According to Consumers, the Commission's apparent rationale for accepting the argument that the state estimator is superior to metered data is that the state estimator information is more granular. Consumers requests that the Commission recognize state estimator information is purely hypothetical and does not take into account the Midwest ISO's manual overrides. If the Commission's concern is granularity, Consumers suggests that the Midwest ISO should break down the hourly data by dividing it into five minute intervals for each hour. This would accomplish the Commission's desire for granularity and take into account the Midwest ISO's manual overrides of the state estimator solutions because the actual meter data reflects what the Midwest ISO's operators actually did as opposed to what the state estimator suggests the operators should do.

169. Constellation is also unclear how tolerance bands would operate, and is unable to determine whether or not they will be just and reasonable. Constellation requests that the

¹¹⁹ *Id.* P 80.

Commission clarify that the intent of the RSG Order was to require the Midwest ISO to define tolerance bands, and the Commission would then determine the reasonableness of any tolerance band at that time.

b. Discussion

170. In response to Williams Power rehearing request, we have no basis to conclude the Midwest ISO calculation of the RSG charge is erroneous or contrary to the TEMT. As we stated in the RSG Order, the Midwest ISO is assessing the RSG charge generally on the difference between the dispatch instruction and actual output, with the qualification that the dispatch instruction also includes the set point as determined by initial start-up. The Midwest ISO data response provided examples of how the set point could differ for generators producing identical MW during the hour but starting up their units at different times and volumes.¹²⁰ If the unit starts up early enough, the initial set point for the first five minute interval is equal to the dispatch instruction. If the unit starts up later, the set point is a lower amount. In the latter case, the generator will have a deviation from the dispatch instruction and will pay the RSG charge, even if its actual output and the dispatch instruction are identical over the remainder of the hour. Such a circumstance would explain why the dispatch instruction approved by the Midwest ISO is 78.8 MW, whereas the dispatch instruction over the entire hour is 80 MW in Case A provided by Williams Power.¹²¹ However, Williams Power has not provided any information that bears on this issue. The information it has provided is limited to the dispatch instruction from the Midwest ISO and the metered MW for the entire hour. No information is provided on whether Williams Power was starting up on time and at the volume required for initial start-up, or on start-ups throughout the day, nor has it provided information regarding generation transitions to off-line status that can also affect the set point.¹²² Therefore, Williams Power has not provided any information that would indicate the

¹²⁰ See Midwest ISO's Data Response, pages 4–6.

¹²¹ Inasmuch as Williams Power knows when its units start, we affirm our conclusion in the RSG Order that market participants should be able to verify for themselves the derivation of the set point.

¹²² See RSG Order at P 80.

Midwest ISO is interpreting its tariff any differently than they represented in their data response and that the Commission found to be a generally accurate description of its dispatch process in the RSG Order, and for this reason we deny rehearing.¹²³

171. We also take exception to the Williams Power position that the Midwest ISO erroneously uses set point information for calculating RSG charges. As discussed in the RSG Order, the Midwest ISO sends a dispatch signal to each generator identifying the expected megawatt output that is expected to be generated in the next five minutes. Over the course of the hour these dispatch signals are integrated into an hourly dispatch set point used for settlement.¹²⁴ We find nothing unreasonable about this method of determining the hourly dispatch settlement amount and, contrary to Williams Power's claim, we believe this method does reflect what that generator has been asked to produce.

172. We also disagree with Williams Power's assessment that the state estimator is no more accurate than the actual metered data. Since the state estimator incorporates set point information, it is tracking unit transitions to on-line and off-line status as well as the dispatch signal every five minutes, whereas metered data only reflects MW of output – no matter when in the hour the energy was produced.

173. Turning to RSG credits in section 40.3.3.b, we first address the currently effective tariff. The Midwest ISO points out that the synchronization of units occurs in response to the Security Constrained Unit Commitment (SCUC) process that specifies a complete schedule for generators, including start-up times, production MW and stop times.¹²⁵ Based on this explanation, and the fact that the SCUC process is referenced in the tariff, we agree that start-up, no-load and production cost recovery should be subject to the SCUC instructions.

174. Based on this requirement and responding to requests for clarification by the Midwest ISO, we clarify that eligible start-up costs are start-up costs for committed units that start up prior to the commitment period provided the start-up occurs on the same day as the commitment period. We agree with the Midwest ISO that generators should not

¹²³ We confirm our finding in the RSG Order that market participants can validate their set points. To the extent they know the start-up times and volumes of their units, market participants should be able to evaluate whether there is an impact on the hourly dispatch instruction used in RSG settlements.

¹²⁴ See RSG Order at P 78 n. 35.

¹²⁵ Midwest ISO Rehearing Request at 17 – 18 and 21 – 23.

receive additional start up cost recovery for units that have already started up and do not need to start up again for a later commitment period. Similarly, we agree that units already receiving start up cost compensation for a must-run requirement during the day or in the day-ahead production cost should not receive additional start-up cost credits, since additional costs were not incurred. We also clarify that production costs, *i.e.*, no-load and incremental energy costs, eligible for RSG credits are those costs incurred during those hours specified in the SCUC schedule.

175. We further clarify that production costs eligible for RSG credits are the lesser of those MW amounts specified in the SCUC schedule, or, if the generator produced an amount less than the SCUC schedule, the amount actually produced. Inasmuch as the purpose of security constrained unit commitment is to minimize production costs, to allow for cost recovery for volumes produced over the specified MW requirements would defeat the purpose of security constrained unit commitment and deny market participants an important benefit of the Midwest ISO. However, market participants should not be denied production cost recovery because of lags in the state estimator, as discussed in the RSG Order and this order, and therefore we require the Midwest ISO to incorporate those adjustments into its eligibility calculations.

176. With respect to refunds, we face a circumstance in which the Midwest ISO has been assessing RSG charges and denying RSG credits when market participants have been following dispatch instructions but the state estimator does not track their activity, or the Midwest ISO has been making its own interpretations, without reference to the tariff or Business Practice Manual, of whether RSG charges should apply and whether RSG credits should be denied, such as for all production if that amount is less than the dispatch instruction. Unlike the situation with respect to virtual supply offers, we cannot characterize these actions to be operating practices. Rather, in these circumstances, market participants had an expectation based on the language of the TEMT that they would receive credits for their production costs, and they did not have an expectation that they would be denied credits and assessed charges. For this reason, while we are requiring changes in calculations, we do not consider a prospective-only remedy sufficient. Therefore, we affirm our refund requirements in the RSG Order, as modified by our clarifications in this order.¹²⁶

177. Turning to the prospectively effective tariff, we agree with WEPCO that clarification is required. As clarified above, start-up and no-load costs should be eligible

¹²⁶ Responding to WEPCO, we believe the RSG Order and our clarifications above clearly indicate the circumstances in which RSG credits should be granted and circumstances in which they should be denied in the current tariff.

for recovery to the extent that are actually incurred during the day of market operation and have not been recovered through other charges. We agree with WEPCO that units providing energy should not be denied cost recovery for production costs actually incurred but not recognized by the state estimator. For this reason, we require the Midwest ISO to add the phrase “and adjusted to reflect actual production within the SCUC-instructed hours of operation” after the term “State Estimator” in subsection (b) of section 40.3.3. At the same time, we recognize the concern of the Midwest ISO that it should not provide make-whole payments for energy produced outside the hour that the Midwest ISO requested. Therefore, it is appropriate for the Midwest ISO to limit production payments to the dispatch instruction in subsection (a) of section 40.3.3., in the event the generator is over-producing or producing outside the hour requested. To avoid the infirmities associated with the term “commitment period” as we have discussed in this order and in the RSG Order, we require the Midwest ISO to replace the phrase “during the relevant commitment period” with “during the relevant SCUC-instructed hours of operation” in both subsections (a) and (b).

178. We disagree with Consumers Energy that the state estimator values are less accurate than actual metered values for determining production costs. As the Midwest ISO explained, and as we agreed in the RSG Order, the state estimator values are more accurate since they estimate incremental energy values every five minutes rather than a single metered value for the hour.¹²⁷ Accordingly, the basis for our decision is not simply that the information is more granular, as Consumers Energy claims, but also because it is more accurate. That is, the state estimator information sets a unique price every five minutes and therefore a unique energy value every five minutes that is weighted by the MW produced every five minutes, thereby yielding a weighted average incremental energy value for the hour, whereas the metered value would price all production at a single price for the hour. With respect to manual overrides, we consider their impact on energy volumes to be minimal since they are rarely used, and, when they are used, are only applicable to very short periods of time for small amounts of energy. Therefore, we do not consider state estimator information to be compromised because it lacks this information. For these reasons, we deny rehearing.

179. We also deny rehearing on the uninstructed deviation penalty issue raised by Williams Power since this is a new issue not raised previously and therefore is beyond the proper scope of rehearing.

¹²⁷ *Id.* P 120.

180. We clarify for Constellation that we expect the Midwest ISO to file its proposed revisions to section 40.3.3.b, including a proposal for tolerance bands,¹²⁸ within 30 days of the date of this order. Parties can comment on the tolerance band proposal in that proceeding.

181. We clarify that this order affirms, with certain modifications, the compliance filing requirements of the RSG Order.¹²⁹

F. Applicability of RSG Charges To Carved-Out Grandfathered Agreements

1. Carved-out Grandfathered Agreements

182. In the RSG Order, the Commission stated that parties to carved-out grandfathered agreements (GFAs) are not subject to RSG charges, and the Midwest ISO may not charge parties to carved-out GFAs for any deviation from their day-ahead schedules, as long as injections and withdrawals are balanced in real-time. The Commission explained that any costs associated with schedule changes post day-ahead when the carved-out GFAs allow for such changes cannot be charged to the carved-out GFAs through uplift, per prior Commission precedent.¹³⁰ Accordingly, the RSG Order required the Midwest ISO to refund amounts charged to carved-out GFAs, with interest.

a. Requests for Rehearing

183. Duke believes that the RSG Order failed to address Duke's argument that RAC benefits all parties, including GFAs, stating that the Commission has clarified this point in another proceeding.¹³¹ However, Duke states that it was not a party to that proceeding. Duke argues that the Commission cannot decline to discuss an issue because it has previously addressed it in another proceeding, particularly where the order in that proceeding does not address the arguments being made here. Duke explains that the Midwest ISO's RAC process and the resulting regional reliability achieved through this

¹²⁸ *Id.* P 120.

¹²⁹ *See* RSG Order at P 80 and 120.

¹³⁰ *See Midwest Independent Transmission System Operator, Inc.*, 111 FERC ¶ 61,042 at P 372-73 (GFA Rehearing Order), *order on reh'g*, 112 FERC ¶ 61,311 (2005).

¹³¹ RSG Order at P 135.

process benefit all the Midwest ISO market participants, including parties to carved-out GFAs. According to Duke, the Commission has previously approved the inclusion of carved-out GFAs where the benefits are system-wide.¹³²

184. The Midwest ISO asserts that the Commission's GFA-related orders indicate that carved-out GFAs are intended to benefit only the load served by carved-out GFA transactions. For instance, the Commission's September 16, 2004 Order referred to "10,385 MW (9.6 percent of total Midwest ISO load) that the Commission finds can be 'carved out' ...".¹³³ Accordingly, the Midwest ISO seeks clarification that the exemption of carved-out GFAs from RSG charges applies only to carved-out GFA transactions serving load and sinking at the node of is the buyer in the carved-out GFA transaction. The Midwest ISO believes that other transactions, or components thereof, not directly under carved-out GFAs should not be deemed exempt from RSG charges. Midwest ISO also seeks clarification that generation resources that serve carved-out GFA load using the Midwest ISO transmission system should not be extended carved-out treatment through exemption from RSG charges whenever such resources deviate from their instructed output level in the course of serving carved-out GFA loads. In addition, the Midwest ISO states that a carved-out GFA with load and generation in separate price nodes does not constitute a valid basis for evading RSG charges that result from a market participant's chosen way to model the specific node.

185. Consumers requests clarification as to the applicability of RSG charges related to virtual transactions that are undertaken pursuant to the GFA Rehearing Order. Consumers believes that it should not be charged the Day-Ahead RSG charge on the virtual bid transactions related to the Ludington Plant (a pumped storage plant), pursuant to the solution developed by the Midwest ISO. Applying the Commission's reasoning in the GFA Rehearing Order, Consumers assert that RSG should not be charged on transactions related to pumping since it is not related to serving load in the traditional sense.

b. Discussion

186. We do not agree with Duke's argument that because the RAC process provides system reliability benefits, RAC costs should be applied to all market participants, including GFAs. By this same reasoning, all market participants, whether or not they

¹³² *Midwest Independent Transmission System Operator, Inc.*, 108 FERC ¶ 61,236 at P 298 (2004).

¹³³ *Midwest Independent Transmission System Operator, Inc.*, 108 FERC ¶ 61,236 at P 4-5 (2004), (emphasis added), *order on reh'g*, 111 FERC ¶ 61,042 (2005).

actually participate in the day-ahead or real-time markets, should equally pay all day-ahead and real-time market costs, including RSG charges. As discussed above, a benefit analysis alone is not sufficient to determine whether a cost assignment is just and reasonable, and hence we cannot base RSG cost assignment to GFAs on a general reliability benefit from unit commitment. Duke has not provided any evidence that GFAs participate in these markets and therefore should share in their costs. We do not consider this finding inconsistent with the Commission's decision to assign Schedule 17 costs to GFAs. Those costs pertain only to general functions undertaken for running the entire energy market and therefore are appropriately assigned to all market participants. For this reason, we deny rehearing.

187. We need not address here the issues raised by the Midwest ISO regarding the applicability of RSG charges to GFAs since the Commission already addressed them in another proceeding.¹³⁴

188. We deny rehearing on the Ludington Plant issues raised by Consumers since they are new issues not raised previously and therefore are beyond the proper scope of rehearing.

The Commission orders:

The requests for rehearing and/or clarification are granted in part, and denied, in part, as specified in the body of this order. The Midwest ISO is hereby directed to submit compliance filings, per the requirements specified in the body of the order, within 30 days and 60 days of the date of this order.

By the Commission. Commissioner Moeller not participating.

(S E A L)

Magalie R. Salas,
Secretary.

¹³⁴ *Midwest Independent Transmission System Operator, Inc.*, 116 FERC ¶ 61,117 (2006).

Appendix A

Motions to Intervene Out-of-Time

Coral Power LLC
 FPL Energy Marketing, Inc.
 Minnesota Municipal – Minnesota Municipal Power Agency
 Missouri River Energy Services
 Morgan Stanley – Morgan Stanley Capital Group
 Olde Towne Energy Associates, L.L.C.
 Saracen Energy LP
 Split Rock Energy LLC
 Strategic Energy, L.L.C.
 TransAlta Energy Marketing (US) Inc.
 Alliant Energy Corporate Services, Inc.
 CAM Energy Products, L.P.

Requests for Rehearing

Ameren – Ameren Services Company
 BP Energy – BP Energy Company
 Cargill – Cargill Power Markets LLC
 Constellation – Constellation Energy Commodities Group, Inc. and Constellation
 NewEnergy, Inc.
 Consumers – Consumers Energy Company
 DC Energy – Coral Power, L.L.C. and DC Energy Midwest, LLC
 DTE – DTE Energy Trading, Inc.
 Duke – Duke Energy Shared Services, Inc., on behalf of The Cincinnati Gas & Electric
 Company, PSI Energy, Inc. and The Union Light, Heat and Power Company
 E.ON – E.ON US LLC
 Edison Mission – Edison Mission Energy, Edison Mission Marketing & Trading, Inc.,
 and Midwest Generation EME, LLC
 Financial Marketers – Epic Merchant Energy, LP, SESCO Enterprises LLC and Black
 Oak Energy, LLC
 Hoosier – Hoosier Energy Rural Electric Cooperative, Inc.
 Indiana Municipal – Indiana Municipal Power Agency
 Midwest ISO – Midwest Independent Transmission System Operator, Inc.
 Minnesota Municipal
 Minnesota Power – ALLETE, Inc., d/b/a Minnesota Power
 Morgan Stanley
 Otter Tail – Otter Tail Power Company

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Saracen Energy LP
Split Rock Energy LLC
Strategic Energy, L.L.C.
WEPCO – Wisconsin Electric Power Company
Williams – Williams Power Company, Inc.
WPS – WPS Energy Services, Inc.
Xcel – Xcel Energy Services, on behalf of Northern States Power Company and Northern States Power Company – Wisconsin

Motion to Lodge

E.ON

Answers

Ameren (two answers)
DC Energy
E.ON (three answers)
Hoosier (two answers)
Minnesota Power
Otter Tail (two answers)
BP Energy
Coral Power LLC (three answers)
Edison Mission
Duke
Financial Marketers
WPS