No. 18-____

IN THE

Supreme Court of the United States

CITY OF MACKINAC ISLAND, *et al.*,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

SPENCER A. SATTLER
MICHIGAN DPT. OF ATTORNEY GENERAL
Public Service Division
7109 West Saginaw Highway
Lansing, MI 48917

DAVID D'ALESSANDRO
M. DENYSE ZOSA
Special Assistant Attorneys General
STINSON LEONARD STREET LLP
1775 Pennsylvania Ave, N.W.
Suite 800
Washington, DC 20006-3816
david.dalessandro@stinson.com

Attorneys for Michigan Public Service Commission

WILLIAM F. DEMAREST, JR.
Counsel of Record
HUSCH BLACKWELL LLP
750 17th Street, N.W.
Suite 900
Washington, D.C. 20006
(202) 378-2300
william.demarest@huschblackwell.com

THOMAS J. WATERS
FRASER TREBILCOCK DAVIS & DUNLAP, P.C.
124 W. Allegan, Suite 1000
Lansing, MI 48933
(517) 377-0811
twaters@fraserlawfirm.com

Attorneys for City of Mackinac Island

[Additional Counsel Listed On Inside Cover]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

SAULIUS K. MIKALONIS
PLUNKETT COONEY
38505 Woodward Ave.
Suite 2000
Bloomfield Hills, MI 48304
(248) 901-4022
smikalonis@
plunkettcooney.com

Attorneys for The Sault Ste. Marie Tribe of Chippewa Indians

ANDREW B. YOUNG
MAYER BROWN LLP
1999 K Street, N.W.
Washington, D.C. 20006
(202) 263-3272
ayoung@mayerbrown.com

Attorneys for Upper Peninsula Power Co.

EMILY W. STREETT
MCCARTER & ENGLISH, LLP
1301 K Street NW
Suite 1000
Washington, D.C. 20005
(202) 753-3351
estreett@mccarter.com

Attorneys for Cloverland Electric Cooperative

ROBERT C. FALLON
ENGLEMAN FALLON, PLLC
1717 K St., NW, Suite 900
Washington, D.C. 20006
(202) 464-1331
rfallon@efenergylaw.com

Counsel for Verso Corporation

QUESTIONS PRESENTED

Does the prohibition against retroactive rate increases, *Ark. La. Gas Co. v. Hall*, 453 U.S. 571 (1981), *FPC v. Tenn. Gas Trans. Co.*, 371 U.S. 145, 152-53 (1962), set forth in Section 206(a) of the Federal Power Act, 16 U.S.C. § 824e(a) (2012), "mean what it says," *City of Anaheim v. FERC*, 558 F.3d 521, 523 (D.C. Cir. 2009) (Kavanaugh, J.), and foreclose a judicially created exception authorizing a retroactive rate increase (surcharge)? Subsumed within this question are the related questions –

(a) Does the D.C. Circuit's reliance on general "enabling" language, authorizing "necessary or appropriate" actions, to confer on a regulatory agency a power that unambiguous operative statutory language expressly denied, exceed the statutory limitations imposed on the agency's delegated powers?

(b) As a matter of statutory construction, may "negative implication" be relied upon to confer on a regulatory agency powers which this Court's precedents found to be expressly denied to the agency in clear and unambiguous operative statutory language? And

(c) Does the D.C. Circuit's reliance on a highly disfavored form of statutory construction, which was not advanced by FERC in support of the orders under review (and, indeed, was first raised on brief by intervenors before the Court of Appeals), violate this Court's holding in *SEC v. Chenery Corp.*, 332 U.S. 194 (1947), that judicial review of agency orders is confined to the grounds relied upon by the agency?

PARTIES TO THE PROCEEDINGS BELOW

The following are the parties to the proceedings below before the United States Court of Appeals for the D.C. Circuit:

Petitioners:

The City of Escanaba, Michigan,
City of Mackinac Island,*
Cloverland Electric Cooperative,*
Constellation Energy Services, Inc.,
Michigan Public Service Commission,*
The Sault Ste. Marie Tribe of Chippewa Indians,*
Tilden Mining Company, L.C. and Empire Iron Mining Partnership,
Upper Peninsula Power Company,* and
Verso Corporation.*

* Petitioners before this Court.

Respondent:

Federal Energy Regulatory Commission

Intervenors in Support of Respondent:

Environmental Law and Policy Center,
Midcontinent Independent System Operator, Inc.,
Public Service Commission of Wisconsin,
White Pine Electric Power, L.L.C.,
Wisconsin Electric Power Company,
WPPI Energy, and
Marquette Board of Light and Power.

CORPORATE DISCLOSURE STATEMENTS

The City Of Mackinac Island

The City of Mackinac Island is a governmental entity for which filing of a Corporate Disclosure is not required.

The Michigan Public Service Commission

The Michigan Public Service Commission is a governmental entity organized under the laws of the state of Michigan for which filing of a Corporate Disclosure is not required.

The Sault Ste. Marie Tribe Of Chippewa Indians

The Sault Ste. Marie Tribe of Chippewa Indians is a Native American Tribal government for which filing of a Corporate Disclosure is not required.

Upper Peninsula Power Company

Upper Peninsula Power Company ("UPPCO") is a direct, wholly-owned subsidiary of Upper Peninsula Power Holding Company. Upper Peninsula Power Holding Company is a direct, wholly-owned subsidiary of Lake AIV, L.P. The general partner of Lake AIV, L.P. is Basalt Infrastructure Partners GP Limited. The ownership interests in Basalt Infrastructure Partners GP Limited are held by private individuals. No publicly held corporation owns 10% or more of UPPCO.

Cloverland Electric Cooperative

Cloverland Electric Cooperative is a member-owned rural electric cooperative corporation serving retail customers in the eastern third of the Upper Peninsula of Michigan. Cloverland has no stock and no parent corporation.

Verso Corporation

Verso Corporation (Verso) is a publicly held corporation. The common stock of Verso trades publicly on the New York Stock Exchange under the symbol "VRS." Verso does not have a parent corporation. No publicly held corporation owns 10% or more of Verso's stock.

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Petitioners, City of Mackinac Island, Cloverland Electric Cooperative, Michigan Public Service Commission, The Sault Ste. Marie Tribe of Chippewa Indians, Upper Peninsula Power Company, and Verso Corporation, respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at *Verso Corp. v. FERC*, 898 F.3d 1 (D.C. Cir. 2018), *reh'g en banc denied*, Pet. App 1a.

The orders of the Federal Energy Regulatory Commission are reported at

(i) *Midcontinent Indep. Sys. Operator, Inc.*, 148 FERC ¶ 61,071 (2014) (July 29, 2014 Order) (Pet. App. 40a);

(ii) *Pub. Serv. Comm'n of Wis. v. Midcontinent Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,104 (2015) (February 19, 2015 Order);

(iii) *Midcontinent Indep. Sys. Operator, Inc.*, 152 FERC ¶ 61,216 (2015);

(iv) *Midcontinent Indep. Sys. Operator, Inc.*, 155 FERC ¶ 61,134 (2016) (May 3, 2016 Order) (Pet. App. 132a); and

(v) *Pub. Serv. Comm'n of Wis. v. Midcontinent Indep. Sys. Operator, Inc.*, 156 FERC ¶ 61,205 (2016) (September 22, 2016 Order) (Pet. App. 172a).

JURISDICTION

The judgment of the court of appeals was entered on July 31, 2018. The Petition for Rehearing was denied on October 26, 2018 (Pet. App. 1a). This Petition for Certiorari is timely because it is filed within 90 days from the date of denial of the petition for rehearing en banc. Supreme Court Rule 13.3. Jurisdiction before the Court of Appeals was based on 16 U.S.C. § 825*l*(b). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

Article I, Sec. 1 of the United States Constitution is reprinted in the Appendix at Pet. App. 26a. Relevant portions of Sections 206 and 309 of the Federal Power

Act, 16 U.S.C. §§ 824e and 825h, are reprinted in the Appendix at Pet. App. 26a and 27a, respectively. The Federal Energy Regulatory Commission Orders *Midcontinent Indep. Sys. Operator, Inc.*, 148 FERC ¶ 61,071 (2014) (July 29, 2014 Order), *Midcontinent Indep. Sys. Operator, Inc.*, 155 FERC ¶ 61,134 (2016) (May 3, 2016 Order) and *Pub. Serv. Comm'n of Wis. v. Midcontinent Indep. Sys. Operator, Inc.*, 156 FERC ¶ 61,205 (2016) (September 22, 2016 Order), are reprinted in the Appendix at Pet. App. 40a, 132a, and 172a, respectively.

STATEMENT OF THE CASE

A. Statutory Structure – The Federal Power Act

The Federal Power Act ("FPA")[1] gives the Federal Energy Regulatory Commission ("FERC" or the "Commission") "exclusive authority to regulate the transmission and sale at wholesale of electric energy in interstate commerce."[2] Under Section 205, interstate transmitters of electricity must file "schedules showing all rates and charges" for the transmission of electricity in interstate commerce.[3] Section 205 requires FERC to assure that "[a]ll rates *** made, demanded, or received" by interstate transmitters of electricity be "just and reasonable."[4] While Section 205 governs changes in rates proposed by electric utilities, Section 206 on the other hand defines FERC's authority to change previously approved rates pursuant to its own

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[1] 16 U.S.C. § 824 *et seq.* (2012).

[2] *New England Power Co. v. New Hampshire,* 455 U.S. 331, 340 (1982); *see* 16 U.S.C. § 824.

[3] 16 U.S.C. § 824d(c).

[4] *Id*. at § 824d(a).

motion or in response to a complaint filed by a third party.[5] If FERC finds an existing rate "unjust, unreasonable, unduly discriminatory or preferential," it must "determine the just and reasonable rate *** to be thereafter observed and *** shall fix the same by order."[6] FERC may order refunds of amounts in excess of a just and reasonable rate back to the date of the filing of the complaint,[7] but is limited to only approving rate increases prospectively,[8] *i.e.*, "to be thereafter observed."

B. Proceedings Before FERC

On April 3, 2014, a complaint was filed with the FERC under Section 206 of the FPA. The complaint challenged an existing cost allocation methodology approved by FERC in 2004 (the "2004 Allocation Methodology") in the Tariff filed by the Midcontinent Independent System Operator, Inc. ("MISO"), a "public utility" subject to regulation under the FPA. On July 29, 2014, FERC determined that the previously approved 2004 Allocation Methodology was no longer "just and reasonable."[9] Nearly two years later, on May 3, 2016, FERC finally determined the just and reasonable cost allocation methodology to be thereafter applied.[10]

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[5] *Id*. at § 824e(a).

[6] *Id.*

[7] *See id.* at § 824e(b).

[8] *Id.* at § 824e(a).

[9] *Midcontinent Indep. Sys. Operator, Inc.*, 148 FERC ¶ 61,071 (2014) (July 29, 2014 Order), *reh'g denied*, February 19, 2015 Order, 150 FERC ¶ 61,104 at P90.

[10] *Midcontinent Indep. Sys. Operator, Inc.*, 155 FERC ¶ 61,134 (2016) (May 3, 2016 Order), *reh'g denied,* September 22, 2016 Order, 156 FERC ¶ 61,205 at P14.

FERC ordered refunds under Section 206(b) of the FPA, retroactive to April 3, 2014, the date of the Complaint, to be made to the ratepayers who had "paid too much" under the existing 2004 Allocation Methodology.[11]

However, in an extraordinary and unprecedented action, FERC also authorized retroactive rate increases (surcharges) to be imposed on those ratepayers "who had paid too little" under the 2004 Allocation Methodology, ordering MISO to increase the rates paid by those ratepayers.[12] FERC justified ordering surcharges on the ground that, because the regulated entity whose rates were at issue, MISO, was a pass-through entity with no funds of its own,[13] surcharges were warranted in order to finance the refunds approved by the Commission.[14]

Although the Commission's orders under review did not expressly invoke the Commission's remedial authority under FPA Section 309,[15] the Court of Appeals construed FERC's orders as based thereon,[16] and that characterization is applied in this Petition.

C. Judicial Review Before The D.C. Circuit

The Court of Appeals affirmed FERC's power to impose surcharges. The Court of Appeals buttressed FERC's authority under FPA Section 309[17] by relying

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[11] September 22, 2016 Order, 156 FERC ¶ 61,205 at P51.

[12] *Id.*

[13] *Id.* at P79.

[14] *Id.* at P56.

[15] 16 U.S.C. § 825h.

[16] *Verso*, 898 F.3d at 12.

[17] 16 U.S.C. § 825h.

on a "negative implication" (an argument raised for the first time on appeal) to support an interpretation of Section 206(b) of the FPA[18] as authorizing retroactive surcharges, despite the fact that *surcharges* contravene an express statutory prohibition set forth in Section 206(a).[19]

REASONS FOR GRANTING THE PETITION

I. INTRODUCTION AND SUMMARY

1. This matter begins and ends with the text of Section 206(a) of the Federal Power Act,[20] which unambiguously forbids retroactive rates increases. As Justice Kavanaugh (then Judge) wrote for the D.C. Circuit in *City of Anaheim v. FERC*, 558 F.3d 521 (D.C. Cir. 2009),

> On its face, § 206(a) prohibits retroactive adjustment of rates. And not surprisingly, the Supreme Court and this Court have read this language *to mean what it says*.

558 F.3d at 523 (emphasis added), citing *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 578 (1981) ("*Arkla v. Hall*"). *Verso*'s contrary conclusions:

> (i) that the retroactive increases authorized therein were necessary to avoid an "inequitable" result,
>
> (ii) that the rate increase actually wasn't a retroactive rate increase at all, but merely a "reallocation" of reliability costs, and

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[18] *Id*. at § 824e(b).

[19] *Verso*, 898 F.3d at 14.

[20] 16 U.S.C. § 824e(a).

(iii) that a "negative inference" justified the retroactive rate increases in question,

are all merely rationalizations for doing what the explicit language of the statute forbids. Moreover, those rationalizations will have profound implications –

- for implementation of "enabling" language in the Natural Gas Act ("NGA")[21] and a host of other statutes affecting broad sectors of the economy,
- for the future of ratemaking under both the FPA and the NGA,
- for implementation of restructuring of the electric industry under FERC Order No. 888,[22] and
- for recovery by electric utilities of reliability-related costs flowing from electric industry restructuring.

This case is solely about FERC's authority (or lack thereof) under FPA Section 309, in the absence of legal error, to order *surcharges* (retroactive rate increases) under circumstances that violate the filed rate doctrine.[23]

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[21] 15 U.S.C. § 717 *et seq*. (2012).

[22] *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), order on reh'g, Order No. 888-A, 78 FERC ¶ 61,220 (1997), order on reh'g, Order No. 888-B, 81 FERC ¶ 61,248 (1997), order on reh'g, Order No. 888-C, 82 FERC ¶ 61,046 (1998), aff'd in relevant part, *Transmission Access Policy Study Grp. v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom*. *New York v. FERC*, 535 U.S. 1 (2002).

[23] To be clear, FERC's authority to order *refunds* retroactively to the date of filing of the complaint is not contested in this

Arkla. v. Hall, 453 U.S. at 578; *FPC v. Tenn. Gas Trans. Co.*, 371 U.S. 145 (1962). The Court of Appeals relied upon a negative implication to broaden "enabling" language of a statute and thereby confer regulatory authority on a federal agency in contravention of an unambiguous statutory prohibition against the exercise by the agency *of that very authority*.[24]

Recently, in *New Prime Inc. v. Oliveira*, No. 17-340 (U.S. Jan. 15, 2019), this Court rejected the very course that *Verso* took in disregarding the inconvenient prohibition of FPA Section 206(a) to permit statutorily prohibited retroactive rate increases in furtherance of FERC's policy goal. In *New Prime* this Court observed,

> If courts felt free to pave over bumpy statutory texts in the name of more expeditiously advancing a policy goal, we would risk failing to "tak[e] . . . account of" legislative compro-

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Petition. The decision below also addressed Petitioners' challenges to the Commission's approval of retroactive *refunds*. That aspect of the decision below is not challenged in this petition.

[24] Notably, *New Prime* involved rejection by this Court of the Appellant's invitation for the Court to rely on a form of negative implication to rule that the term "workers" in the Arbitration Act should be construed as meaning "employees."[24] The Arbitration Act at issue in *New Prime* excludes from its coverage "contracts of employment of . . . any . . . class of *workers* engaged in foreign or interstate commerce." 9 U.S.C. §1 (emphasis added). Relying on the fact that the statute also excludes "contracts of employment" for "seamen" and "railroad employees" as well as other transportation workers, Appellant argued that "because 'seamen' and 'railroad employees' included *only* employees in 1925, . . . [the Court] should understand 'any other class of workers engaged in . . . interstate commerce' to bear a similar construction."[24] The Court's characterization of the argument as resting on a "precarious premise"[24] was correct in more than one way inasmuch as the argument was a form of disfavored negative implication.

> mises essential to a law's passage and, in that way, thwart rather than honor "the effectuation of congressional intent."[25]

As in *New Prime*, this Petition presents important questions of statutory interpretation with broad public policy implications warranting the grant of a Writ of Certiorari.

2. The questions of statutory construction include:

(a) whether "enabling" language in a statute, authorizing an agency to issue rules and orders "necessary or appropriate" to the discharge of the agency's responsibilities and obligations under the statute, may be applied to authorize the agency to exercise regulatory powers *expressly denied to the agency in the substantive provisions of the statute*; and

(b) whether "negative implication" can be relied upon to support a judicially legislated exception to an express and unambiguous statutory prohibition.

A "cardinal rule" of statutory construction endorsed by this Court and separation of powers principles founded on the exclusive grant of legislative power to Congress[26] support granting Certiorari and reversal of the Court of Appeals' decision. (Part B. below.)

3. The statutory "enabling" language of FPA Section 309 construed in *Verso* authorizes FERC to issue rules

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[25] *New Prime*, No. 17-340, slip op. at 14 (quoting *Moses H. Cone Memorial Hospital* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

[26] U.S. Constitution, Art. I, Sec. 1.

and orders "necessary or appropriate" to the discharge by the Commission of the responsibilities imposed and authorities conferred on the Commission by the Federal Power Act. This form of enabling authorization is a common feature of a number of federal statutes covering a panoply of federal programs, many having significant impacts on the economy. In view of the prevalence of identical or substantially similar enabling language in numerous federal statutes, the precedent established in *Verso* could be applied across a wide range of federal regulatory programs. The Court should grant Certiorari in light of the potential scope of the precedential consequences of the *Verso* decision to federal regulatory programs in securities, energy policy, communications, housing, international trade and other areas. Absent review and reversal by this Court, FERC will be emboldened to further disregard the statutory prohibition forbidding retroactive rate increases. And other federal agencies may view themselves as no longer constrained in their implementation of federal regulatory programs by the limitations and prohibitions expressly imposed by Congress on the exercise of delegated powers. (Part C. below.)

4. The decision below is the most recent of a series of significant regulatory decisions of the FERC supervising the restructuring of the nation's electricity industry. See *New York v. FERC*, 535 U.S. 1 (2002), *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cty.*, 554 U.S. 527 (2008) ("*Morgan Stanley*"), *NRG Power Mktg. LLC v. Maine Pub. Util. Comm'n*, 558 U.S. 165 (2010) ("*NRG Power Marketing*"), *Hughes v. Talen Energy Mktg. LLC*, 136 S. Ct. 1288 (2016) ("*Hughes v. Talen*"), and *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760 (2016) ("*FERC v. EPSA*"). Pursuant to these decisions, this Court has played

an active role in supervising judicial review of that restructuring process. This case greatly expands the Commission's authority respecting how reliability-based System Supply Resource ("SSR") costs are allocated and paid for in the restructured electric industry.[27] For the same reasons that this Court granted Certiorari in *New York v. FERC*, *Morgan Stanley*, *NRG Power Marketing, Hughes v. Talen*, and *FERC v. EPSA*, Certiorari is warranted in this precedent setting case to assure that FERC's implementation of restructuring is consistent with this Court's precedents respecting the limitations on FERC's rate-setting authority under the FPA. In particular, Certiorari is required to assure that a *sui generis* exception to the statutory prohibition against retroactive rate increases established under this Court's precedents is not created for recovery of restructuring-related reliability costs. (Part D. below.)

5. The negative implication construction relied upon by the D.C. Circuit to support FERC's interpretation of Section 309 was never advanced by FERC in support of its rulings below. Indeed, the negative implication adopted by *Verso* was first raised *by Intervenors* before the Court of Appeals (and never embraced by the Commission). Certiorari is required to assure that the scope of judicial review of the orders of the FERC is confined to the grounds relied upon by the Commission as directed by this Court in *SEC v. Chenery Corp.*, 332 U.S. 194 (1947). (Part E. below.)

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[27] In MISO, these reliability required assets are called System Support Resources ("SSRs"). The nomenclature differs in other RTOs, but the cost-recovery principles are comparable.

II. THIS COURT SHOULD GRANT CERTIORARI TO PRESERVE THIS COURT'S PRECEDENTS CONSTRUING EXPRESS STATUTORY LANGUAGE TO MEAN WHAT IT SAYS.

A. Separation of Powers principles provide the context for the substantive legal issues raised in this case.

A cornerstone of the United States Constitution is that the Constitution vests each branch of the federal government with a separate and exclusive type of power. *Patchak v. Zinke,* 138 S. Ct. 897, 904 (2018). The Constitution entrusts the law making power to the Congress alone. *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 589 (1952). While the power to make the law rests with the legislature, the judiciary is tasked with interpreting what the law is. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); *King v. Burwell*, 135 S. Ct. 2480, 2496 (2015). In this regard, however, courts "do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions." *Griswold v. Conn.*, 381 U.S. 479, 482 (1965). Accordingly, courts are not free to rewrite a statute because the court might deem the statute susceptible of improvement. *Nat'l Ass'n of Mfrs. v. Dpt. of Def.*, 138 S. Ct. 617, 629 (2018); *Badaracco v. CIR,* 464 U.S. 386, 398 (1984). Stated differently, a court cannot overrule Congress' judgment based on its own policy views. *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 137 S. Ct. 954, 966 (2017).

These fundamental principles are applicable and controlling in this case because *Verso* ignores an express statutory prohibition based on the Court of Appeals'

view of the competing equities, and the court's conclusion that application of the statute as written would produce an inequitable result. [28]

B. *Verso* contravenes an express statutory prohibition and the precedent of this Court.

Verso confers on the FERC regulatory powers expressly denied the agency by Congress. In doing so, *Verso* contravenes the language of the statute and precedent of this Court.

Section 206(a) provides:

> [T]he Commission shall determine the just and reasonable rate *** *to be thereafter observed* and in force, and shall fix the same by order.[29]

In *Arkla v. Hall*, this Court construed the identical language of Section 5 of the NGA[30] as consistent with the filed rate doctrine's prohibition against retroactive rate increases on energy already purchased.[31] That holding is equally applicable to FPA Section 206(a).[32] In *FPC v. Tenn. Gas Trans. Co.*, 371 U.S. at 152-53, this Court found that the refund provisions of the NGA precluded surcharges to customers who paid too little,

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[28] *Verso*, 898 F.3d at 13 ("[I]t is equitable that those customers receiving a windfall from the pro rata methodology pay it back to effect the reallocation.").

[29] 16 U.S.C. § 824e(a) (emphasis added).

[30] 15 U.S.C. §§ 717d, the NGA counterpart to FPA Section 206.

[31] *Arkla v. Hall*, 453 U.S. at 578.

[32] Where the provisions of the NGA and the FPA are identical, this Court has a practice of citing cases under one statute as support for a ruling under the "sister" statute. *Arkla v. Hall*, 453 U.S. at 578 n.7.

even where refunds may be ordered to customers who paid too much.[33] Finally, the D.C. Circuit's own precedents construe FPA Section 206(a) as prohibiting FERC from authorizing retroactive rate increases. *E.g.*, *City of Anaheim*, 558 F.3d at 523.

The fact that Congress amended Section 206(b) of the FPA to provide FERC authority to order refunds does not mean that Congress authorized FERC to impose retroactive rate increases, even where purportedly necessary to fund refunds otherwise permitted by statute.

It is worth repeating that in *City of Anaheim* Justice Kavanaugh (then Judge) wrote for the D.C. Circuit,

> On its face, § 206(a) prohibits retroactive adjustment of rates. And not surprisingly, the Supreme Court and this Court have read this language *to mean what it says*.

558 F.3d at 523 (emphasis added), citing *Arkla v. Hall,* 453 U.S. at 578. In *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy,* 548 U.S. 291, 296 (2006), this Court admonished that the Court had stated "time and again" that courts must "presume that a legislature says in a statute what it means and means in a statute what it says there" (quoting *Conn. Nat. Bank*

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[33] *FPC v. Tenn. Gas Trans. Co.*, 371 U.S. 145, involved a change in cost of service, coupled with potential changes in cost allocation. The interplay of these ratemaking elements posed the risk of under-recovery by the pipeline of its costs due to the lack of surcharge authority under the NGA. Such under-recovery was a direct consequence of the statutory structure enacted by Congress and, despite the equities presented, did not authorize surcharges otherwise expressly prohibited by statute.

v. Germain, 503 U.S. 249, 253–54 (1992).[34] *Verso* ignores this admonition, and Supreme Court precedent, in authorizing MISO to impose surcharges in order to fund refunds. As explained below, the broad enabling authority of Section 309 cannot be used to circumvent the specific limitations on FERC's authority set forth in Section 206(a).

C. The Court should grant certiorari because the broad "enabling" language of Section 309 cannot be used to supersede the specific statutory strictures of Section 206(a) and "set at naught" the prohibition against retroactive rate increases.

Section 309 of the FPA[35] confers on FERC power "to perform any and all acts," and to "prescribe *** such orders" as it may find "necessary or appropriate" to the discharge by the Commission of the responsibilities imposed and authorities conferred on the Commission by the Federal Power Act. It is well-established that under the NGA and the FPA the implementing authority conferred by Sections 16 and 309, respectively, is limited to actions "consistent with the purposes" of the statute.[36] Section 309 does not add anything to the authority delegated to the Commission by Congress, confer new powers, or authorize remedial

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[34] See also *MCI Telecomm. Corp. v. AT&T Co.,* 512 U.S. 218, 229 (1994).

[35] 16 U.S.C. § 825h.

[36] *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967) (holding the Commission's remedial powers are at their "zenith" when addressing violations of the statute). As previously noted, the instant case involves neither a "legal error," nor a violation of the FPA.

actions expressly prohibited by another section of the Act. Decisions of lower federal courts have consistently emphasized that Section 309 is "far from an unbounded grant of remedial authority."[37] "[W]hile [Section 309] must be read in a broad expansive manner, [it] can only be implemented 'consistently with the provisions and purposes of the legislation.'"[38]

Verso cites no case absent a finding of legal error or violation of the FPA,[39] where any court has construed FERC's equitable powers under section 309 as broad enough to authorize surcharges (as distinguished from

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[37] *E.g.*, *Boston Edison Co. v. FERC*, 856 F.2d 361, 370 (1st Cir. 1988).

[38] *New England Power Co. v. FPC*, 467 F.2d 425, 430 (D.C. Cir. 1972), *aff'd*, 415 U.S. 345 (1974) (quoting *Pub. Serv. Comm'n of N.Y. v. FPC*, 327 F.2d 893, 896–97 (D.C. Cir. 1964)).

[39] See, *e.g.*, *Niagara Mohawk Power Corp.*, 379 F.2d 153. FERC has conceded that the instant case does not involve a "legal error" of the type which this Court has recognized authorizes surcharges to place the parties in the position they would have been in, but for the legal error. *United Gas Improvement Co. v. Callery Props., Inc.*, 382 U.S. 223, 229 (1965). In that respect, it is important to note that, unlike this case, where the surcharges are clearly inconsistent with congressional intent, the remedies authorized in the so-called "legal error" line of cases do not represent an exception to a statutory prohibition. Rather, those cases give effect to the statutory scheme and congressional intent by deeming that which should have been done as done, and thereby placing the parties in the position they would have been in, but for the Commission's legal error. Thus, this case does not involve the exercise of traditional judicial power to: (i) interpret the law, (ii) apply the law to situations not expressly contemplated by Congress, (iii) construe ambiguous statutory language, or (iv) fill a gap left by Congress where Congress' intent is clear (or may be fairly discerned).

refunds or recoupment)[40] based solely on "equitable considerations." The precedents of the lower courts uniformly make clear that, while Section 309 "vests FERC with broad remedial authority, *** [it] cannot be used to supersede specific statutory strictures."[41] Section 206(a)'s prohibition against surcharges is certainly such a "stricture."

In construing Section 16 of the NGA,[42] this Court held that Section 16 "does not authorize the Commission to set at naught an explicit provision of the Act." *FPC v. Texaco*, 417 U.S. 380, 394 (1974). By ignoring the express prohibition of retroactive rate increases in Section 206(a) of the FPA, *Verso* contravenes this Court's binding construction of the statute. Just as the D.C. Circuit saw "no basis for reading [NGA] § 16 as overriding the balance achieved by §§ 4 and 5[43]",[44] likewise there is no basis in this case for reading FPA Section 309 as overriding the balance achieved by Sections 205 and 206 of the FPA.

Verso's reliance on Section 309 is inconsistent with the weight of authority and indeed is a radical departure from the settled understandings of the fundamental operation of ratemaking authorities

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[40] For example, *Towns of Concord, Norwood, & Wellesley v. FERC*, 955 F.2d 67, 73 (D.C. Cir. 1992), involved refunds, not surcharges. The distinction between refunds and recoupment vs. a surcharge is critical and is founded on the statutory language. *Verso* ignores the distinction.

[41] *TNA Merch. Projects, Inc. v. FERC*, 857 F.3d 354, 359 (D.C. Cir. 2017).

[42] 15 U.S.C. § 717o. The NGA counterpart to FPA Section 309.

[43] 15 U.S.C. §§ 717c and 717d. The NGA counterparts to FPA Sections 205 and 206.

[44] *Pub. Serv. Comm'n of N.Y. v. FERC*, 866 F.2d 487, 491-92 (D.C. Cir. 1989).

under the FPA and the NGA. As explained below, that departure cannot be shored up by flawed reliance on "disfavored" negative implication to contradict express statutory language. Certiorari should be granted to ratify the otherwise uniform construction of the FPA's "enabling" legislation by lower courts as limited to authorizing agency actions that are consistent with the substantive powers, and limitations on those powers, conferred on FERC in the operative provisions of the Act.

D. The Court should grant Certiorari because negative implication cannot be used as a tool of statutory construction to contravene clear and unambiguous statutory language.

Verso relies heavily on negative implication, based on the 1988 and 2005 amendments to subsections (b) and (c) of Section 206 (discussed below), to confirm its interpretation of Section 309 as providing authority to impose retroactive surcharges in cost allocation cases.[45] As such, *Verso*'s holding construes subsection (a) of Section 206 as amended by negative implication based on the relationship between subsections (b) and (c) of Section 206 enacted in 1988 and 2005. However, this Court has required that the intention of the legislature "must be clear and manifest" in order to support amendment by negative implication such as that adopted by *Verso*.[46] This Court has repeatedly stressed that "'[a] new statute will not be read as . . . amending a prior one unless there exists a "positive repugnancy" between the provisions of the new [here,

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[45] *Verso*, 898 F.3d at 11.

[46] *U.S. v. Borden Co.*, 308 U.S. 188, 198 (1939) (quoting *Town of Red Rock v. Henry*, 106 U.S. 596, 602 (1883)).

subsections (b) and (c)] and those of the old [subsection (a)] that cannot be reconciled.'" *Regional Rail Reorganization Act Cases,* 419 U.S. 102, 134 (1974) (quoting *In re Penn Central Transp. Co.,* 384 F.Supp. 895, 943 (Sp.Ct.R.R.R.A. 1974)). As explained below, there is nothing in the amendments to FPA Section 206 that would cause a "positive repugnancy" that "cannot be reconciled" between the amended provisions of subsections (b) and (c) and the undisturbed text of subsection (a). Moreover, there is nothing in the legislative history of the 1988 and 2005 amendments to suggest that Congress' intent to modify Section 206(a)'s settled construction was "clear and manifest," so as to support *Verso*'s effective amendment by implication of Section 206(a)'s prohibition of retroactive rate increases.

In 1988, in order to address rates which were too high, Congress amended Section 206 of the FPA by redesignating subsection (b) as subsection (d) and adding a new subsection (b) to authorize *refunds* back to a date "not earlier than the date 60 days after the filing" of the complaint or "the publication by the Commission of notice of its intention to initiate" an investigation of the utility's rates.[47] Notably, Congress made no corresponding change to subsection (a) of Section 206 to authorize rate increases (or *surcharges*) to address rates which were too low.

Subsequently, in 2005, Congress further amended subsection (b) to provide authority to order refunds back to the date of the filing of the Complaint or the Federal Register publication of notice of the initiation of an investigation by the Commission.[48] Again,

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[47] Pub. L. 100-473 § 2, 102 Stat. 2299 (Oct. 6, 1988).

[48] Pub. L. 109-58, Title XII, Subtitle G, § 1285, 119 Stat. 980 (Aug. 8, 2005).

Congress did not amend subsection (a) to provide comparable authority to order retroactive rate increases (surcharges).

In the 2005 amendments, Congress also added a new subsection (c) limiting FERC's authority to order refunds in certain cases involving reallocation of costs among utilities within a holding company structure.[49] These amendments give rise to *Verso*'s negative implication, drawn from the relationship between subsections (b) and (c) of FPA Section 206, to support legislating an exception to the express statutory prohibition in subsection (a).[50] As a matter of statutory construction, negative implication drawn from extraneous provisions of a complex statute, amended at various times, cannot be relied upon to support an interpretation of the statute contrary to express, unambiguous statutory language. Doing so is also unconstitutional because it arrogates to the judiciary legislative powers conferred exclusively on Congress by Article I, Sec. 1, of the United States Constitution.

In *Marx v. General Revenue Corp.*, 568 US 371, 381 (2013), this Court admonished, that "[t]he force of any negative implication *** depends on context." The Court explained, for example, that the *expressio unius* canon "does not apply 'unless it is fair to suppose that Congress considered the unnamed possibility and meant to say no to it.'"[51] In this case, the legislative history of the amendment authorizing *refunds* back to the date of the filing of the complaint contains no support for the negative implication relied upon by the

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[49] *Id*.

[50] *Verso*, 898 F.3d at 11.

[51] *Marx v. Gen. Revenue Corp.*, 568 U.S. at 381 (quoting *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003)).

D.C. Circuit to authorize *surcharges* back to the same filing date.

Furthermore, *Marx v. General Revenue* recognized that in principle "the canon can be overcome by 'contrary indications that adopting a particular rule or statute was probably not meant to signal any exclusion.'"[52] Once again, there is nothing in the text of the statutory amendments themselves, or in the legislative history of the enactment of the amendments, which together form the basis for the negative implication relied upon by the D.C. Circuit, to suggest that the enactment of a special *limitation* on refunds under subsection (c) of Section 206 was meant to signal a general exception *in other contexts* to the express statutory prohibition against retroactive rate increases in FPA Section 206(a) that was not amended in either 1988 or 2005.

The principles established in *Marx v. General Revenue* reject application of a negative implication in this case. The context of the refund authority resulting from Congress' decision to amend Section 206(b) is no different than the refund authority at issue in *FPC v. Tenn. Gas Trans. Co.* This Court made clear in that case that authority to order refunds does not include authority to impose surcharges. In the absence of any indication in this case that Congress contemplated a different result, surcharges are not authorized. Yet that is precisely what *Verso* does.

In choosing between a negative implication and *unambiguous contrary statutory language*, sound rules of statutory construction demand that the express prohibition prevail. A "cardinal principle" of statutory

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[52] *Id.*, 568 U.S. at 381 (quoting *U.S. v. Vonn*, 535 U.S. 55, 65 (2002)).

interpretation is that repeals by implication are not favored.[53] Indeed, this Court has repeatedly recognized that implied amendments are no more favored than implied repeals.[54]

Verso's reliance on negative implication raises significant questions of statutory construction that only this Court can resolve. This Court should grant Certiorari in light of *Verso*'s radical departure from one of the "cardinal principles" of statutory construction consistently applied by this Court for 150 years. If allowed to stand, negative implication could be applied in numerous other statutory contexts *to contravene express statutory language.* Certiorari should be granted to address *Verso*'s analytically unprincipled departure from settled law respecting fundamental aspects of utility ratemaking that affect the regulated electric and natural gas industries.

E. The conflating of "revenue requirement" and "rate increase" in *Verso* does violence to the regulatory structure enacted by Congress.

Verso attempts to define away the statutory impediment to retroactive surcharges posed by Section 206(a), by mischaracterizing MISO's "revenue requirement"

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[53] *U.S. v. Tynen*, 78 U.S. 88, 92 (1870); *Posadas v. National City Bank of New York*, 296 U.S. 497, 503 (1937); *U.S. v. Madigan*, 300 U.S. 500, 506 (1937); *Borden Co.*, 308 U.S. at 198; *Morton v. Mancari*, 417 U.S. 535, 549 (1974).

[54] *U.S. v. Welden*, 377 U.S. 95, 102-03 n.12 (1964); *Regional Rail Reorganization Act Cases,* 419 U.S. at 134; *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 664 & n.8 (2007); *see* 1 J.G. Sutherland, Statutory Construction (3d ed. F.E. Horack, 1943) 365-366 (citing cases).

as the "aggregate rate."[55] Thus, *Verso* disingenuously claims that no retroactive rate increase actually existed because "the aggregate rate remained the same."[56] Verso explains that no rate increase occurred because the restructuring-related reliability costs at issue were merely "divided differently among the constituent payers."[57] This reasoning is pure sophistry. It is well-established by this Court that the "rate" to which the FPA applies is the individual rate paid by customers, not the utility's *revenue requirement*, mischaracterized by *Verso* as the "aggregate rate."[58]

Verso's holding turns ratemaking methodology on its head, ignores fundamental utility ratemaking principles, and does violence to the regulatory structure created by statute. In *FPC v. Tenn. Gas Trans. Co.*, this Court explained:

> [A] rate for one class or zone of customers may be found by the Commission to be too low, but the company cannot recoup its losses by making retroactive the higher rate subsequently allowed; on the other hand, when another class or zone of customers is found to be subjected to excessive rates and a lower rate is ordered, the company must make refunds to them. The company's losses in the first instance do not justify its illegal gain in the latter. Such situations are entirely

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[55] *Verso,* 898 F.3d at 11.

[56] *Id.*

[57] *Id.*

[58] See *FERC v. EPSA*, 136 S. Ct. at 777, defining "rate" for FPA purposes fundamentally contrary to the construction given in *Verso*.

> consistent with the policy of the Act and, we are told, occur with frequency.[59]

This Court should grant Certiorari to reject the confusion by *Verso* of a utility's revenue requirement on the one hand with costs allocated to each customer on the other, where historically such ratemaking elements have been different concepts. Certiorari is required in order to preserve application of the statutory structure created by Congress and traditional ratemaking principles to reliability costs that are a product of restructuring of the electric industry.

F. Congress already balanced the equities and, therefore, only Congress can rebalance the equities by providing the remedy FERC imposed and the D.C. Circuit ratified.

Although both FERC and the D.C. Circuit professed to engage in a balancing of equitable considerations,[60] such balancing was not theirs to make. Petitioners reject the FERC's and the D.C. Circuit's *perception* that an inequity existed in this case that needed to be corrected. Congress decided it is more inequitable to order a surcharge on wholesale customers who cannot change their historical consumption of electricity than it is to deny refunds to other customers who knew the rate they were paying at the time they used whatever power they used. Congress having made that determination, it is not within the province of FERC or the Court of Appeals to weigh the equities differently in

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[59] *FPC v. Tenn. Gas Trans. Co.*, 371 U.S. at 152-53.

[60] Sept. 22 Order, 156 FERC ¶ 61,205 at PP51-56; *Verso*, 898 F.3d at 13.

order to justify rejecting the text of the statute in fashioning an *ultra vires* remedy.

The allegedly "inequitable results" relied upon in this case, by both the FERC and the D.C. Circuit, flow directly from balancing of the equities that Congress accepted in developing the regulatory structure Congress enacted and, as such, only Congress could re-balance the equities differently to provide a "remedy" in this case.[61]

Verso ignores the basic framework of the FPA based on the conclusion that the inability of FERC to order surcharges would produce an inequitable result. "FERC is a 'creature of statute,' [however,] having 'no constitutional or common law existence or authority, but *only* those authorities conferred upon it by Congress.'"[62] Therefore, a perceived *need* for surcharges to pay for refunds (in order to avoid an inequitable result) does not create the *authority* to order surcharges. This conclusion is particularly true in view of the express statutory prohibition against surcharges set forth in FPA Section 206(a).[63] That prohibition exists despite the statute's potential to yield what even the D.C. Circuit has acknowledged may be inequitable results from time-to-time.[64] Most recently, the D.C. Circuit held that the Commission lacks

> any power to disregard on equitable grounds either the filed rate doctrine or the rule

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[61] *E.g.*, *FPC v. Tenn. Gas Trans. Co.*, 371 U.S. at 152-53.

[62] *Atl. City Elec. Co. v. FERC*, 295 F.3d 1, 8 (D.C. Cir. 2002) (quoting *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001)).

[63] *Id.*

[64] *Pub. Serv. Comm'n of N.Y. v. FERC*, 866 F.2d at 492.

> against retroactive ratemaking, *no matter how compelling the equities might be.*[65]

Nevertheless, in *Verso* the D.C. Circuit adopted FERC's view that it would be inequitable to deny "those who paid too much" refunds because MISO, a non-profit entity, lacked any source of funds from which to pay refunds. However, that *perceived* "inequitable result"[66] is a direct consequence of the congressionally mandated prohibition against retroactive rate increases statutorily embodied in FPA Section 206(a). *Indeed, the imposition of surcharges barred by statute works an inequitable result on those ratepayers subject to the retroactive rate increases.* Congress already balanced the equitable considerations in establishing the statutory structure which produced the result that FERC and the court found inequitable.

The circumstance which the FERC and D.C. Circuit found compelling is inherent in the statutory structure enacted by Congress. It is not up to FERC to exceed the limitations Congress imposed on the powers conferred on the agency by statute, or for the D.C. Circuit to rely on highly disfavored "negative implication" to read into the statute a remedial authority (approval of retroactive rate increases) expressly denied the agency by statute. Relief from the consequences of the

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[65] *Old Dominion,* 892 F.3d 1223, 1230 (D.C. Cir. 2018) (paraphrasing *Old Dominion Elec. Coop.,* 154 FERC ¶ 61,155 at P 17 (2016) (emphasis added)).

[66] Petitioners do not concede that the result would be "inequitable," as it is a consequence of the balancing of equitable considerations made by Congress, pursuant to which Congress determined that it would be more inequitable to impose surcharges on ratepayers after they had made their purchase decisions and were unable to avoid the cost increase.

legislative amendments which created the FPA's asymmetrical statutory structure may only be provided by Congress. *FPC v. Texaco Inc.*, 417 U.S. at 394 ("It is not the Court's role *** to overturn congressional assumptions embedded into the framework of regulation established by the Act."). FERC and the D.C. Circuit ignored the balance struck by Congress, choosing instead to substitute their view of a more equitable balance for the one Congress chose by enacting Section 206(a). That, however, was not FERC's or the court's prerogative.

Verso's authorization of surcharges on equitable grounds cannot be reconciled with the express statutory prohibition "no matter how compelling the equities might be."[67] This Court should grant Certiorari to assure that FPA Section 206(a) is construed by lower courts to "mean what it says."[68]

III. THE COURT SHOULD GRANT CERTIORARI TO PREVENT *VERSO*'S PRECEDENT FROM BEING APPLIED TO A WIDE RANGE OF FEDERAL STATUTES CONTAINING IDENTICAL "ENABLING" STATUTORY LANGUAGE.

Certiorari is also appropriate in view of the potential precedential effect from extension of *Verso*'s erroneous construction of Section 309's enabling language to other federal statutes. The "enabling" authority construed in *Verso*, authorizing FERC to issue rules and orders "necessary or appropriate" to the discharge by the Commission of the responsibilities imposed and authorities conferred by the Federal Power Act, is

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[67] *Old Dominion*, 892 F.3d at 1230 (emphasis added).

[68] *City of Anaheim*, 558 F.3d at 523.

common to many federal statutes covering a wide range of federal programs, many with significant impacts on the economy. For example, see Section 16 of the Natural Gas Act, 15 U.S.C. § 717o; Section 23 of the Securities Exchange Act of 1934, 15 U.S.C. § 78w(a)(1) (pertaining to regulation of security exchanges); Section 38 of the Investment Company Act of 1940, 15 U.S.C. § 80a-37(a) (regulating Investment Companies); Section 108 of the Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7218(b) (pertaining to corporate governance); Section 402 of the North American Free Trade Agreement Implementation Act, 19 U.S.C. § 3432(g) (relating to regulation of international trade); Section 1102 of the Panama Canal Act of 1979, 22 U.S.C. § 3612b(d) (foreign relations); Section 252 of the Energy Policy and Conservation Act, 42 U.S.C. § 6272(e)(4) (energy policy); Section 120 of the Federal Credit Union Act, 12 U.S.C. § 1766(i)(2); and Section 1367 of the Housing And Community Development Act of 1992, 12 U.S.C. § 4617(i)(8). Still other federal statutes employ similar enabling authority for actions "necessary" to carry out the functions of the agency. See, *e.g.*, Section 4(i) of the Communications Act of 1934, 47 U.S.C. § 154(i) (Federal Communications Commission "may perform any and all acts, make such rules and regulations, and issue such orders *** as may be *necessary* in the execution of its functions" (emphasis added)); Section 301(a)(1) of the Clean Air Act, 42 U.S.C. §7601(a)(1) (EPA Administrator authorized "to prescribe such regulations as are *necessary* to carry out his functions" (emphasis added)).

In view of the prevalence of identical or substantially similar enabling language in numerous federal statutes, the precedent established in *Verso* could be applied across a wide range of federal regulatory programs, both (a) to confer on agencies powers

Congress expressly intended to deny the agencies, and (b) to exempt agencies from compliance with statutory requirements Congress expressly imposed. The Court should grant Certiorari in light of the potential scope of the precedential consequences of the *Verso* decision to federal regulatory programs in securities, energy policy, communications, housing, international trade and other areas. Certiorari is needed to prevent the erroneous statutory construction in *Verso* from being applied under other statutes affecting all sectors of the nation's economy in direct contravention of express statutory limitations, prohibitions, or requirements.

This Court should grant Certiorari to prevent an extension to NGA Section 16 of *Verso*'s expansive reading of FPA Section 309. Similarly, the Court should grant Certiorari to prevent the spread of *Verso*'s sweepingly broad reading of the FPA's enabling authority to identical or substantively similar enabling language in a substantial number of other federal statutes affecting large segments of the nation's economy.

IV. THE COURT SHOULD GRANT CERTIORARI TO CONTINUE THE COURT'S PRACTICE OF REVIEW OF SIGNIFICANT CASES IMPLEMENTING "RESTRUCTURING" OF THE ELECTRIC INDUSTRY.

In Title VII of the Energy Policy Act of 1992,[69] Congress amended the FPA to authorize FERC to order utilities that own transmission lines to transmit power sold by competitors.[70] In 1996, in furtherance

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[69] Pub. L. 102-486, §§ 721-726, 106 Stat. 2915-2921 (Oct. 24, 1992).

[70] See 16 U.S.C. § 824j-824k.

of this authorization, FERC invoked its powers under FPA Sections 205 and 206 to promulgate a general rule, Order No. 888,[71] "restructuring" the electric industry.[72]

In *New York v. FERC*, 535 U.S. 1 (2002), this Court reviewed FERC's landmark Order No. 888 for consistency with the agency's new legislative charge and largely upheld the rule.[73] *New York v. FERC* was merely the first of a series of decisions by this Court reviewing significant actions taken by FERC in implementing restructuring of the electric industry. A series of cases involving aspects of implementation of restructuring under Order No. 888 ensued: *Morgan Stanley*, 554 U.S. 527 (application of the *Mobile-Sierra* doctrine[74] following restructuring);[75] *NRG Power Marketing*, 130 S. Ct. 693 (application of *Mobile-Sierra* public interest standard to Regional Transmission Organization settlement rates); *Hughes v. Talen*, 136 S. Ct. 1288 (post-restructuring state subsidy program preempted due to conflict with FERC's exclusive and plenary jurisdiction under the FPA over restructured

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[71] *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), order on reh'g, Order No. 888-A, 78 FERC ¶ 61,220 (1997), order on reh'g, Order No. 888-B, 81 FERC ¶ 61,248 (1997), order on reh'g, Order No. 888-C, 82 FERC ¶ 61,046 (1998), aff'd in relevant part, *Transmission Access Policy Study Grp.*, 225 F.3d at 667.

[72] See *New York v. FERC*, 535 U.S. at 9-14.

[73] See *id.* at 14-28.

[74] *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956).

[75] *Morgan Stanley*, 554 U.S. at 555.

wholesale electricity markets); and *FERC v. EPSA*, 136 S. Ct. 760 (FERC demand response initiative consistent with FERC's statutory authority).

In the *FERC v. EPSA* proceedings before the D.C. Circuit, the lower court vacated Order No. 745-A[76] in its entirety as "*ultra vires* agency action."[77] Notably, the D.C. Circuit expressed the view that "the potential *windfall* to demand response resources" from the pricing methodology adopted by FERC "seems troubling."[78] In *Verso*, the D.C. Circuit voiced similar concern respecting potential "windfalls" from the absence of surcharge authority.[79] *Verso*'s concern suffers from the same flaw that afflicted the D.C. Circuit's fixation in *EPSA v. FERC* with the "troubling" potential for inequitable "windfalls" under Order No. 745. This Court did not share the D.C. Circuit's view of the significance of potentially inequitable windfalls, reversing the D.C. Circuit in *FERC v. EPSA*. For the same reason, this Court should grant Certiorari to reject the D.C. Circuit's misplaced reliance in *Verso* on potential windfalls to justify ignoring the clear and unambiguous language of Section 206(a) of the FPA.

The foregoing cases evidence a consistent pattern of involvement by this Court in supervision of both the implementation by the FERC of restructuring of the electric industry, and judicial review thereof by the nation's Courts of Appeals. The orders under review

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[76] *Demand Response Compensation in Organized Wholesale Energy Markets* (Order No. 745-A), 137 FERC ¶ 61,215 (2011).

[77] *Electric Power Supply Ass'n v. FERC*, 753 F.3d 216 (D.C. Cir. 2014), ("*EPSA v. FERC*"), *rev'd and remanded*, 136 S. Ct. 760 (2016).

[78] *Id*. 753 F.3d at 225.

[79] *Verso,* 898 F.3d at 13.

in this case are the most recent FERC Orders implementing restructuring of the electric industry. The orders challenged in this case deal with critical issues involving the reliability of the restructured electric industry pursuant to which RTOs such as MISO may pay utility generators to continue to operate generation facilities that the utilities would otherwise remove from service for economic reasons. The FERC orders under review address how those reliability-related restructuring costs may be allocated by MISO among industry participants, and essentially determine who will pay those reliability related SSR costs which notably arise uniquely in the context of the restructured electric industry. *Verso*'s departure from this Court's interpretations of the statutorily established regulatory scheme is an expedient, but erroneous, solution to complex reliability issues flowing out of FERC's restructuring initiative. A common thread throughout *New York v. FERC*, *Morgan Stanley*, *NRG Power Marketing*, *Hughes v. Talen*, and *FERC v. EPSA*, is that restructuring must be accomplished within the statutory structure enacted by Congress. Review by this Court is required to assure that FERC's ongoing implementation of electric industry restructuring, including critically important statutory construction questions related to recovery of reliability-related costs, is consistent with the statute and with this Court's precedents construing the FPA.

V. THE COURT SHOULD GRANT CERTIORARI BECAUSE *VERSO* VIOLATES THIS COURT'S PRECEDENT IN *SEC V. CHENERY CORP.*

Verso violates the general rule in *SEC v. Chenery Corp.* that a reviewing court "must judge the propriety of [agency] action solely by the grounds invoked by the agency."[80]

The core negative implication construction adopted by the D.C. Circuit was never advanced by FERC in support of its rulings below. Moreover, the negative implication argument adopted by *Verso* was never even presented to FERC. The argument was first raised in the Joint Intervenor's Brief before the Court of Appeals, and was never litigated before the Commission.[81]

Certiorari is required to limit the scope of judicial review of the orders of the FERC to the grounds relied upon by the Commission as directed by this Court's precedent in *SEC v. Chenery*.

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[80] 332 U.S. at 196. While under the D.C. Circuit's precedents, the court may, in its discretion, "entertain arguments raised only by an intervenor on review," *La. P.S.C. v. FERC*, 482 F.3d 510 at 519 (D.C. Cir. 2007), *citing*, *Nat'l Ass'n of Regulatory Util. Comm'rs v. ICC*, 41 F.3d 721, 729-30 (D.C. Cir. 1994), it is important to note that the court may do so *only* "if [the arguments] have been fully litigated in the agency proceeding." *Id*. Notably *Verso* does not even comply with the D.C. Circuit's own exception to *SEC v. Chenery*, an exception not yet endorsed by this Court.

[81] Joint Brief of Intervenors in Support of Respondent at 27.

CONCLUSION

This is a case in which the D.C. Circuit allowed itself to be swayed by what the court apparently viewed as compelling equitable considerations. In response, the court strained to find a basis for affirming the surcharges approved by the Commission, ultimately relying on a highly disfavored principle of statutory construction to read out of the statute an express prohibition against the relief FERC authorized. In doing so, the court exceeded its jurisdiction and encroached on the legislative province of Congress.

In choosing between a disfavored negative implication, conferring on an agency regulatory power, and express unambiguous statutory language denying that agency the very same power, this Court's long-standing "cardinal principle" of statutory construction demands that the express statutory language must prevail. Certiorari should be granted to preserve the fundamental principle of statutory construction that negative implication cannot be used to contravene express statutory requirements, limitations or prohibitions. In this case, Certiorari is required to preserve the express statutory prohibition set forth by Congress in FPA Section 206(a) and this Court's precedent that section 206(a)'s prohibition against retroactive rate increases "mean[s] what it says."[82]

Certiorari should be granted to prevent the D.C. Circuit's expansive reading of "necessary or appropriate" enabling legislative language, commonly found in numerous federal statutes, from being applied across a wide range of federal regulatory programs, both (a) to confer on agencies powers Congress expressly

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[82] *City of Anaheim*, 558 F.3d at 523.

denied them by statute and (b) to exempt agencies from compliance with statutory requirements.

Certiorari should be granted in this precedent setting case to assure that FERC's implementation of restructuring of the nation's electric industry is consistent with the statutory requirements and limitations of the FPA as construed by this Court. Doing so would be consistent with this Court's repeated exercise of appellate jurisdiction to review FERC's implementation of restructuring in the electric industry and judicial review thereof by the Courts of Appeals.

Finally, Certiorari should be granted to assure that the scope of judicial review of the orders of the FERC is properly limited to the grounds relied upon by the Commission as directed by *SEC v. Chenery*.

Respectfully submitted,

SPENCER A. SATTLER
MICHIGAN DPT. OF
ATTORNEY GENERAL
Public Service Division
7109 West Saginaw Highway
Lansing, MI 48917

DAVID D'ALESSANDRO
M. DENYSE ZOSA
Special Assistant
Attorneys General
STINSON LEONARD
STREET LLP
1775 Pennsylvania Ave, N.W.
Suite 800
Washington, DC 20006-3816
david.dalessandro@
stinson.com

Attorneys for Michigan
Public Service Commission

WILLIAM F. DEMAREST, JR.
Counsel of Record
HUSCH BLACKWELL LLP
750 17th Street, N.W.
Suite 900
Washington, D.C. 20006
(202) 378-2300
william.demarest@
huschblackwell.com

THOMAS J. WATERS
FRASER TREBILCOCK DAVIS
& DUNLAP, P.C.
124 W. Allegan, Suite 1000
Lansing, MI 48933
(517) 377-0811
twaters@fraserlawfirm.com

Attorneys for City of
Mackinac Island

SAULIUS K. MIKALONIS
PLUNKETT COONEY
38505 Woodward Ave.
Suite 2000
Bloomfield Hills, MI 48304
(248) 901-4022
smikalonis@
plunkettcooney.com

Attorneys for The Sault Ste. Marie Tribe of Chippewa Indians

ANDREW B. YOUNG
MAYER BROWN LLP
1999 K Street, N.W.
Washington, D.C. 20006
(202) 263-3272
ayoung@mayerbrown.com

Attorneys for Upper Peninsula Power Co.

EMILY W. STREETT
MCCARTER & ENGLISH, LLP
1301 K Street NW
Suite 1000
Washington, D.C. 20005
(202) 753-3351
estreett@mccarter.com

Attorneys for Cloverland Electric Cooperative

ROBERT C. FALLON
ENGLEMAN FALLON, PLLC
1717 K St., NW, Suite 900
Washington, D.C. 20006
(202) 464-1331
rfallon@efenergylaw.com

Counsel for Verso Corporation

January 23, 2019

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS,
DISTRICT OF COLUMBIA CIRCUIT

No. 15-1098
Consolidated with 16-1205
16-1212
16-1226
16-1228
16-1385
16-1388
16-1389
16-1391
16-1397
16-1404

VERSO CORPORATION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

MARQUETTE BOARD OF LIGHT AND POWER, *et al*.,
Intervenors.

Argued April 6, 2018
Decided July 31, 2018
Rehearing En Banc Denied October 26, 2018

Synopsis

Background: Customers subject to surcharges as monetary remedy for improper pro rata allocation of system support resource (SSR) costs, which ensured ongoing operation of SSR units, petitioned for review of orders of the Federal Energy Regulatory Commission (FERC), which ordered refunds to customers that were overcharged SSR costs via surcharges, alleging orders violated filed-rate doctrine and prohibition on retroactive rate increases.

Holdings: The Court of Appeals, Wilkins, J., held that:

FERC's determination, that undercharging pro rata portion of costs to certain customers was unjust and unreasonable under Federal Power Act (FPA), such that those customers would be subject to surcharge to refund overcharged customers, was supported by substantial evidence and reasoned decision-making;

FERC's determination that undercharging pro rata portion of costs to certain customers was unjust and unreasonable under FPA, such that those customers would be subject to surcharge to refund overcharged customers, was not arbitrary and capricious, notwithstanding FERC's usual policy of denying reallocation; and

FERC acted within its discretion when determining that undercharging pro rata portion of costs to certain customers was unjust and unreasonable under FPA, and ordering that those customers would be subject to surcharges to refund overcharged customers.

Petition denied.

On Petitions for Review of Orders of the Federal Energy Regulatory Commission

Attorneys and Law Firms

David W. D'Alessandro argued the cause for petitioner Michigan Public Service Commission. William F. Demarest Jr. argued the cause for petitioners Tilden Mining Company L.C. and Empire Iron Mining Partnership. With them on the joint briefs were Kelly A. Daly, M. Denyse Zosa, Steven A. Neeley Jr., Sylvia J.S. Bartell, Lauren D. Donofrio, Assistant Attorney General, Office of the Attorney General for the State of Michigan, Jennifer U. Heston, Saulius K. Mikalonis, Christopher R. Jones, Elizabeth W. Whittle, Thomas J. Waters, Christine C. Ryan, Phyllis G. Kimmel, Robert C. Fallon, and Andrew B. Young. Steven D. Hughey, Assistant Attorney General, Office of the Attorney General for the State of Michigan, Francis A. Taylor Jr., and A. Hewitt Rose III, entered appearances.

Holly E. Cafer, Senior Attorney, Federal Energy Regulatory Commission, argued the cause for respondent. With her on the brief were James P. Danly, General Counsel, Robert H. Solomon, Solicitor, and Nicholas M. Gladd, Attorney.

William L. Massey argued the cause for intervenor Public Service Commission of Wisconsin. On the joint brief of intervenors were Cynthia S. Bogorad, David E. Pomper, Rory McGarry, Justin M. Vickers, Regina Y. Speed-Bost, and Debra Ann Palmer.

Before: Rogers, Srinivasan and Wilkins, Circuit Judges.

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OPINION

Opinion for the Court filed by Circuit Judge WILKINS.

In *Louisiana Public Service Commission v. Federal Energy Regulatory Commission*, this Court affirmed FERC's denial of refunds in a cost-allocation case, upholding its discretion to deny refunds where a flaw in rate design caused the costs to be borne disproportionately among customers. *See* 883 F.3d 929 (D.C. Cir. Mar. 6, 2018). This case presents a similar scenario with an opposite result: here, after finding the rate-distribution methodology unjust and unreasonable upon a Section 206 complaint, FERC ordered refunds to customers who paid too much, funded by surcharges on customers who paid too little. Petitioners—who were subjected to surcharges—challenge FERC's orders as violating the filed-rate doctrine and the prohibition on retroactive rate increases. They also argue that FERC's decisions were supported by insufficient evidence and that FERC's reliance on the evidence it did employ was arbitrary and capricious.

We conclude that the reallocation at issue here does not constitute an impermissible retroactive rate increase. FERC reasonably determined that the prior rate methodology was unjust and unreasonable, and its reliance on certain evidence in reaching this conclusion was appropriate. Having established that the existing rate was unjust and unreasonable, and having determined that a different methodology would comply with cost-causation principles, FERC had authority to order refunds and corresponding surcharges under Section 206 and its broad remedial authority under Section 309. Accordingly, we deny the Petitions for review.

I.

This case involves system support resource ("SSR") costs in the territory of the American Transmission Company ("ATC") under the Midcontinent Independent System Operator, Inc. ("MISO") Tariff. To ensure system stability, MISO requires energy producers in its territory to notify MISO prior to ceasing operation. MISO then evaluates the importance of the would-be retired facility and may require continued operation if necessary for the reliability of energy supply. Such providers are designated SSRs, and they are compensated for the cost of continued operation under SSR agreements with MISO.

For most of the MISO service area, SSR costs have long been shared by customers based on the load served. *Midwest Indep. Transmission Sys. Operator, Inc. Pub. Utils. with Grandfathered Agreements in the Midwest Iso Region*, 108 FERC ¶ 61,163, ¶ 61,968, P 372 (Aug. 6, 2004). Under this allocation methodology, each load-serving entity ("LSE") pays for the reliability resources in proportion to its reliability needs.

For the ATC area, however, the MISO Tariff allocated SSR costs pro rata among all customers. *See id.* at P 368. FERC originally approved the ATC pro rata allocation as part of the separate tariff for ATC's territory in Michigan's Upper Peninsula and Wisconsin. *See Wis. Elec. Power Co. Am. Transmission Co., LLC Madison Gas & Elec. Co. Wis. Pub. Serv. Corp. Wis. Power & Light Co.*, 97 FERC ¶ 61,337, ¶ 62,582 & n.4 (Dec. 21, 2001). However, FERC incorporated ATC into the MISO system around the same time that it approved ATC's SSR-cost-allocation methodology. *See Am. Transmission Co., LLC*, 97 FERC ¶ 62,182, ¶ 64,269 (Nov. 28, 2001). The MISO Tariff continued

the pro rata allocation methodology for the ATC area after it became part of MISO. Specifically, Section 38.2.7.k of the Tariff provided that "any costs of operating an SSR Unit allocated to the footprint of [ATC] shall be allocated to all LSEs within the footprint of [ATC] on a *pro rata* basis." *See Midcontinent Indep. Sys. Operator, Inc. Pub. Serv. Comm'n of Wis.*, 148 FERC ¶ 61,071, ¶ 61,443, P 12 (July 29, 2014) ("July 29, 2014 Order"). Only the ATC area was subject to such a specified methodology: for the rest of the MISO area, the Tariff provided only that reliability costs were allocated to the LSEs "which require[ ] the operation" of reliability resources. *Id.* at P 18. In other words, SSR costs for all non-ATC service areas were allocated to the LSEs that actually benefited from the reliability resources.

The instant Petitions arise from SSR agreements regarding three facilities in the ATC service area. MISO filed the first SSR agreement using the ATC pro rata allocation in October 2012, for the continued operation of a City of Escanaba, Michigan facility, which FERC accepted. *See Midwest Indep. Transmission Sys. Operator, Inc.*, 142 FERC ¶ 61,170, ¶ 61,812, P 11 (Mar. 4, 2013). In early 2014, MISO filed an SSR agreement requiring the continued operation of a Presque Isle facility located in Marquette, Michigan, with costs allocated to customers pro rata. FERC accepted the proposed Presque Isle SSR Agreement on April 1, 2014. *Midcontinent Indep. Sys. Operator, Inc.*, 147 FERC ¶ 61,004, ¶ 61,013, PP 5, 12 (Apr. 1, 2014). MISO also submitted an SSR agreement regarding the continued operation of a White Pine Electric Power, LLC unit, which FERC accepted on June 13, 2014. *Midcontinent Indep. Sys. Operator, Inc.*, 147 FERC ¶ 61,199, ¶ 62,114, PP 1, 3, 11 (June 13, 2014).

On April 3, 2014, two days after FERC accepted the Presque Isle SSR Agreement, the Public Service Commission of Wisconsin ("Wisconsin Commission" or "PSCW") filed a complaint under Section 206 of the Federal Power Act, 16 U.S.C. § 824e, to challenge the allocation of the Presque Isle SSR costs as unjust and unreasonable. The Complaint relied on a study that MISO conducted, at the request of stakeholders, to assess which load-serving entities in the ATC footprint actually benefited from the continued operation of the Presque Isle facility. PSCW Complaint at 3 & n.8, FERC Docket No. EL14-34-000 (Apr. 3, 2014). The preliminary load-shed analysis showed that 42 percent of the benefiting load of the Presque Isle facility was in Wisconsin; however, the MISO Tariff assigned 92 percent of the SSR costs to Wisconsin ratepayers based on the pro rata allocation methodology. *Id.* at 3-4.

On July 29, 2014, FERC granted the Wisconsin Commission's Complaint. *See* July 29, 2014 Order, 148 FERC ¶ 61,071. FERC concluded that the Wisconsin Commission "met its burden ... to show that the ATC *pro rata* cost allocation provision in MISO's Tariff is unjust, unreasonable, unduly discriminatory, or preferential because ... it does not follow cost causation principles." *Id.* at P 59. Relying on the preliminary load-shed study, FERC reasoned that the pro rata allocation "would allocate 92 percent of the Presque Isle SSR costs to LSEs located in Wisconsin even though ... such LSEs only receive 42 percent of the reliability benefit." *Id.* at P 61. This evidence "demonstrat[ed] that the methodology d[id] not reflect a proper allocation of costs." *Id.* FERC explained that the "preliminary nature of the load-shed study" was not problematic for its analysis because the data showed that "the current ATC *pro rata* cost allocation

[ ] bears little, if any, relation to the benefits provided" from the reliability agreement. *Id.*

By way of remedy, the July 29, 2014 Order directed MISO to remove the pro rata provision from the Tariff, "thereby extending to the ATC footprint the general SSR cost allocation Tariff language, which requires MISO to allocate SSR costs to 'the LSE(s) which require(s) the operation of the SSR Unit for reliability purposes.'" July 29, 2014 Order, 148 FERC ¶ 61,071, P 66. FERC further determined that the assessment encapsulated in the preliminary load-shed study was appropriate, but required MISO to submit a final load-shed study within 30 days. *Id.* Finally, and most critically for this Petition, FERC ordered refunds to reallocate the SSR costs in the ATC footprint dating from the filing of the Section 206 Complaint. *Id.* at P 68.

Within weeks, FERC also addressed the Escanaba and White Pine SSR Agreements that similarly allocated costs on a pro rata basis. *See Midcontinent Indep. Sys. Operator, Inc.*, 148 FERC ¶ 61,116, P 12 (Aug. 12, 2014) ("Escanaba Initial Order"); *Midcontinent Indep. Sys. Operator, Inc.*, 148 FERC ¶ 61,136, P 7 (Aug. 21, 2014) ("White Pine Initial Order"). FERC directed MISO to conduct load-shed studies and submit revised proposals allocating the costs of continued operation of each of these units in accordance with the results. Escanaba Initial Order, 148 FERC ¶ 61,116, P 37; White Pine Initial Order, 148 FERC ¶ 61,136, P 44. FERC also ordered refunds dated to April 16, 2014, for White Pine and June 15, 2014, for Escanaba. *See Pub. Serv. Comm'n of Wis.*, 156 FERC ¶ 61,205, P 12 (Sept. 22, 2016) ("September 22, 2016 Order").

MISO completed a second load-shed study as directed by the July 29, 2014 Order and submitted

compliance filings regarding each of the three SSR facilities. *Pub. Serv. Comm'n of Wis.*, 150 FERC ¶ 61,104, PP 8-9, 12-13, 15-16 (Feb. 19, 2015) ("February 19, 2015 Order"). The second load-shed study attributed approximately 86 percent of the SSR benefits to Local Balancing Authorities ("LBAs") located in Wisconsin. *See* J.A. 984-85. These results were far closer to the original allocation—where 92 percent of the costs were allocated to Wisconsin customers—than were the results of the preliminary load-shed study upon which the Wisconsin Commission Complaint and the July 29, 2014 Order relied.

FERC reviewed the compliance filings, among other proceedings, in an order dated February 19, 2015. *See Pub. Serv. Comm'n of Wis.*, 150 FERC ¶ 61,104. In the February 19, 2015 Order, FERC reaffirmed its prior finding that MISO's pro rata allocation of SSR costs in the ATC area was unjust, unreasonable, unduly discriminatory, or preferential under Section 206 of the Federal Power Act. *Id.* at P 2. During this time, MISO divided one of the LBAs that spanned areas of Michigan and Wisconsin to "provid[e] a more granular identification of reliability events in the Wisconsin-Michigan boundary area." MISO Tariff Filing at 2, FERC Docket No. ER14-2952 (Sept. 26, 2014), J.A. 1163; *see also* Feb. 19, 2015 Order, 150 FERC ¶ 61,104, PP 17-18. Accounting for the newly divided LBAs, approximately 99 percent of the reliability benefits were attributed to Michigan LSEs, while Wisconsin LSEs received the remaining 1 percent. Feb. 19, 2015 Order, 150 FERC ¶ 61,104, P 19. FERC determined that MISO's proposed reallocation based on LBA boundaries "can produce results that are not consistent with MISO's Tariff or cost causation principles by failing to allocate SSR costs to the LSEs that benefit from those SSR Units." *Id.* at P 2. Accordingly, FERC

required further compliance filings allocating the costs from the Presque Isle, White Pine, and Escanaba SSR Units to the benefitting LSEs directly. *Id.* This required MISO to revise its study methodology to identify the LSEs relying on the SSR resources. *Id.* at P 113. By order dated May 3, 2016, FERC accepted MISO's revised SSR-cost-allocation methodology and ordered MISO to prepare a refund report describing how MISO would effectuate that methodology in the previously ordered refunds. *Midcontinent Indep. Sys. Operator, Inc.*, 155 FERC ¶ 61,134, P 37 (May 3, 2016).

On September 22, 2016, FERC issued the final order under review in these Petitions. *See* Sept. 22, 2016 Order, 156 FERC ¶ 61,205. FERC denied requests for rehearing of its decision to order refunds for the Presque Isle, White Pine, and Escanaba SSR costs from April 3, 2014, April 16, 2014, and June 15, 2014, respectively. *Id.* at P 40. Turning to the remedy, FERC explained that it "ha[d] established a policy of not ordering refunds in rate design and cost allocation cases," but this policy "is not a strict requirement in every cost allocation case." *Id.* at PP 41, 43. Instead, FERC's approach would vary based on equitable considerations. "[P]rimary" bases disfavoring refunds include "the unfairness that results from retroactive implementation of a new rate for both utilities and customers who cannot alter their past actions in light of that new rate, and [ ] the potential for under-recovery." *Id.* at P 44. FERC reasoned that "neither of these grounds applies here," because no party "identified any particular decisions made in reliance on the previous SSR cost allocation methodology," and "MISO can calculate the exact amount of SSR costs that should be assessed to each LSE that underpaid in order to refund LSEs that overpaid," based on its

records. *Id.* at PP 45-47. Accordingly, FERC concluded, the equitable considerations with respect to the three SSR units at issue "require a narrow exception to the Commission's general policy of not providing refunds in a cost allocation case." *Id.* at PP 50-51. FERC ordered that the refunds "will be implemented through surcharges to LSEs that paid too little under the previous methodology." Sept. 22, 2016 Order, 156 FERC ¶ 61,205, P 51.

Petitioners—customers "that paid too little" and are now subject to surcharges—challenge FERC's authority to impose surcharges as part of its remedy, contending that it amounts to an impermissible retroactive rate increase. They also contend that FERC's decision was arbitrary and capricious because the difference between the allocation rejected and the allocation ultimately approved was insignificant.

II.

"Under the Federal Power Act, [FERC] must ensure that all rates charged for the transmission or sale of electric energy are 'just and reasonable.'" *Maine v. Fed. Energy Regulatory Comm'n*, 854 F.3d 9, 15 (D.C. Cir. 2017) (quoting 16 U.S.C. § 824e(a)). The scope of judicial review of such determinations is "narrow": courts afford "great deference" to FERC's rate decisions, and we "may not substitute our own judgment for that of the Commission." *Fed. Energy Regulatory Comm'n v. Elec. Power Supply Ass'n*, — U.S.—, 136 S.Ct. 760, 782, 193 L.Ed.2d 661 (2016). That said, a reviewing court must "at least assure itself that the Commission's reason for its decision is both rational and consistent with the authority delegated to it by Congress." *Xcel Energy Servs. Inc. v. Fed. Energy Regulatory Comm'n*, 815 F.3d 947, 952 (D.C. Cir. 2016). The courts review FERC's decisions under the

familiar arbitrary-and-capricious standard of the Administrative Procedure Act, and this review requires "a reasoned explanation" "where an agency departs from established precedent." *Transmission Agency of N. Cal. v. Fed. Energy Regulatory Comm'n*, 495 F.3d 663, 672 (D.C. Cir. 2007); *see* 5 U.S.C. § 706.

A.

Petitioners challenge FERC's determination that the pro rata methodology for distributing SSR costs was unjust and unreasonable, contending that there was no new evidence or change in circumstances to justify this conclusion, that the results of the final load-shed study undermined FERC's reasoning, and that FERC "fail[ed] to consider the historical basis" for that methodology, such that its orders lacked reasoned decision-making. Pet'rs' Br. 48-55. None of these objections is persuasive.

FERC must undertake a two-step inquiry regarding a Section 206 challenge. *See Maine*, 854 F.3d at 21. The first step involves reviewing the rate subject to a Section 206 complaint to determine whether it is unjust, unreasonable, unduly discriminatory, or preferential. *Id.* (citing 16 U.S.C. § 824e(a)). "Only *after* having made the determination that the utility's existing rate fails that test may FERC exercise its section 206 authority to impose a new rate." *Id.* In the orders now under review, FERC followed this process—first determining that the existing allocation was problematic before considering a replacement. At the time of the Wisconsin Commission's Complaint and the July 29, 2014 Order granting it—in other words, during the first step of the Section 206 process—FERC had before it only the preliminary load-shed study. The preliminary data showed that the Wisconsin customers received 42 percent of the reliability benefit of the SSR

facilities, despite being allocated 92 percent of the costs.

Petitioners contend that the preliminary load-shed study is not sufficient to support FERC's conclusion that the existing rate is unreasonable because the study merely confirmed the difference between a load-shed methodology and the pro rata methodology. Pet'rs' Br. 41-45.

Contrary to Petitioners' view, FERC's determination that the pro rata methodology was unjust and unreasonable relied on new information not previously before the Commission. In one sense, the eventuality that two different methodologies would yield different results was reasonably known to the parties and FERC during the initial decision that the pro rata methodology was just and reasonable. But just because some difference between the results of these two methodologies is predictable does not make the information actually collected any less telling. *See OXY USA, Inc. v. Fed. Energy Regulatory Comm'n*, 64 F.3d 679, 690 (D.C. Cir. 1995) (explaining that "[no] finding of unforeseeability is required before the Commission may reach the conclusion that a rate that was previously just and reasonable is no longer so"). The preliminary load-shed evidence demonstrated a sizable gap between the benefits accrued by each LSE and the allocated cost, supporting FERC's determination that the pro rata methodology did not comport with cost-causation principles. And the actual data underlying FERC's consideration was not before it in prior proceedings regarding the ATC SSR-cost-allocation methodology. As the February 19, 2015 Order noted, MISO did not previously require load-shed studies for SSR units in the ATC area—there was no need for this information in light of the pro

rata allocation. *See* Feb. 19, 2015 Order, 150 FERC ¶ 61,104, PP 12, 15. In any event, the preliminary load-shed study regarding the Presque Isle, Escanaba, and White Pine units was new information about newly designated SSRs. That MISO could have collected similar information before designating these support resources does not detract from the new information available through the load-shed data underlying the Complaint, upon which FERC relied.

We also are unpersuaded by Petitioners' argument that the final load-shed study defeats FERC's conclusion that the pro rata methodology was unjust and unreasonable. Petitioners point out that, according to the second study, the pro rata methodology was off by only about 6 percent with respect to the benefits received by Michigan and Wisconsin respectively. As an initial matter, the load-shed study that FERC actually accepted showed that the pro rata methodology was an order of magnitude more inaccurate than the second study had revealed: the pro rata methodology was off not by 6 percent, but by 91 percent. In any event, Petitioners' assertion that a 6 percent difference is insufficient to show that the pro rata methodology is unreasonable lacks support. *See* Pet'rs' Br. 46. And Petitioners failed to preserve this point, as they did not argue before the Commission that the final load-shed data undermined a finding that the pro rata methodology was outside of the zone of reasonableness. *See* 16 U.S.C. § 825*l*(b). Moreover, since FERC did not rely on a zone-of-reasonableness analysis, this challenge is inapt: a rate may be shown to be unreasonable under Section 206 even without a showing that the rate is entirely outside the zone of reasonableness. *See Maine*, 854 F.3d at 24 ("While showing that the existing rate is entirely outside the zone of reasonableness may illustrate that the existing rate is unlawful, that is not

the *only* way in which FERC can satisfy its burden under section 206."). In addition, whether 6 percent is significant for the reasonableness analysis is a policy question for FERC to decide: Petitioners point to no precedent or evidence to suggest that such a difference could not be significant for the purposes of the Federal Power Act. Also unavailing is Petitioners' position that the difference between the results of the preliminary load-shed study and the final study call into question the validity of the evidence. FERC's recognition that more accurate data was necessary does not undermine its reliance on the preliminary study at the time of the Complaint, or on the final data once the study was complete. Petitioners identify no support for the proposition that FERC cannot rely on different evidence at each step of the Section 206 inquiry.

Finally, we reject Petitioners' contention that FERC failed to take into account the historical rationale for the ATC carve-out. *See* Pet'rs' Br. 48-53. To the contrary, FERC acknowledged the origins of the pro rata methodology as springing from ATC's cost-sharing philosophy and explained its conclusion that ATC's "original intent" in sharing costs was "not served by the *pro rata* sharing of SSR costs ... because decisions concerning the operational status of ... generation assets are not subject to the ATC transmission planning process." July 29, 2014 Order, 148 FERC ¶ 61,071, P 65. FERC further addressed the historical basis for the ATC's pro rata allocation in its February 19, 2015 Order, reasoning that the new evidence related to cost causation undermined the propriety of that vestigial methodology. *See* Feb. 19, 2015 Order, 150 FERC ¶ 61,104, P 76. That FERC rejected then-protesters' position—twice—does not mean that it failed to consider it. Accordingly, we defer to FERC's

rate allocation determination as supported by substantial evidence and reasoned decision-making.

B.

Having concluded that FERC reasonably determined that the pro rata allocation was unjust and unreasonable under Section 206, we turn to Petitioners' challenge relating to remedy.

Petitioners posit that the ordered surcharges effect a retroactive rate increase, violating Section 206 and the filed-rate doctrine. The Commission argues that because "[t]his is a cost allocation case," the limitations surrounding retroactive rate changes do not come into play, and the remedy imposed here was otherwise within FERC's broad power to effectuate the FPA under Section 309. *See* Resp't's Br. 39-46. Because Section 206 contemplates surcharges in cost-allocation cases, FERC's orders here are within its remedial authority. And because FERC explained valid reasons for departing from its usual policy of denying reallocation, that departure was not arbitrary or capricious.

i.

Section 206 defines FERC's authority when an existing rate is found unjust, unreasonable, unduly discriminatory, or preferential. 16 U.S.C. § 824e. This includes two main tools at FERC's disposal. First, Section 206(a) authorizes FERC to "fix" rates prospectively, after it concludes that a rate is inappropriate upon a complaint by a market participant or on FERC's own impetus. *See id.* § 824e(a); *Xcel*, 815 F.3d at 950. Second, Section 206(b) permits FERC to order refunds where the previous rate was unfairly high, effectively setting the rate as of the date that the Section 206 proceeding began—either when FERC

instituted an investigation or the date of the complaint, if instigated by a third party. 16 U.S.C. § 824e(b). However, no concomitant authority exists to retroactively correct rates that were too low. *See Fed. Power Comm'n v. Sierra Pac. Power Co.*, 350 U.S. 348, 353, 76 S.Ct. 368, 100 L.Ed. 388 (1956) (noting that "[the Section 206] power is limited to prescribing the rate 'to be thereafter observed' and thus can effect no change prior to the date of the order"). This rule against retroactive rate increases precludes FERC from ordering remedies that accomplish a higher rate for a past period. In turn, the filed-rate doctrine requires market participants to abide by the rates set: "utilities are forbidden to charge any rate other than the one on file with the Commission." *W. Deptford Energy, LLC v. Fed. Energy Regulatory Comm'n*, 766 F.3d 10, 12 (D.C. Cir. 2014). The "rule against retroactive ratemaking" and the filed-rate doctrine may thus be understood as "corollar[ies]" that make static the rates paid for energy, once established. *NSTAR Elec. & Gas Corp. v. Fed. Energy Regulatory Comm'n*, 481 F.3d 794, 800 (D.C. Cir. 2007). *See also Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577, 101 S.Ct. 2925, 69 L.Ed.2d 856 (1981) (explaining the development of the filed-rate doctrine in the context of the Natural Gas Act).

While Section 206's limitations and the filed-rate doctrine thus restrict the remedies that FERC may order, FERC's remedial authority is otherwise expansive. Section 309 of the FPA provides that

> The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or

> appropriate to carry out the provisions of this chapter.

16 U.S.C. § 825h. Section 309 accordingly permits FERC to advance remedies not expressly provided by the FPA, as long as they are consistent with the Act. *See TNA Merch. Projects, Inc. v. Fed. Energy Regulatory Comm'n*, 857 F.3d 354, 359 (D.C. Cir. 2017) (citing *Niagara Mohawk Power Corp. v. Fed. Power Comm'n*, 379 F.2d 153, 158 (D.C. Cir. 1967)). This Court has endorsed FERC's authority under Section 309 to recoup erroneous refunds, *id.* at 362; *Canadian Ass'n of Petroleum Producers v. Fed. Energy Regulatory Comm'n*, 254 F.3d 289, 299-300 (D.C. Cir. 2001), to order refunds where the rate paid exceeds the filed rate, *see Towns of Concord, Norwood, & Wellesley, Mass. v. Fed. Energy Regulatory Comm'n*, 955 F.2d 67, 73 (D.C. Cir. 1992), and to imply a refund protection where the Commission erred in accepting a tariff revision that lacked such a commitment, *see Xcel*, 815 F.3d at 954-56. This variety of remedies indicates the expansive range afforded by FERC's Section 309 remedial power.

The reallocation of SSR costs, including through surcharges, is well within FERC's remedial authority under Section 309, read in harmony with Section 206 and the filed-rate doctrine. While the surcharges at issue here resulted in some customers paying more for past services than they were charged originally, that cost increase to a subgroup of ratepayers is not a "retroactive rate increase" as such: the aggregate rate remained the same, divided differently among the constituent payers. Although such a reallocation is not expressly contemplated under Section 206, subsection (c) confirms our interpretation by negative implication. Section 206(c) discusses "shifting costs" between

utility companies within a registered holding company. The provision bars refunds in circumstances where "refunds ... might otherwise be payable" but where the refund order "is based upon a determination that the amount of such decrease should be paid through an increase in the costs to be paid by other electric utility companies of [the] registered holding company." 16 U.S.C. § 824e(c). This statement that surcharges to pay for refunds are impermissible in specific, limited circumstances contemplates that the converse is true in all other circumstances: surcharges to cover retroactive rate design changes are acceptable when those limited circumstances do not apply. Reading the Section 206(c) exception in conjunction with Section 206(b) and against the backdrop of Section 309, FERC's authority to order refunds thus must be understood to encompass surcharges to pay for ordered refunds where the result is a reallocation of an existing rate. Only that understanding gives meaning to the Section 206(c) carve-out prohibiting surcharge-funded refunds as between multiple utility companies within a single holding company. If FERC could not ordinarily order surcharge-funded refunds, the exception would be superfluous.

Petitioners rely heavily on this Court's decision in *City of Anaheim, California v. Federal Energy Regulatory Commission* to argue that surcharges are unlawful, but that decision is inapt. *See* 558 F.3d 521 (D.C. Cir. 2009). *City of Anaheim* involved a Section 206 complaint by wholesale electricity generators alleging that the FERC-approved rate for must-offer generation was too low. FERC agreed, ordered a rate increase, and applied it retroactively, with surcharges to make up the difference. We rejected FERC's action as an impermissible retroactive rate change: longstanding precedent holds that rate changes may be

prospective only. *Id.* at 523-25. Because the rate change increased what customers paid during the past period of depressed rates, it made no difference that FERC ordered the higher rates through forward-looking surcharges. *City of Anaheim* thus stands for the unremarkable proposition that FERC cannot order through surcharges what it could not otherwise accomplish directly. But reallocation is a different animal altogether, and the surcharges ordered here are part and parcel of that reallocation. As FERC explained in its September 22, 2016 Order, "*City of Anaheim* involved the Commission's direct imposition of retroactive surcharges to effectuate a rate increase," while in "the instant case [ ] the Commission has not changed the SSR rates." Sept. 22, 2016 Order, 156 FERC ¶ 61,205, P 48. Because FERC's remedial authority allows for rate reallocation, and Section 206(c) buttresses this understanding, FERC's use of surcharges to effectuate the reallocation is squarely within FERC's authority.

Petitioners also argue that the Section 309 cases relied upon by FERC in its September 22, 2016 Order are distinguishable as involving error by the Commission. Pet'rs' Br. 38; Pet'rs' Reply Br. 7-8 (citing *TNA*, 857 F.3d at 360). But Section 309 grants FERC broad remedial power regardless of whether a mistake by FERC creates a reason to use it. The provision itself allows for "any and all acts" "necessary or appropriate" to carry out the FPA's statutory ends, 16 U.S.C. § 825h, not merely to fix mistakes by the Commission. *See Niagara Mohawk*, 379 F.2d at 158 (explaining that the "necessary or appropriate" clause is "not restricted to procedural minutiae, and ... authorize[s] an agency to use means of regulation not spelled out in detail, provided the agency's action conforms with the purposes and policies of Congress and does not contravene

any terms of the Act"). And, as described above, this Court has validated FERC's Section 309 authority in myriad contexts, with and without a predicate error. Because Section 206 supports, rather than negates, FERC's authority to order rate reallocations, the statute does not restrict FERC's Section 309 authority for the remedy ordered here.

Finally, Petitioners invoke the *Chenery* doctrine. They claim that FERC's reliance on Section 309 in its brief "is an impermissible *post hoc* rationalization of counsel," since "FERC did not rely on FPA Section 309 below," and Intervenors' use of Section 206(c) to inform the interpretation of Section 206(a) and Section 309 similarly "is improper." Pet'rs' Reply Br. 2, 5-6, 11-12. *See Sec. & Exch. Comm'n v. Chenery Corp.*, 332 U.S. 194, 196, 67 S.Ct. 1760, 91 L.Ed. 1995 (1947) (limiting a reviewing court to "the grounds invoked by the agency" when judging the "propriety" of a "determination or judgment which the administrative agency alone is authorized to make"). Neither of these arguments hold water. While FERC did not explicitly mention Section 309 in the challenged orders, it repeatedly cited *Niagara Mohawk*, a Section 309 case about the scope of permissible remedies, and *Xcel Energy*, a Section 309 case about refund commitments. *See, e.g.*, Escanaba Initial Order, 148 FERC ¶ 61,116, P 38 n.49; Feb. 19, 2015 Order, 150 FERC ¶ 61,104, P 90 n.220; Sept. 22, 2016 Order, 156 FERC ¶ 61,205, PP 49, 61 & n.126. By these references, FERC invoked its Section 309 authority, even if not by name. Moreover, Section 206(c) is only further textual support for the conclusion that Section 206(a) does not preclude and Section 309 affords FERC the remedial authority used here. *Chenery* poses no obstacle when we consider a party's interpretation of other statutory provisions to bolster the interpretation of the statutory language

at issue. *See Am.'s Cmty. Bankers v. Fed. Deposit Ins. Corp.*, 200 F.3d 822, 835 (D.C. Cir. 2000).

ii.

Having established that FERC has the statutory authority to order a reallocation of SSR costs through refunds and surcharges, we next consider whether FERC acted within its discretion in doing so here. Petitioners argue that FERC previously "acknowledged that it has no authority to order retroactive surcharges," making this action a departure from its ordinary policy. *See* Pet'rs' Br. 36. However, as Petitioners note, FERC consistently has construed its refund authority to be equitable and flexible, with appropriate remedies dictated by the circumstances. *Id.*

The circumstances here support FERC's decision to order refunds paid for by surcharges. In *Louisiana Public Service Commission v. Federal Energy Regulatory Commission*, a reallocation case like this one, this Court validated FERC's "previously muddled position" that "it has no generally applicable policy of granting refunds" where a rate has been unfairly allocated between multiple constituent payers, but "the utility has received no net over-recovery." 883 F.3d at 932. As the Court explained, FERC's "default position" with respect to reallocation refunds relies on two premises: that typically "it would be difficult for the utility to recover its costs fully" because "it would be difficult or inequitable to extract recompense" from customers that paid too little, and that "customer firms that had made operational decisions in reliance on one set of rates would be unable to 'undo' those transactions retroactively in light of the new, corrected rates." *Id.* at 933.

As FERC explained in the September 22, 2016 Order, neither of these circumstances are present here. First, there is no risk of "under-recovery" because "MISO has a record of the SSR costs paid by each LSE ... and [ ] can calculate the exact amount of SSR costs that should be assessed to each LSE that underpaid in order to refund LSEs that overpaid" based on the revised methodology. Sept. 22, 2016 Order, 156 FERC ¶ 61,205, P 47. MISO's LSE customer population has not changed, so the calculation of over- and under-payments does not present any concern of inequitable recovery. Second, no challenger "identified any particular decisions made in reliance on the previous SSR cost allocation methodology." *Id.* at P 45. While parties protesting the retroactive application of the changed rate design argued that the reallocation "create[d] market uncertainty" by disrupting "sellers' expectations," FERC concluded that because "SSR cost-allocation is an out-of-market process," "there are no markets involved, there is no undermining of those markets, nor is there previous market conduct that would have been adjusted to account for eventual refunds." *Id.* at P 46. In other words, because the SSR costs cannot be avoided, changing rate design does not implicate market-reliance concerns.

FERC's rationale for distinguishing the reallocation at issue here is particularly compelling in light of the unique nature of the SSR agreements at issue. Reliability resources are so designated because they are essential to the reliability of the system's energy supply, and SSR agreements are accomplished in short order so as to avoid any gap in coverage. As the Commission explained in its September 22, 2016 Order, SSR agreements "must go into effect quickly to ensure that the resource continues to operate,"

and without an agreement in place, a designated unit "would otherwise have provided SSR service on an uncompensated basis while the required Tariff process took its course." Sept. 22, 2016 Order, 156 FERC ¶ 61,205, P 52. In addition, MISO is a non-profit that itself lacks any funding to cover the costs of refunds to the LSEs that paid too much. *See Wis. Pub. Power, Inc. v. Fed. Energy Regulatory Comm'n*, 493 F.3d 239, 245 (D.C. Cir. 2007). Accordingly, there was no over-recovery due to the pro rata methodology that would have resulted in a surplus in MISO's hands. *See* Sept. 22, 2016 Order, 156 FERC ¶ 61,205, P 42 (discussing *La. Pub. Serv. Comm'n & the Council of the City of New Orleans*, 155 FERC ¶ 61,120 (Apr. 29, 2016)). The only way that FERC's ordered refunds may be accomplished is by collecting the necessary funds from MISO's customers. As the Commission reasoned, it is equitable that those customers receiving a windfall from the pro rata methodology pay it back to effect the reallocation.

FERC's consideration of these "relevant, significant facts" distinguished its approach in this case from its usual policy and the precedent it set in other cases. *Cf. PG&E Gas Transmission, Nw. Corp. v. Fed. Energy Regulatory Comm'n*, 315 F.3d 383, 388-90 (D.C. Cir. 2003). Accordingly, we are satisfied that FERC's atypical remedy in this case reflects a reasoned decision-making process and was within the Commission's discretion.

* * *

We thus deny the Petitions in full. FERC reasonably determined that the pro rata allocation of SSR costs in the ATC footprint was unjust and unreasonable, based upon substantial evidence. The ordered remedy of refunds funded by surcharges was within FERC's

remedial authority under Sections 206 and 309 of the FPA, and FERC adequately explained its rationale in ordering that remedy here.

APPENDIX B

STATUTORY AUTHORITIES

United States Constitution, Art. I, Sec. 1

Article I, Section 1. Legislative Power Vested in Congress

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

U.S. Const. art. I, § 1

FPA Section 206, 16 U.S.C. § 824e

Effective: August 8, 2005

16 U.S.C.A. § 824e. Power of Commission to fix rates and charges; determination of cost of production or transmission

(a) Unjust or preferential rates, etc.; statement of reasons for changes; hearing; specification of issues

Whenever the Commission, after a hearing held upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. Any complaint or motion of the Commission to initiate a proceeding under this section shall state the change or changes to be made in the rate, charge, classification, rule, regulation, practice, or contract then in force, and the reasons for any proposed change or changes therein. If, after review of any motion or complaint and answer, the Commission shall decide to hold a hearing, it shall fix by order the time and place of such hearing and shall specify the issues to be adjudicated.

(b) Refund effective date; preferential proceedings; statement of reasons for delay; burden of proof; scope of refund order; refund orders in cases of dilatory behavior; interest

Whenever the Commission institutes a proceeding under this section, the Commission shall establish a refund effective date. In the case of a proceeding instituted on complaint, the refund effective date shall not be earlier than the date of the filing of such complaint nor later than 5 months after the filing of such complaint. In the case of a proceeding instituted by the Commission on its own motion, the refund effective date shall not be earlier than the date of the publication by the Commission of notice of its intention to initiate such proceeding nor later than 5 months after the publication date. Upon institution of a proceeding under this section, the Commission shall give to the decision of such proceeding the same preference as provided under section 824d of this title and otherwise act as speedily as possible. If no final decision is rendered by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to this section, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision. In any proceeding under this section, the burden of proof to show that any rate, charge, classification, rule, regulation, practice, or contract is unjust, unreasonable, unduly discriminatory, or preferential shall be upon the Commission or the complainant. At the conclusion of any proceeding under this section, the Commission may order refunds of any amounts paid, for the period subsequent to the refund effective date through a date fifteen months after such refund effective date, in excess of those which would have been paid under the just and reasonable rate, charge, classification, rule, regulation, practice, or contract which the Commission orders to be thereafter observed and in force: *Provided,* That if the proceeding is not concluded within fifteen months

after the refund effective date and if the Commission determines at the conclusion of the proceeding that the proceeding was not resolved within the fifteen-month period primarily because of dilatory behavior by the public utility, the Commission may order refunds of any or all amounts paid for the period subsequent to the refund effective date and prior to the conclusion of the proceeding. The refunds shall be made, with interest, to those persons who have paid those rates or charges which are the subject of the proceeding.

(c) Refund considerations; shifting costs; reduction in revenues; "electric utility companies" and "registered holding company" defined

Notwithstanding subsection (b), in a proceeding commenced under this section involving two or more electric utility companies of a registered holding company, refunds which might otherwise be payable under subsection (b) shall not be ordered to the extent that such refunds would result from any portion of a Commission order that (1) requires a decrease in system production or transmission costs to be paid by one or more of such electric companies; and (2) is based upon a determination that the amount of such decrease should be paid through an increase in the costs to be paid by other electric utility companies of such registered holding company: *Provided,* That refunds, in whole or in part, may be ordered by the Commission if it determines that the registered holding company would not experience any reduction in revenues which results from an inability of an electric utility company of the holding company to recover such increase in costs for the period between the refund effective date and the effective date of the Commission's order. For purposes of this subsection, the terms "electric utility companies" and "registered

holding company" shall have the same meanings as provided in the Public Utility Holding Company Act of 1935, as amended.

(d) Investigation of costs

* * *

(e) Short-term sales

* * *

FPA Section 309, 16 U.S.C. § 825h

16 U.S.C.A. § 825h. Administrative powers of Commission; rules, regulations, and orders

The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this chapter; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours.

UNITED STATES PUBLIC LAWS
100th Congress - Second Session
Convening January 25, 1988
PL 100-473 (HR 2858)
October 6, 1988

PL 100-473, 102 Stat 2299

An Act to provide for refunds pursuant to rate decreases under the Federal Power Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act "16 USC 791a note" may be cited as the "Regulatory Fairness Act".

SEC. 2. REFUNDS IN PROCEEDINGS UNDER SECTION 206 OF THE FEDERAL POWER ACT.

Section 206 of the Federal Power Act (16 U.S.C. 824e) is amended as follows:

(1) At the end of subsection (a) insert: "Any complaint or motion of the Commission to initiate a proceeding under this section shall state the change or changes to be made in the rate, charge, classification, rule, regulation, practice, or contract then in force, and the reasons for any proposed change or changes therein. If, after review of any motion or complaint and answer, the Commission shall decide to hold a hearing, it shall fix by order the time and place of such hearing and shall specify the issues to be adjudicated.".

(2) Designate subsection (b) as (d) and insert the following new subsections after subsection (a):

"(b) Whenever the Commission institutes a proceeding under this section, the Commission shall establish a refund effective date. In the case of a proceeding instituted on complaint, the refund effective date shall not be earlier than the date 60 days after the filing of such complaint nor later than 5 months after the expiration of such 60–day period. In the case of a proceeding instituted by the Commission on its own motion, the refund effective date shall not be earlier than the date 60 days after the publication by the Commission of notice of its intention to initiate such proceeding nor later than 5 months after the expiration of such 60–day period. Upon institution of a proceeding under this section, the Commission shall give to the decision of such proceeding the same preference as provided under section 205 of this Act and otherwise act as speedily as possible. If no final decision is rendered by the refund effective date or by the conclusion of the 180–day period commencing upon initiation of a proceeding pursuant to this section, whichever is earlier, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision. In any proceeding under this section, the burden of proof to show that any rate, charge, classification, rule, regulation, practice, or contract is unjust, unreasonable, unduly discriminatory, or preferential shall be upon the Commission or the complainant. At the conclusion of any proceeding under this section, the Commission may order the public utility to make refunds of any amounts paid, for the period subsequent to the refund effective date through a date fifteen months after such refund effective date, in excess of those which would have been paid under the just and reasonable rate, charge, classification, rule, regulation, practice, or contract which

the Commission orders to be thereafter observed and in force: Provided, That if the proceeding is not concluded within fifteen months after the refund effective date and if the Commission determines at the conclusion of the proceeding that the proceeding was not resolved within the fifteen-month period primarily because of dilatory behavior by the public utility, the Commission may order refunds of any or all amounts paid for the period subsequent to the refund effective date and prior to the conclusion of the proceeding. The refunds shall be made, with interest, to those persons who have paid those rates or charges which are the subject of the proceeding.

"(c) Notwithstanding subsection (b), in a proceeding commenced under this section involving two or more electric utility companies of a registered holding company, refunds which might otherwise be payable under subsection (b) shall not be ordered to the extent that such refunds would result from any portion of a Commission order that (1) requires a decrease in system production or transmission costs to be paid by one or more of such electric companies; and (2) is based upon a determination that the amount of such decrease should be paid through an increase in the costs to be paid by other electric utility companies of such registered holding company: Provided, That refunds, in whole or in part, may be ordered by the Commission if it determines that the registered holding company would not experience any reduction in revenues which results from an inability of an electric utility company of the holding company to recover such increase in costs for the period between the refund effective date and the effective date of the Commission's order. For purposes of this subsection, the terms 'electric utility companies' and 'registered holding company' shall have the same meanings as

provided in the Public Utility Holding Company Act of 1935, as amended.".

SEC. 3. LIMITATION ON AUTHORITY PROVIDED.

Nothing in subsection (c) of section 206 of the Federal Power Act, as amended (16 U.S.C. 824e(c)) shall be interpreted to confer upon the Federal Energy Regulatory Commission any authority not granted to it elsewhere in such Act to issue an order that (1) requires a decrease in system production or transmission costs to be paid by one or more electric utility companies of a registered holding company; and (2) is based upon a determination that the amount of such decrease should be paid through an increase in the costs to be paid by other electric utility companies of such registered holding company. For purposes of this section, the terms "electric utility companies" and "registered holding company" shall have the same meanings as provided in the Public Utility Holding Company Act of 1935, as amended.

SEC. 4. EFFECTIVE DATE.

The amendments made by this Act are not applicable to complaints filed or motions initiated before the date of enactment of this Act pursuant to section 206 of the Federal Power Act: Provided, however, That such complaints may be withdrawn and refiled without prejudice.

SEC. 5. "16 USC 824e note" STUDY.

No earlier than three years and no later than four years after the date of enactment of this Act, the Federal Energy Regulatory Commission shall perform a study of the effect of the amendments to section 206 of the Federal Power Act made by this Act. The study

shall analyze (1) the impact, if any, of such amendments on the cost of capital paid by public utilities; (2) any change in the average time taken to resolve proceedings under section 206; and (3) such other matters as the Commission may deem appropriate in the public interest. Upon completion the study shall be sent to the Committee on Energy and Natural Resources of the Senate and the Committee on Energy and Commerce of the House of Representatives.

Approved October 6, 1988.

UNITED STATES PUBLIC LAWS
109th Congress - First Session
Convening January 7, 2005
PL 109-58 (HR 6)
August 8, 2005

ENERGY POLICY ACT OF 2005

PL 109-58, 119 Stat 594

An Act To ensure jobs for our future with secure, affordable, and reliable energy.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Subtitle G—Market Transparency, Enforcement, and Consumer Protection

* * * * * * *

SEC. 1285. REFUND EFFECTIVE DATE.

Section 206(b) of the Federal Power Act (16 U.S.C. 824e(b)) is amended as follows:

(1) By striking "the date 60 days after the filing of such complaint nor later than 5 months after the expiration of such 60–day period" in the second sentence and inserting "the date of the filing of such complaint nor later than 5 months after the filing of such complaint".

(2) By striking "60 days after" in the third sentence and inserting "of".

(3) By striking "expiration of such 60–day period" in the third sentence and inserting "publication date".

(4) By striking the fifth sentence and inserting the following: "If no final decision is rendered by the conclusion of the 180–day period commencing upon

initiation of a proceeding pursuant to this section, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision.".

SEC. 1286. REFUND AUTHORITY.

Section 206 of the Federal Power Act (16 U.S.C. 824e) is amended by adding at the end the following:

"(e)(1) In this subsection:

"(A) The term 'short-term sale' means an agreement for the sale of electric energy at wholesale in interstate commerce that is for a period of 31 days or less (excluding monthly contracts subject to automatic renewal).

"(B) The term 'applicable Commission rule' means a Commission rule applicable to sales at wholesale by public utilities that the Commission determines after notice and comment should also be applicable to entities subject to this subsection.

"(2) If an entity described in section 201(f) voluntarily makes a short-term sale of electric energy through an organized market in which the rates for the sale are established by Commission-approved tariff (rather than by contract) and the sale violates the terms of the tariff or applicable Commission rules in effect at the time of the sale, the entity shall be subject to the refund authority of the Commission under this section with respect to the violation.

"(3) This section shall not apply to—

"(A) any entity that sells in total (including affiliates of the entity) less than 8,000,000 megawatt hours of electricity per year; or

"(B) an electric cooperative.

"(4)(A) The Commission shall have refund authority under paragraph (2) with respect to a voluntary short term sale of electric energy by the Bonneville Power Administration only if the sale is at an unjust and unreasonable rate.

"(B) The Commission may order a refund under subparagraph (A) only for short-term sales made by the Bonneville Power Administration at rates that are higher than the highest just and reasonable rate charged by any other entity for a short-term sale of electric energy in the same geographic market for the same, or most nearly comparable, period as the sale by the Bonneville Power Administration.

"(C) In the case of any Federal power marketing agency or the Tennessee Valley Authority, the Commission shall not assert or exercise any regulatory authority or power under paragraph (2) other than the ordering of refunds to achieve a just and reasonable rate.".

* * *

APPENDIX C

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

148 FERC ¶ 61,071

Docket Nos.
ER14-1242-000
ER14-1242-001
ER14-1243-000
ER14-1243-001

MIDCONTINENT INDEPENDENT SYSTEM OPERATOR, INC.

Docket No.
EL14-34-000

PUBLIC SERVICE COMMISSION OF WISCONSIN

v.

MIDCONTINENT INDEPENDENT SYSTEM OPERATOR, INC.

(Issued July 29, 2014)

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

ORDER ON COMPLAINT, TARIFF FILINGS, AND REHEARING, AND ESTABLISHING HEARING AND SETTLEMENT PROCEDURES

1. On January 31, 2014, in Docket No. ER14-1242-000, pursuant to section 205 of the Federal Power Act (FPA),[1] Midcontinent Independent System Operator, Inc. (MISO) submitted a proposed System Support Resource (SSR) Agreement between Wisconsin Electric Power Company (Wisconsin Electric) and MISO, designated as Original Service Agreement No. 6502 (Presque Isle SSR Agreement) under its Open Access Transmission, Energy and Operating Reserve Markets Tariff (Tariff).[2] Also on January 31, 2014, in Docket No. ER14-1243-000, pursuant to section 205 of the FPA, MISO submitted proposed Rate Schedule 43G (Allocation of SSR Costs Associated with the Presque Isle SSR Units) under its Tariff. On April 1, 2014, the Commission issued an order accepting the Presque Isle SSR Agreement and associated Rate Schedule 43G and suspending them for a nominal period, subject to refund and further Commission order.[3]

2. As discussed below, in this order, we establish hearing and settlement judge procedures in Docket No. ER14-1242-000 on the issue of SSR compensation

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[1] 16 U.S.C. § 824d (2012).

[2] The Tariff defines SSRs as "[g]eneration Resources or Synchronous Condenser Units [(SCUs)] that have been identified in Attachment Y – Notification to this Tariff and are required by the Transmission Provider for reliability purposes, to be operated in accordance with the procedures described in Section 38.2.7 of this Tariff." MISO, FERC Electric Tariff, Module A, § 1.S "System Support Resource (SSR)" (30.0.0).

[3] *Midcontinent Indep. Sys. Operator, Inc.*, 147 FERC ¶ 61,004 (2014) (April 1 Order).

under the Presque Isle SSR Agreement. In this order, we also require a compliance filing in Docket No. ER14-1243-000 to revise Rate Schedule 43G.

3. On April 3, 2014, in Docket No. EL14-34-000, the Public Service Commission of Wisconsin (Wisconsin Commission) submitted a complaint pursuant to sections 206 and 306 of the FPA[4] and Rule 206 of the Rules of Practice and Procedure[5] (Complaint). The Complaint alleges that the SSR cost allocation provision in section 38.2.7.k of MISO's Tariff, and the provision's implementation in Rate Schedule 43G with respect to the Presque Isle SSR Agreement between MISO and Wisconsin Electric, is unjust, unreasonable, and unduly discriminatory. As further discussed below, in this order, we grant the Complaint and find that the Tariff is unjust, unreasonable, unduly discriminatory, or preferential. We direct MISO to submit Tariff revisions with revised SSR cost allocation provisions in a compliance filing due within 30 days of the date of this order, to take effect on April 3, 2014. We also establish a refund effective date of April 3, 2014 and order MISO to provide refunds as of this date, as further described below.

4. On May 1, 2014, the Environmental Law and Policy Center, Sustainable FERC Project, Earthjustice, and Sierra Club (collectively, the Public Interest Organizations) filed a request for rehearing of the April 1 Order conditionally accepting the Presque Isle SSR Agreement and Rate Schedule 43G, subject to

[4] 16 U.S.C. §§ 824e, 825e (2012).

[5] 18 C.F.R. § 385.206 (2013).

refund and further Commission order.[6] As further discussed below, we deny the request for rehearing.

I. Background

5. Under MISO's Tariff, market participants that have decided to retire or suspend a generation resource or SCU must submit a notice (Attachment Y Notice), pursuant to Attachment Y (Notification of Potential Resource/SCU Change of Status) of the Tariff, at least 26 weeks prior to the resource's retirement or suspension effective date. During this 26-week notice period, MISO will conduct a study (Attachment Y Study) to determine whether all or a portion of the resource's capacity is necessary to maintain system reliability, such that SSR status is justified. If so, and if MISO cannot identify an SSR alternative that can be implemented prior to the retirement or suspension effective date, then MISO and the market participant shall enter into an agreement, as provided in Attachment Y-1 (Standard Form SSR Agreement) of the Tariff, to ensure that the resource continues to operate, as needed.[7]

6. On July 25, 2012, in Docket No. ER12-2302-000, MISO submitted proposed Tariff revisions regarding the treatment of resources that submit Attachment Y Notices. On September 21, 2012, the Commission conditionally accepted MISO's proposed Tariff revisions effective September 24, 2012, subject to two compliance filings due within 90 and 180 days of the date

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[6] Joint Petition for Rehearing of Public Interest Organizations, Docket Nos. ER14-1242-001 and ER14-1243-001 (filed May 1, 2014) (Public Interest Organizations Rehearing Request).

[7] *See Midwest Indep. Transmission Sys. Operator, Inc.*, 108 FERC ¶ 61,163 (2004 SSR Order), *order on reh'g*, 109 FERC ¶ 61,157 (2004) (2004 SSR Rehearing Order).

of the order.[8] The Commission reiterated that the evaluation of alternatives to an SSR designation is an important step that deserves the full consideration for MISO and its stakeholders to ensure that SSR agreements are used only as a limited, last-resort measure and required, among other things, that MISO document its process for identifying and screening SSR alternatives.[9]

II. MISO's Filings

7. On January 31, 2014, in Docket No. ER14-1242-000, MISO submitted the Presque Isle SSR Agreement for purposes of providing compensation for the continued availability of Wisconsin Electric's Presque Isle Units 5-9 as SSR Units.[10] According to MISO, on August 1, 2013, Wisconsin Electric submitted its Attachment Y Notice to MISO for suspension of Presque Isle Units 5-9, beginning on February 1, 2014 and resuming operations June 1, 2015.[11] MISO states that it completed the analysis of the Attachment Y Notice and replied to Wisconsin Electric on October 16, 2013. MISO determined that the proposed suspension of Presque Isle Units 5-9 during the 16-month suspension period, without curtailment of load by means of demand response or other alternative, would result in

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[8] *Midwest Indep. Transmission Sys. Operator, Inc.*, 140 FERC ¶ 61,237 (2012) (2012 SSR Order), *order on compliance*, 148 FERC ¶ 61,056 (2014).

[9] 2012 SSR Order, 140 FERC ¶ 61,237 at P 36.

[10] Presque Isle Units 5-9 are located in Marquette, Michigan within the footprint of the American Transmission Company LLC (ATC) and provide up to 344 MW of capacity.

[11] MISO Presque Isle SSR Agreement Filing, Transmittal Letter, Docket No. ER14-1242-000, at 2 (filed Jan. 31, 2104) (Presque Isle SSR Agreement Filing).

reliability violations.[12] Consequently, MISO designated Presque Isle Units 5-9 as SSR Units until such time as appropriate alternatives can be implemented to mitigate reliability issues.

8. MISO states that its analysis of the proposed alternatives identified no near term solutions that would eliminate or reduce the number of units needed to address the reliability issues that are caused by the suspension of Presque Isle Units 5-9.[13] MISO reports that it worked with Wisconsin Electric and the MISO Independent Market Monitor to negotiate and develop the Presque Isle SSR Agreement. According to MISO, Wisconsin Electric submitted a draft agreement for MISO's consideration, and Wisconsin Electric agreed to a 12-month term for the period between February 1, 2014 and January 31, 2015. MISO states that Wisconsin Electric has agreed to continue operating Presque Isle Units 5-9 on and after February 1, 2014.[14] MISO requested waiver of the prior notice requirement to allow the proposed Presque Isle SSR Agreement to go into effect on February 1, 2014.

9. In Docket No. ER14-1243-000, MISO submitted a proposed Rate Schedule 43G under its Tariff, which specifies the allocation of the costs associated with the continued operation of Presque Isle Units 5-9 as SSR

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[12] Specifically, the study performed by MISO showed that the suspension of Presque Isle Units 5-9 would cause violations of North American Electric Reliability Corporation (NERC) reliability standards under Category B (loss of a single element) and Category C (loss of two or more elements) contingencies. *See* Presque Isle SSR Agreement Filing, Ex. B (Attachment Y Study Report) at 2.

[13] *Id.*, Transmittal Letter at 7-8.

[14] *Id.* at 2.

Units.[15] As stated in the filing, section 38.2.7.k of MISO's Tariff requires that the costs associated with the Presque Isle SSR Agreement be allocated to all load-serving entities (LSEs) within the ATC footprint on a *pro rata* basis. MISO requested waiver of the prior notice requirement to allow Rate Schedule 43G to go into effect on February 1, 2014 to correspond with the effective date of the Presque Isle SSR Agreement.

III. April 1, 2014 Order

10. On April 1, 2014, the Commission issued an order accepting the Presque Isle SSR Agreement and associated Rate Schedule 43G, suspending them for a nominal period, to be effective February 1, 2014, as requested, subject to refund and further Commission order.[16] In that order, the Commission accepted the interventions, comments and answers filed in that proceeding. In this further order, we address the arguments presented.

IV. Request for Rehearing

11. On May 1, 2014, the Public Interest Organizations filed a request for rehearing of the April 1 Order. The Public Interest Organizations request that the Commission grant rehearing and reject MISO's proposed Presque Isle SSR Agreement and Rate Schedule 43G, and order MISO to more properly evaluate demand response alternatives and to explain and initiate a process that will eventually allow the units to retire. Alternatively, they request that the Commission provide a reasoned explanation for its decision to accept

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[15] MISO Rate Schedule 43G Filing, Docket No. ER14-1243-000 (filed Jan. 31, 2014) (Rate Schedule 43G Filing).

[16] April 1 Order, 147 FERC ¶ 61,004 at P 12.

the Presque Isle SSR Agreement and Rate Schedule 43G.

V. Wisconsin Commission's Complaint

12. On April 3, 2014, in Docket No. EL14-34-000, the Wisconsin Commission submitted a Complaint alleging that the ATC-specific SSR cost allocation provision in section 38.2.7.k of MISO's Tariff, and the provision's implementation in Rate Schedule 43G with respect to the Presque Isle SSR Agreement, is unjust, unreasonable, and unduly discriminatory.[17] The Wisconsin Commission states that it is the Wisconsin agency charged with regulation and supervision of all public utilities in the state, and that it seeks to protect Wisconsin ratepayers from paying a disproportionate share of the costs for reliability provided by the Presque Isle SSR Units.[18] Section 38.2.7.k of MISO's Tariff states:

> The costs pursuant to the SSR Agreement shall be allocated to the LSE(s) which require(s) the operation of the SSR Unit for reliability purposes, and shall be specified in the SSR Agreement. For the purposes of this Section, any costs of operating an SSR Unit allocated to the footprint of [ATC] shall be allocated to all LSEs within the footprint of [ATC] on a *pro rata* basis.

The Wisconsin Commission states that, when MISO assigns SSR costs to LSEs outside of the ATC footprint, MISO conducts a load-shed analysis to identify

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[17] Complaint at 4.

[18] *Id.* at 7. The Wisconsin Commission notes that any wholesale rates paid by LSEs pursuant to the MISO Tariff are ordinarily passed through to Wisconsin retail rate customers.

the Local Balancing Authorities (LBAs) benefitting from designating a unit as an SSR.[19] However, the Wisconsin Commission notes that such a load-shed study is not required once MISO determines that the load affected by the SSR designation lies within the ATC footprint.

13. The Wisconsin Commission states that the Presque Isle power plant is located in the Upper Peninsula of Michigan (Upper Peninsula) on the far northern end of the ATC transmission footprint, and that the plant is the sole generator of any significant size in the Upper Peninsula.[20] The Wisconsin Commission asserts that the plant was constructed in the 1950s to provide power for the Tilden and Empire iron ore mines located approximately 17 miles from the plant, which are currently owned by Cliffs National Resources Inc. (Cliffs).[21] The Wisconsin Commission notes that the mining load in the area is approximately 280 MW, fed by several ATC 138 kV transmission lines.[22] The Wisconsin Commission asserts that, until recently, the mines made up approximately 80 percent of Wisconsin Electric's load in the Upper Peninsula. However, the Wisconsin Commission notes that the Michigan legislature amended its "customer Choice and Electricity Reliability Act" in 2008 to place conditions on customer retail choice. First, the amendment imposed a 10 percent cap on Michigan

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[19] *Id*. at 3 n.8.

[20] *Id*. at 2, 7. The Wisconsin Commission states that the next largest generator is in Green Bay, Wisconsin, 150 miles to the south.

[21] *Id*. at 7. The Wisconsin Commission states that the power plant originally had nine generating units totaling 592 MW, but that four of the original units were retired over time. *Id*. at 13.

[22] *Id*.

load serving entity retail sales that could be shifted to alternative electric suppliers, and second, it exempted the Tilden and Empire mines from the cap so that they could exercise customer choice. The Wisconsin Commission notes that Cliffs exercised its retail choice in July 2013 and changed its electrical supplier for the mines from Wisconsin Electric to Integrys Energy Services, Inc., prompting Wisconsin Electric to notify MISO of its intentions to suspend operations of Presque Isle Units 5-9 for 16 months, and ultimately leading to the filing of the Presque Isle SSR Agreement and associated Rate Schedule 43G.[23]

A. The ATC *Pro Rata* Cost Allocation Provision Does Not Meet Cost Causation Principles

14. The Wisconsin Commission states that, during its assessment of the Attachment Y Notice submitted by Wisconsin Electric for Presque Isle Units 5-9, MISO conducted a load-shed analysis to determine which load in each of the five LBAs within the ATC footprint benefits from continued operation of Presque Isle Units 5-9, and provided a percentage allocation of costs by LBA. The Wisconsin Commission states that the load-shed analysis showed that 58 percent of the reliability impact of the Presque Isle SSR Agreement is located in the Upper Peninsula, while only 42 percent of the benefitting load is in Wisconsin.[24] However,

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[23] *Id*. at 8. The Wisconsin Commission states that Cliffs represented 80 percent of Wisconsin Electric's load in the Upper Peninsula. The Wisconsin Commission states that the loss of Cliffs and other smaller customers exercising their customer choice led to Wisconsin Electric losing approximately 85 percent of its Michigan sales. *Id*. at 15.

[24] *Id*. at 3; Ex. B (Neumeyer Aff.) at 3-4. In other words, MISO's load-shed analysis showed that 42 percent of the load that would need to be shed if the Presque Isle SSR Units were immediately

because SSR costs for Presque Isle Units 5-9 are allocated to the footprint of ATC, it notes that the cost allocation provision contained in section 38.2.7.k of MISO's Tariff assigns cost recovery for SSR units not according to benefit, but on a *pro rata* basis to all LSEs in the ATC footprint. The Wisconsin Commission states that MISO determines the *pro rata* share based upon the peak load of each LBA during the month; after each LBA's share of cost is determined, every LSE within that LBA is assigned costs based on its contribution to the peak of its LBA.[25] Using this allocation method, the Wisconsin Commission states that most of the costs of the Presque Isle SSR Agreement are allocated to Wisconsin LSEs, because that is where the bulk of load in the ATC footprint is located. As a result, the Wisconsin Commission states that 92 percent of the projected $52.23 million in annual fixed costs under the Presque Isle SSR Agreement will be allocated to LSEs in Wisconsin, even though Wisconsin LSEs only receive 42 percent of the reliability benefits associated with the Presque Isle SSR Units (according to MISO's load-shed study).[26]

15. The Wisconsin Commission argues that this *pro rata* allocation is unjust and unreasonable because it does not satisfy the Commission's traditional cost causation principle that "all approved rates [must] reflect to some degree the costs actually caused by the

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suspended is located in Wisconsin, while the remaining 58 percent is located in the Upper Peninsula.

[25] *Id*. at 26.

[26] *Id*. at 9, 27. The Wisconsin Commission notes that it approximated the cost allocation percentage based on historical information, and that the load ratio allocations will be slightly different when MISO calculates them based on actual energy withdrawals during each monthly peak. *Id*. at 27 n.111.

customer who pays them."[27] The Wisconsin Commission states that the ATC carve-out allocates costs to the ratepayers of Wisconsin LSEs without providing benefits that are at least roughly commensurate to the costs imposed. The Wisconsin Commission additionally notes that ATC is not an LBA, and thus does not have the same reliability responsibilities as other LBAs that are allocated SSR costs. Thus, according to the Wisconsin Commission, the ATC carve-out ignores the linkage between cost assignment and reliability responsibility that is the underlying rationale for SSR cost allocation.[28] The Wisconsin Commission states that the affected LSEs in Wisconsin will seek recovery for these costs in their retail rates, and this prompts the concern of the Wisconsin Commission on behalf of retail consumers that receive no corresponding benefit from the continued operation of Presque Isle Units 5-9.[29]

16. The Wisconsin Commission states that in the rest of MISO, SSR costs are allocated to the LSEs that require the operation of the SSR Unit for reliability purposes.[30] The Wisconsin Commission states that this more generally applicable allocation would provide a more just, reasonable, and non-discriminatory allocation of the Presque Isle SSR Unit costs.[31] The

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[27] *Id*. at 24-25 (citing *Black Oak Energy, LLC v. FERC*, 725 F.3d 230, 364 (D.C. Cir. 2013) (*Black Oak v. FERC*); *E. Ky. Power Coop., Inc. v. FERC*, 489 F.3d 1299, 1303 (D.C. Cir. 2007); *Illinois Commerce Comm'n v. FERC*, 576 F.3d 470, 476-477 (7th Cir. 2009); *CED Rock Springs, LLC*, 116 FERC ¶ 61,163, at P 37 (2006)).

[28] *Id*. at 29.

[29] *Id*. at 10 n.40.

[30] *Id*. at 11.

[31] *Id*. at 32.

Wisconsin Commission notes that this method would distribute costs based on the relative impact on load of LSEs in the various affected areas, and not just on the fact that the LSE is located in the ATC footprint.[32] The Wisconsin Commission asserts that MISO should allocate 58 percent of the costs of the Presque Isle SSR Agreement to Michigan LSEs and 42 percent to Wisconsin LSEs, consistent with MISO's load-shed study.

B. The ATC *Pro Rata* Cost Allocation Provision is Unduly Discriminatory

17. The Wisconsin Commission also alleges that the ATC carve-out is discriminatory, because it only applies to the ATC footprint. The Wisconsin Commission asserts that this disparate treatment between ratepayers is only permissible if there is a valid reason for the disparity, and no such reason exits, as the presence of the Tariff provision is due to oversight rather than thoughtful ratemaking, as explained below.[33] The Wisconsin Commission states that there are no characteristics of the area inside the ATC footprint that justify such discrimination. According to the Wisconsin Commission, LSEs in Wisconsin whose territories are concentrated in the southern portion of the ATC footprint are affected by this discrimination, even though they will receive little or no reliability benefit from the operation of Presque Isle Units 5-9 as SSR Units.[34] The Wisconsin Commission states that the electricity bill savings for Cliffs from exercising retail choice inappropriately shifts costs to

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[32] *Id*. at 33.

[33] *Id*. at 24 (citing *Black Oak v. FERC*, 725 F.3d at 239; 16 U.S.C. § 824d (2012)).

[34] *Id*. at 30-31.

Wisconsin ratepayers that are not electrically benefitted by operation of Presque Isle Units 5-9.[35]

C. History of the ATC *Pro Rata* Cost Allocation Provision

18. The Wisconsin Commission asserts that the history of section 38.2.7.k of MISO's Tariff shows the ATC cost allocation provision to be an accident of timing. The Wisconsin Commission states that ATC, now a transmission-owning member of MISO, originally proposed to operate as a single control area and become the balancing authority for its region.[36] However, the Wisconsin Commission states that the Commission rejected ATC's request by orders on May 16, 2003 and April 13, 2004.[37] While ATC was in the process of making this request, the Commission was also considering MISO's initial Tariff filing. According to the Wisconsin Commission, on March 31, 2004, before the Commission rejected ATC's proposal to be a single control area, the Commission approved MISO's Tariff compliance filing containing the carve-out for cost allocation in the ATC footprint.[38] The Wisconsin Commission asserts that the Tariff stated:

> The costs of operating an SSR Unit plus any other payments made pursuant to the SSR contract shall be allocated on a *pro rata* basis

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[35] *Id*. at 32.

[36] *Id*. at 18. The Wisconsin Commission states that on December 22, 2000, it granted a certificate of authority to ATC to become the transmission company that would replace the transmission service of a number of Wisconsin electric utilities.

[37] *Id*. at 19 (citing *Midwest Indep. Transmission Sys. Operator, Inc*., 103 FERC ¶ 61,191 (2003); *Midwest Indep. Transmission Sys. Operator, Inc*., 107 FERC ¶ 61,015 (2004)).

[38] *Id*. (citing 2004 SSR Order, 108 FERC ¶ 61,163 at P 372).

> to the Market Participants Serving Load as an LSE or on behalf of an LSE in the Control Areas(s) which requires the operation of the SSR Unit for reliability purposes. For the purposes of this Section, any SSR Unit located within the footprint of [ATC] shall be allocated to all Market Participants within the footprint of [ATC] on a *pro-rata* basis.

The Wisconsin Commission states that this Tariff language was not discussed in the order, except to note that "SSR costs are appropriately assigned to market participants serving load in the affected control areas," and that the continued presence of the language in the Tariff has never been discussed by the Commission.[39] The Wisconsin Commission argues that the carve-out for allocation in the ATC footprint was apparently included by MISO to facilitate the treatment of ATC as a single control area, and was intended to clarify how costs were to be allocated in ATC; it was not intended to create an exception for ATC.[40] The Wisconsin Commission asserts that that when ATC's request to operate as a single control area was rejected by the Commission, this language should have been removed.

19. The Wisconsin Commission notes that the carve-out language remained unnoticed for years, until MISO submitted proposed revisions to its SSR provisions in 2012 in anticipation of needing to designate several SSR Units.[41] The Wisconsin Commission

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[39] *Id.*

[40] *Id*. at 20.

[41] *Id*. at 21. The Wisconsin Commission notes that the Tariff language was substantively untouched, but was changed to state:

states that, although stakeholders expressed concerns about the vagueness of the allocation provisions in the Tariff, the Commission held that market participants would have the opportunity to contest the allocation of SSR costs when MISO submits its required filing under section 205 of the FPA at the time it seeks to charge customers for SSR costs.[42] The Wisconsin Commission states that the ATC carve-out provision was implemented in 2013 when MISO filed an SSR agreement between MISO and the City of Escanaba, Michigan (the Escanaba Agreement).[43] The Wisconsin Commission states that it did not raise any objections in that proceeding because the Escanaba Agreement was a small transaction that involved 25 MW of capacity and a fixed annual payment of about $3.7 million per year, and the small scale combined with the novelty of the first SSR agreement involving the ATC *pro rata* cost allocation provision "did not ring alarm bells."[44] The Wisconsin Commission also asserts that *Escanaba* is distinguishable because the Escanaba Agreement provided the required support for a 25 MW municipal facility prior to its conversion

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> The costs pursuant to the SSR Agreement shall be allocated to the LSE(s) which require(s) the operation of the SSR Unit for reliability purposes, and shall be specified in the SSR Agreement. For purposes of this Section, any costs of operating an SSR Unit allocated to the footprint of [ATC] shall be allocated to all LSEs within the footprint of [ATC] on a *pro rata* basis.

The Wisconsin Commission notes that this language is identical to current Tariff section 38.2.7.k.

[42] *Id*. (citing 2012 SSR Order, 140 FERC ¶ 61,237 at PP 148-151).

[43] *Id*. at 22 (citing *Midwest Indep. Transmission Sys. Operator, Inc*., 142 FERC ¶ 61,170 (2013) (*Escanaba*)).

[44] *Id*. at 23.

to a biomass-fuel facility and planned transfer into private ownership, whereas Presque Isle Units 5-9 have a keystone generation role for grid reliability in the Upper Peninsula even though the units are uneconomic for lack of retail revenue load.[45]

D. Requested Relief

20. The Wisconsin Commission asks that the Commission: (1) find that the ATC *pro rata* SSR cost allocation methodology in section 38.2.7.k of MISO's Tariff, in itself and as implemented in Rate Schedule 43G, is unjust, unreasonable and unduly discriminatory; (2) order MISO to remove the ATC cost allocation methodology from section 38.2.7.k of MISO's Tariff and make any necessary modification to Rate Schedule 43G; and (3) set a just, reasonable, and non-discriminatory allocation for the costs of the Presque Isle SSR Agreement.[46] The Wisconsin Commission further asks the Commission to: (1) extend to the ATC footprint the general benefits-based SSR cost allocation methodology under section 38.2.7.k that applies to the rest of MISO; and (2) apply the generally-applicable SSR cost allocation methodology to the

[45] *Id*. at 34. The Wisconsin Commission's testimony states that the keystone position of Presque Isle Units 5-9 stems from the electrical isolation of the Upper Peninsula and the unique generation and transmission issues present there, which include: limited access to the peninsula due to the presence of Lake Superior and Lake Michigan, demand from large iron ore mines that operate around the clock and cannot be shut down, sparse communities, and the fact that transmission and generation developed under a vertically-integrated utility model. *Id.*, Ex. B (Neumeyer Aff.) at 5.

[46] *Id*. at 33, 36.

Presque Isle SSR Agreement, effective as of the earliest possible date.[47]

21. Alternatively, the Wisconsin Commission requests that the Commission grant a limited waiver of the applicability of the ATC carve-out in section 38.2.7.k of MISO's Tariff and Rate Schedule 43G with regard to the allocation of costs arising from the Presque Isle SSR Agreement, and that such waiver be extended to any renewals of the agreement.[48] The Wisconsin Commission asks that the waiver be made effective February 1, 2014, the date that the Presque Isle SSR Agreement and Rate Schedule 43G become effective, as those filings were accepted subject to refund. The Wisconsin Commission argues that the Tariff waiver meets the Commission's requirements for such waivers because it: (1) is of limited scope, because it deals with one power plant located on an electrically-isolated peninsula; (2) remedies a concrete problem by properly identifying which entities should pay for the reliability from which they benefit, in accordance with MISO's load-shed analysis; and (3) does not have undesirable consequences, because the relief sought in the Complaint will prevent harm to non-benefitting parties and avoid jurisdictional cost-shifting windfalls.[49] The Wisconsin Commission asks that the Commission grant the earliest lawful refund effective date for any amounts paid under the Presque Isle SSR Agreement and Rate Schedule 43G.[50]

22. As another alternative, the Wisconsin Commission requests that the Commission set the Complaint

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[47] *Id*. at 36-37.

[48] *Id*. at 34, 37-38.

[49] *Id*. at 35.

[50] *Id*. at 37-38.

for hearing, but hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.[51] The Wisconsin Commission also states that the issues raised in the Complaint warrant fast track processing under Rule 206(b)(11) of the Commission's Rules of Practice and Procedure,[52] as the Presque Isle SSR Agreement and Rate Schedule 43G are effective as of February 1, 2014, and expedited issuance of an order would simplify the implementation by MISO of any change in the allocation methodology.[53] Finally, the Wisconsin Commission requests a waiver of Rule 203(b)(3) of the Commission's Rules of Practice and Procedure,[54] to permit inclusion of additional persons on the Commission's service list.

VI. Notice and Responsive Pleadings

23. Notice of the Complaint in Docket No. EL14-34-000 was published in the *Federal Register*, 79 Fed. Reg. 20,195 (2014), with interventions and protests due on or before May 5, 2014. MISO submitted an answer to the Complaint on April 28, 2014. The Michigan Public Service Commission filed a notice of intervention and comments on May 5, 2014. Timely motions to intervene were submitted by: Michigan Municipal Electric Association; ATC; Wisconsin Industrial Energy Group; Coalition of MISO Transmission Customers; Verso Paper Corporation; Tilden Mining Company, L.C.; Citizens Utility Board of Wisconsin; Manitowoc Public Utilities; Consumers

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[51] *Id*. at 5 (citing 18 C.F.R. § 385.603 (2013)).

[52] 18 C.F.R. § 385.206(b)(11) (2013).

[53] Complaint at 5, 40.

[54] 18 C.F.R. § 385.203(b)(3) (2013).

Energy Company; Wolverine Power Supply Cooperative, Inc.; Exelon Corporation; Cloverland Electric Cooperative, Alger Delta Cooperative Electric Association, and Ontonagon County Rural Electrification Association; NewPage Corporation; Xcel Energy Services, Inc.; Dairyland Power Cooperative; and Michigan Technological University. Motions to intervene and comments were filed by: the Public Interest Organizations; Wisconsin Electric; Wisconsin Power and Light Company (Wisconsin Power); Madison Gas and Electric Company (Madison Gas and Electric); WPPI Energy; Customers First! Coalition; Wisconsin Customers Coalition; Citizens Against Rate Excess; and Municipal Electric Utilities of Wisconsin. Motions to intervene and protests were filed by Tilden Mining Company L.C. and Empire Iron Mining Partnership (the Mines); Wisconsin Public Service Corporation and Upper Peninsula Power Corporation (WPSC/UPPCo); Great Lakes Utilities; and Integrys Energy Services, Inc. (Integrys). The Missouri Joint Municipal Electric Utility Commission submitted a motion to intervene out-of-time.

24. Alger Delta Cooperative Electric Association filed a notice of withdrawal of its motion to intervene on June 9, 2014.

25. The Wisconsin Commission submitted a motion to answer and answer to the comments and protests on May 16, 2014. Wisconsin Power submitted a motion to answer and answer to the comments and protests on May 19, 2014. ATC and WPSC/UPPCo filed motions to answer and answers on May 20, 2014. WPSC/UPPCo filed a subsequent motion to answer and additional answer on May 30, 2014.

A. MISO Answer

26. In its answer to the Complaint, MISO clarifies that the percentage allocation by LBA contained in the load-shed study were preliminary and not final results.[55] MISO states that the load-shed analysis, which would guide the assignment of costs to LBAs in the absence of the ATC cost allocation provision in the Tariff, was not necessary for the purpose of assigning Presque Isle SSR costs under the Tariff. MISO states that it would have to complete its assessment of the impacts on loads of the identified contingent conditions that require the SSR designation in order to arrive at final results that are consistent with the Tariff. According to MISO, the final results could be different than the preliminary results that were quoted by the Wisconsin Commission.[56]

B. Comments in Support

27. Commenters in support of the Complaint generally agree that MISO's proposed allocation of costs associated with the Presque Isle SSR Agreement, as mandated by section 38.2.7.k of the Tariff, is not roughly commensurate with the cost causers and beneficiaries of the agreement.[57] The Wisconsin

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[55] MISO Answer to the Complaint, Docket No. ER14-34-000, at 5 (filed Apr. 28, 2014).

[56] *Id*. at 5.

[57] *See, e.g.*, Comments of the Public Interest Organizations, Docket No. EL14-34-000 at 5 (filed May 5, 2014) (Public Interest Organizations Comments in Support of the Complaint); Comments of Madison Gas and Electric Company, Docket No. EL14-34-000 at 6-7 (filed May 5, 2014) (Madison Gas and Electric Comments in Support of the Complaint); Comments of Wisconsin Power and Light Company, Docket No. EL14-34-000 at 3-4 (filed May 5, 2014) (Wisconsin Power Comments in Support of the Complaint).

Customers Coalition states that Wisconsin customers are being asked to pay $26.1 million more on an annual basis under the ATC cost allocation calculation than they would under a pure reliability-based allocation, according to MISO's load-shed analysis.[58] Madison Gas and Electric notes that although it does not cause any of the costs that give rise to the SSR designation for Presque Isle Units 5-9 and does not derive any benefit from that designation, it is allocated a portion of the Presque Isle SSR costs while LSEs located within similarly situated LBAs in MISO are not.[59] The Public Interest Organizations note that the Mines are still receiving power from Presque Isle Units 5-9 despite no longer paying their fair share of the costs to maintain the plant, and they argue that Cliffs should not be insulated from the reliability effects that its decision to change electricity suppliers has had on the system.[60] Wisconsin Electric recognizes that, as pertains to the Presque Isle SSR Agreement, the majority of the benefits from the continued operation of the Presque Isle SSR Units rests with LSEs in Michigan, not those in Wisconsin, and agrees that the Presque Isle SSR Agreement does not allocate costs within the ATC footprint in the same manner that such costs are allocated elsewhere in MISO. Wisconsin Electric asks that any changes to the cost allocation methodology in the ATC footprint be

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[58] Wisconsin Customers Coalition Comments, Docket No. EL14-34-000, at 8 (filed May 5, 2014) (Wisconsin Customers Coalition Comments in Support of the Complaint).

[59] Madison Gas and Electric Comments in Support of the Complaint at 7.

[60] Public Interest Organizations Comments in Support of the Complaint at 8.

prospective and not applied to the Presque Isle SSR Agreement.[61]

28. Commenters agree that the ATC cost allocation provision has no logical place in the current MISO Tariff. Madison Gas and Electric Company states that the initial socialization of costs among ATC member utilities helped align the member utilities' interests with the system as a whole, which resulted in more efficient transmission-planning decisions.[62] However, Madison Gas and Electric says that it is now apparent that socialization of SSR-related costs is misguided because the cost-sharing does not create any beneficial incentives that justify the deviation from cost-causation principles. Commenters state that the Tariff language in section 38.2.7.k was not based on economics or analyses, and that the continued presence of the language in the Tariff has never been discussed by the Commission nor been vetted through the traditional stakeholder process.[63] Wisconsin Power argues that MISO never initially received stakeholder approval for the ATC Tariff language.[64]

29. Commenters argue that *pro rata* ATC cost allocation will prevent LSEs from fully exploring potential alternative solutions to SSR agreements

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[61] Wisconsin Electric Power Company Comments, Docket No. EL14-34-000 at 4-5 (filed May 5, 2014).

[62] Madison Gas and Electric Comments in Support of the Complaint at 8-9.

[63] Comments of Municipal Electric Utilities of Wisconsin, Docket No. EL14-34-000, at 5 (filed May 5, 2014); Wisconsin Power Comments in Support of the Complaint at 5.

[64] Wisconsin Power Comments in Support of the Complaint, McNamara Aff. at 6-10.

because they are not exposed to the full costs of keeping an SSR unit online.[65]

30. Wisconsin Power states that SSR costs in the ATC footprint should be allocated the same way that Revenue Sufficiency Guarantee (RSG) costs associated with Voltage and Local Reliability (VLR) units are allocated, because both types of units are needed for the same reason – to support system reliability.[66] Wisconsin Power asserts that the majority of the MISO footprint appropriately allocates VLR and SSR costs in a similar manner. Wisconsin Power asserts that the exception to this rule is the ATC footprint, where there is a large disparity between how VLR and SSR costs are allocated. Wisconsin Power notes that, in the ATC footprint, as in the rest of MISO, VLR make-whole payments are allocated to the electrically-close LBAs that benefit from the VLR commitment.[67] However, in the ATC footprint only, states Wisconsin Power, SSR costs are allocated on a *pro rata* basis to all of the ATC LSEs without any consideration to the actual reliability benefits that an entity receives.

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[65] *Id.*; Wisconsin Customers Coalition Comments in Support of the Complaint at 8.

[66] Wisconsin Power Comments in Support of the Complaint at 6-7.

[67] *Id.* at 7 (citing *Midwest Indep. Transmission Sys. Operator, Inc.,* 140 FERC ¶ 61,171, at P 78 (2012)). RSG costs associated with VLR commitments are allocated to market participants within each LBA where the VLR resource is located on a *pro rata* basis, per their actual energy withdrawals in the LBA. *See* MISO, FERC Electric Tariff, Module C (Energy and Operating Reserve Markets), § 40.3.3(a)(xviii) (Real-Time Energy and Operating Reserve Market Settlement Calculation) (34.0.0).

C. Comments in Opposition/Protests

1. MISO's Load-Shed Study is Preliminary

31. Commenters argue that the Wisconsin Commission has not met its heavy dual burden of proof to demonstrate, based on substantial evidence, that the Tariff in effect is unjust and unreasonable and that the solution it proposes is just and reasonable.[68] Commenters argue that MISO's load-shed study is preliminary and does not provide an adequate basis to support the Wisconsin Commission's conclusion that cost allocation in the Presque Isle SSR Agreement is unjust and unreasonable.[69] They note that there was a group of contingencies that remained unresolved by the load-shed study, and assert that these contingencies could lead to cascading outages.[70]

2. The ATC *Pro Rata* Cost Allocation Provision is not Unduly Discriminatory and Meets Cost Causation Principles

32. Commenters argue that the Wisconsin Commission has not met its burden to show that cost allocation using the generally applicable method would be just and reasonable when applied in the ATC footprint.[71] Commenters argue that cross-border cost sharing in

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[68] Protest of the Wisconsin Public Service Corporation and Upper Peninsula Power Co., Docket No. EL14-34-000, at 12-13 (filed May 5, 2014) (WPSC/UPPCo Protest of the Complaint); Tilden Mining Company, L.C. and Empire Iron Mining Partnership Protest of the Complaint, Docket No. EL14-34-000, at 12 (filed May 5, 2014) (The Mines Protest of the Complaint).

[69] The Mines Protest of the Complaint at 22-23; WPSC/UPPCo Protest of the Complaint at 29-30.

[70] Citizens Against Rate Excess Comments on the Complaint, Docket No. EL14-34-000, at 10 (filed May 5, 2014).

[71] The Mines Protest of the Complaint at 29.

the region happens in other contexts, and the mere fact that Wisconsin ratepayers shoulder more SSR costs does not make the Presque Isle SSR Agreement unjust and unreasonable.[72] They explain that Wisconsin Electric operates its electric utility operations on an integrated system-wide basis. Because 93 percent of Wisconsin Electric's total system demand is in Wisconsin, they state that Wisconsin Electric's Wisconsin ratepayers bear the vast majority of total system costs, including the costs of Presque Isle. Citizens Against Rate Excess state that Michigan's Upper Peninsula customers are required to pay an allocated share of the costs of Wisconsin Electric's generating assets located in Wisconsin, even when power from that generation cannot be delivered to Michigan.[73] In addition, they state that Wisconsin's renewable portfolio standards are structured so that Wisconsin Electric's costs of compliance with the standards may be billed on a system-wide basis and passed to Michigan ratepayers.[74]

33. Commenters argue that there are rational bases for allocating SSR costs *pro rata* among LSEs in the ATC footprint. Citizens Against Rate Excess claim that Northeast Wisconsin and the Upper Peninsula have unique characteristics such as limited access to transmission, greater distance between load and generation, and a low-voltage system, all of which increase the danger of voltage collapse, thereby

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[72] *Id.* at 24; Citizens Against Rate Excess Comments on the Complaint at 17; Motion to Intervene and Answer in Opposition of Integrys Energy Services, Inc., Docket No. EL14-34-000, at 5 (filed May 5, 2014) (Integrys Comments on the Complaint.)

[73] Citizens Against Rate Excess Comments on the Complaint at 16.

[74] *Id.* at 18.

increasing the importance of local generation for local voltage support.[75] Commenters argue that the reliability effects of operating Presque Isle Units 5-9 to prevent large-scale voltage collapse extend to the entire ATC footprint, and it is not unjust and unreasonable for all ratepayers in the ATC footprint to pay their *pro rata* share of the Presque Isle SSR units.[76] They state that isolating the costs of transmission service solely to Michigan customers located on the Upper Peninsula would result in those customers paying a disproportionate share of reliability costs.[77] Commenters allege that the ATC cost allocation provision provides a just and reasonable solution that promotes regional planning and regional solutions to reliability issues to ensure access to competitive wholesale energy markets.[78]

34. Commenters argue that the ATC cost allocation provision is actually consistent with the way SSR costs are allocated generally. WPSC/UPPCo note that MISO's general SSR benefits-based methodology is LBA-based, where MISO determines which LBAs benefit from the SSR Unit.[79] WPSC/UPPCo state that this can work for most of MISO, because each pricing zone is coextensive with a single LBA; thus, the determination of benefits on the basis of the LBA is a determination of benefits associated with a pricing

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[75] *Id.* at 11-12.

[76] *Id.*; The Mines Protest of the Complaint at 22, 25-26.

[77] The Mines Protest of the Complaint at 25-26; Citizens Against Rate Excess Comments on the Complaint at 10-11.

[78] The Mines Protest of the Complaint at 28; WPSC/UPPCO Protest of the Complaint at 25.

[79] WPSC/UPPCo Protest of the Complaint at 26.

zone.[80] But because the ATC pricing zone includes five LBAs, WPSC/UPPCO state that the general cost allocation method would result in five sub-allocations of SSR costs in ATC. Commenters state that the ATC SSR cost allocation provision actually ensures that the costs of SSR units are allocated on a zonal basis (*pro rata* to all LSEs in the five LBAs that make up the ATC pricing zone), just as such costs are allocated to other MISO pricing zones.[81]

3. SSR Costs are Essentially Transmission Reliability Costs and Should be Allocated in a Similar Manner

35. WPSC/UPPCo argue that SSR units are transmission reliability assets, just like the transmission facilities that are built to obviate the need for SSR units.[82] They state that the MISO Tariff recognizes this fact because it provides compensation to generators that qualify as SSR units under MISO's Transmission Expansion Planning Protocol. Therefore, they conclude that SSR costs are essentially transmission reliability costs, and they should be allocated the same way; namely, on a pricing zone basis. WPSC/UPPCo note that over the past decade, billions of dollars in transmission reliability costs have been allocated to LSEs within the ATC footprint on a *pro rata* basis, regardless of how individual costs or projects benefitted individual LSEs.[83]

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[80] *Id.*

[81] *Id.* at 27; The Mines Protest of the Complaint at 11.

[82] WPSC/UPPCo Protest of the Complaint at 14-15.

[83] *Id.* at 22-26.

4. History of the ATC *Pro Rata* Cost Allocation Provision

36. Commenters state that the ATC *pro rata* SSR cost allocation provision has already been found by the Commission to be just and reasonable, and that MISO has correctly implemented its Tariff. For instance, the Mines state that the Commission initially approved the separate provision for the *pro rata* allocation of SSR unit costs in the ATC footprint on August 6, 2004, and again in 2012 when the Commission accepted MISO's revisions to its SSR Tariff.[84] In addition, the Mines state that the Commission has already specifically approved section 38.2.7.k of MISO's Tariff in the *Escanaba* order, where it found that the "*pro rata* allocation of SSR costs to LSEs throughout the ATC footprint" was "just and reasonable."[85] The Mines state that the Wisconsin Commission has presented no evidence of changed circumstances since the Commission last approved the Tariff provision that would warrant overturning the Commission's prior orders.

37. Commenters refute the Wisconsin Commission's assertion that the ATC cost allocation provision was left in the MISO Tariff by mistake, arguing instead that single system operation and *pro rata* cost allocation were foundational principles of ATC. WPSC/UPPCo claim that the area covered by the ATC footprint was previously comprised of five separate control areas with separate planning, construction, operations, and generation dispatch, such that LSEs were hesitant to construct transmission beyond their

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[84] The Mines Protest of the Complaint at 17-18 (citing 2012 SSR Order, 140 FERC ¶ 61,237 at P 154).

[85] *Id.* at 18-19 (citing *Escanaba*, 142 FERC ¶ 61,170 at P 72).

own needs.[86] WPSC/UPPCo assert that the initial formation of ATC was intended to eliminate transmission rate pancaking and improve transmission reliability through the creation of a single-purpose transmission company that would operate the combined transmission system on a single system basis under MISO's jurisdiction.[87] They state that the costs of this single system were to be shared *pro rata* on a load ratio share basis amongst the LSEs and their customers through a single zonal network transmission rate in order to avoid the balkanization that previously affected efficient expansion of the transmission system.[88]

38. WPSC/UPPCo state that the ATC cost allocation provision was implemented due to a Wisconsin law that required ATC to operate under any MISO tariff as a single zone. The statute states that transmission companies must "[a]pply for membership in [MISO] as a single zone for pricing purposes that

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[86] WPSC/UPPCO Protest of the Complaint at 16.

[87] *Id.* at 9, 17 (citing Wis. Stat. § 196.485(1)(ge), 196.485(1m)(c)). Wis. Stat. § 196.485(l)(ge) states:

> Transmission company means a corporation...that has as its sole purpose the planning, constructing, operating, maintaining and expanding of transmission facilities that it owns to provide for an adequate and reliable transmission system that meets the needs of all users that are dependent on the transmission system and that supports effective competition in the energy markets without favoring any market participant.

The Wisconsin Commission certified ATC as a transmission company under the Wisconsin statute on December 22, 2000. *See* Complaint, Ex. DEE-2 at 1-2.

[88] WPSC/UPPCO Protest of the Complaint at 9, 17.

includes the transmission area[.]"[89] The statute also required ATC to implement a five-year transition to an average transmission network service rate based on average, system-wide costs to replace the zonal rates of each control area.[90] Finally, the statute required transmission companies to "elect to be included in a single zone for the purpose of any tariff administered by [MISO.]"[91] Great Lakes Utilities states that the Wisconsin statute evinced a clear state policy to create a single price for transmission throughout eastern Wisconsin, and argues that MISO's treatment of ATC as a single rate zone for SSR cost allocation purposes is consistent with the treatment of ATC as a single transmission pricing zone.[92]

39. WPSC/UPPCo also argue that all of the formational documents for ATC were guided by the principles of single zone operation and the *pro rata* sharing of transmission reliability costs. For example, they state that ATC's original OATT included a five-year transition to a single zonal network rate and *pro rata* sharing of congestion and redispatch costs.[93] According to WPSC/UPPCo, this evidence refutes the Wisconsin Commission's claim that the ATC *pro rata* cost allocation provision was left in the Tariff through oversight.

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[89] *Id.* at 17 (citing Wis. Stat. § 196.485(3m)(a)1.d).

[90] *Id.* (citing Wis. Stat. §§ 196.485(3m)(a)1.d & 4).

[91] *Id.* (citing Wis. Stat. § 196.485(3m)(a)1.f).

[92] Protest of Great Lakes Utilities, Docket No. EL13-34-000, at 6-7 (filed May 5, 2014) (Great Lakes Utilities Protest of the Complaint).

[93] WPSC/UPPCo Protest of the Complaint at 19.

5. The Request for Relief Should be Denied

40. Commenters request that the Commission dismiss the Complaint because the Wisconsin Commission has not met its dual burden of proof under section 206 of the FPA.[94] Commenters request that, if the Commission determines that the Complaint has merit, the Commission schedule the matter for hearing and settlement procedures in order to allow stakeholders to develop appropriate Tariff changes that take into account the nature of ATC's unique transmission system and consumer costs.[95] Integrys asserts that MISO could prepare a study that assesses the appropriate Tariff changes.[96] WPSC/UPPCo state that if the Commission requires any changes to the Tariff, it should require MISO to clarify that SSR costs are to be allocated to the pricing zones that benefit, because LBAs are vestigial geographical distinctions that are meaningless for present cost allocation purposes, as power flows do not recognize LBA boundaries and LBAs do not reflect the proximity of generation and load.[97] Alternatively, WPSC/UPPCo ask the Commission to require that the separate LBAs within ATC be consolidated into one LBA. Great Lakes Utilities generally supports the Wisconsin Commission's contention that the existing allocation of SSR costs in ATC is unjust and unreasonable, but argue that the proposal to eliminate the ATC cost allocation provision

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[94] *Id*. at 12-13; The Mines Protest of the Complaint at 12; Citizens Against Rate Excess Comments at 20.

[95] The Mines Protest of the Complaint at 38; Integrys Comments on the Complaint at 5; Comments of the Michigan Public Service Commission, Docket No. EL14-34-000, at 7 (filed May 5, 2014).

[96] Integrys Comments on the Complaint at 6.

[97] WPSC/UPPCo Protest of the Complaint at 12, 27.

fails to acknowledge that the provision is the result of a policy demand made by the State of Wisconsin.[98] Great Lakes Utilities suggests a modified version of the ATC carve-out provision whereby the costs of any SSR unit proposed to be allocated to any LSE within the Wisconsin portion of the ATC footprint would be allocated on a *pro rata* basis to all LSEs within the Wisconsin portion of the footprint.[99]

41. The Mines argue that the Complaint is defective and should be dismissed because it does not comply with the Commission's filing requirements with respect to requesting confidential treatment of information under section 388.112 of the Commission's rules.[100] Specifically, the Mines state that the Complaint did not include a proposed protective agreement or identify a previously filed protective agreement that applies to the confidential material.

42. Commenters allege that the Wisconsin Commission's alternative request for a waiver of section 38.2.7.k of MISO's Tariff for the Presque Isle SSR Agreement does not meet the Commission's standards for tariff waivers. WPSC/UPPCo state that the waiver is not limited in scope because it goes to the heart of how all costs will be allocated in the Presque Isle SSR Agreement and any future renewals.[101] They argue that the waiver would not remedy a concrete problem but actually create additional problems, because it would create confusion as to how costs should be allocated in every future SSR agreement in the ATC footprint. The Mines state that Michigan ratepayers

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[98] Great Lakes Utilities Protest of the Complaint at 4-5.

[99] *Id*. at 12.

[100] The Mines Protest of the Complaint at 13-14.

[101] WPSC/UPPCo Protest of the Complaint at 31.

would be harmed under the general reliability-based cost allocation methodology in MISO's Tariff, and Michigan LSEs would face an additional $26 million in cost responsibility for the Presque Isle SSR Units.[102] They also state that granting a waiver would result in undue discrimination, because similarly-situated SSR units within the ATC footprint would be allocated differently, due to the Commission's previous application of section 38.2.7.k to the Escanaba Agreement.

43. The Mines also protest the Wisconsin Commission's request that relief be granted back to February 1, 2014. They state that the Commission's authority to remedy an unlawful rate under section 206 of the FPA is prospective, and that "[t]he filed rate doctrine bars an amendment to MISO's ATC SSR Tariff retroactively."[103] They further argue that the Commission typically denies refunds in cases where there is no over-recovery or violation of the filed rate, and that the Wisconsin Commission has not alleged that the total level of cost recovery under the Presque Isle SSR Agreement is inappropriate or that there is any over-recovery. They argue that there is no requirement to establish a refund effective date under section 206(b) of the FPA where the proceeding is instituted upon complaint.

D. Answers

1. Answers in Support of the Complaint

44. The Wisconsin Commission argues that the Complaint establishes a *prima facie* case that the Tariff is unjust, unreasonable, and unduly discriminatory because it demonstrates that the ATC *pro rata*

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[102] The Mines Protest of the Complaint at 30.

[103] *Id.* at 32.

SSR cost allocation Tariff provision violates Commission precedent and policy by allocating costs without regard to the benefits received. The Wisconsin Commission asserts that none of the intervenors have presented evidence that justifies allocating SSR costs *pro rata* in the ATC footprint.[104]

45. The Wisconsin Commission states that the preliminary nature of the load-shed study is irrelevant to its Complaint, because the load-shed study merely demonstrates that a cost allocation based on reliability benefits would be different from the current *pro rata* cost allocation, which bears no relation to the benefits provided.[105] The Wisconsin Commission argues that the preliminary nature of the load-shed analysis also does not affect the remedy requested, because MISO has stated that it will complete the study and allocate the Presque Isle SSR costs based on the results of the study if the Commission orders it to apply the prevailing methodology for allocating SSR costs.[106]

46. The Wisconsin Commission and Wisconsin Power assert that SSR units are not in fact equivalent to transmission facilities.[107] Wisconsin Power states that, while SSRs do support local system reliability, this alone is not sufficient evidence to consider SSR

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[104] Wisconsin Commission Answer to Protests, Docket No. EL14-34-000, at 4, 6-7 (filed May 16, 2014) (Wisconsin Commission Answer).

[105] *Id.* at 5, 7.

[106] *Id.* at 5, 7-8.

[107] *Id*. at 8-10; Wisconsin Power and Light Company Answer, Docket No. EL14-34-000 at 3 (filed May 19, 2014) (Wisconsin Power Answer).

costs and transmission costs to be synonymous.[108] The Wisconsin Commission states that SSR units provide only local reliability benefits, while transmission facilities provide wide-spread, long-term regional benefits.[109] Wisconsin Power states that there are also many other possible solutions to an SSR agreement, including demand response, new generation, and targeted load shed, but the costs of these potential alternative solutions are not allocated *pro rata* in ATC.[110] The Wisconsin Commission and Wisconsin Power argue that SSR service is a generation service, like VLR and reactive power, and should be treated comparably.[111] Specifically, reactive power costs are allocated to five pricing zones within ATC and VLR costs are allocated directly to the electrically-close local areas that benefit from the resource commitment and which do nothing to relieve the need for the VLR commitment. The Wisconsin Commission notes that the Commission accepted a MISO application to change the cost allocation for VLRs to one based on LBAs, finding that local load is the primary beneficiary of VLR commitments, and therefore, allocating RSG costs associated with VLR commitments predominately to local load is reasonable.[112]

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[108] Wisconsin Power Answer at 3-4. Wisconsin Power notes that reactive power and regulation services both support system reliability, but they are not classified as transmission.

[109] Wisconsin Commission Answer at 9.

[110] Wisconsin Power Answer at 4.

[111] Wisconsin Commission Answer at 10; Wisconsin Power Answer at 5.

[112] Wisconsin Commission Answer at 10 (citing *Midwest Indep. Transmission Sys. Operator, Inc*., 140 FERC ¶ 61,171 at P 78).

47. The Wisconsin Commission disputes claims that ATC has unique characteristics that justify cost socialization in ATC.[113] The Wisconsin Commission acknowledges that transmission costs were socialized when ATC was formed in order to align the interests of the member utilities with the interests of ATC as a whole, but states that such socialization makes no sense when applied to SSR costs.[114] The Wisconsin Commission argues that decisions concerning ATC member utilities' generation assets are not subject to the ATC transmission planning process; rather, the decision to operate or shut down a generator belongs to the utility. The Wisconsin Commission states that socializing the costs of the Presque Isle SSR Units to other ATC members will not promote any regional decision-making. The Wisconsin Commission also takes issue with arguments that Wisconsin law requires socialization of SSR costs. The Wisconsin Commission states that the Commission should defer to it to interpret Wisconsin laws that it is entrusted to enforce, and concludes that nothing requested in the Complaint would put ATC out of compliance with Wisconsin law.[115]

48. The Wisconsin Commission states that the Commission has never ruled on the justness and reasonableness of the ATC SSR cost allocation provision. First, the Wisconsin Commission notes that the *Escanaba* order merely found that the proposed rate schedule for the 25 MW Escanaba unit was just and reasonable, and therefore did not address the merits of a suggestion that MISO adopt a VLR-type allocation

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[113] *Id.* at 11 (citing Complaint, Ex. B (Neumeyer Aff.) at 4).

[114] *Id*. at 12.

[115] *Id*. at 12-13.

for the costs.[116] The Wisconsin Commission states that *Escanaba* did not hold that a *pro rata* cost allocation in the ATC footprint would be just and reasonable in any future proceeding. The Wisconsin Commission argues that a rate that was just and reasonable in one situation can become unjust and unreasonable when applied later, and that one purpose of section 206 of the FPA is to provide a mechanism for challenging such formerly approved rates.[117]

49. The Wisconsin Commission argues that it is wholly within the Commission's discretion to grant refunds for an unjust and unreasonable allocation of costs, and that the facts in this case warrant refunds.[118] The Wisconsin Commission states that refunds will not alter past decisions made in reliance on a rate design in effect because there was no allocation of costs for Presque Isle SSR service in effect when Cliffs chose to exercise its retail choice. The Wisconsin Commission states that refunds are warranted because the SSR Agreement allocates costs in a manner that diverges from the benefits conferred. The Wisconsin Commission asserts that section 206 of the FPA requires the Commission to establish a refund effective date whenever it institutes a proceeding under section 206, regardless of whether

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[116] *Id*. at 14 (citing *Escanaba*, 142 FERC ¶ 61,170 at P 75).

[117] *Id*. at 14-15.

[118] *Id*. at 16-17 (citing *Louisiana Pub. Serv. Comm'n v. Entergy Corp.*, 132 FERC ¶ 61,133, at P 28 (2010) (finding that section 206 of the FPA does not prohibit refunds for misallocated costs); *Louisiana Pub. Serv. Comm'n v. Entergy Corp.*, 142 FERC ¶ 61,211, at P 51 (2013) (*Entergy*), *appeal pending, Louisiana Pub. Serv. Comm'n v. FERC*, No. 13-1155 (D.C. Cir. filed Sept. 18, 2013)).

the Commission institutes the proceeding on its own motion or on complaint.[119]

2. Answers in Protest

50. WPSC/UPPCo state that MISO's preliminary load-shed study does not provide adequate evidence that is sufficient to establish a *prima facie* case under section 206 of the FPA because the study does not resolve a group of severe contingencies in east-central Wisconsin, which suggests that the final study could be materially and directionally different than the preliminary study.[120]

51. WPSC/UPPCo refute claims that the ATC cost allocation provision creates inappropriate economic incentives.[121] WPSC/UPPCo argue that allocating costs to the individual LSEs or generation owners who allegedly cause transmission reliability costs may result in decisions made without regard to what is best for the transmission system as a whole. WPSC/UPPCo acknowledge that the decision to shut down a generator is made without regard to the transmission system, but argue that ATC's and MISO's response to that decision is made on the basis of what is best for the transmission system.[122] WPSC/UPPCo reiterate that SSR costs are transmission reliability costs and should be allocated the same way the transmission reliability upgrades to eliminate the SSR costs would be allocated. WPSC/UPPCo refute claims that SSRs

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[119] *Id*. at 18-19 (citing 16 U.S.C. § 824e(b) (2012)).

[120] WPSC/UPPCo Additional Answer to Comments, Docket No. EL14-34-000, at 3 (filed May 30, 2014) (WPSC/UPPCo Additional Answer).

[121] WPSC/UPPCo Answer to Comments, Docket No. EL14-34-000, at 9-10 (filed May 20, 2014).

[122] *Id.* at 11.

are unlike transmission facilities because they do not provide wide-spread, long-term regional benefits, because the same thing could be said for many transmission system upgrades.

52. WPSC/UPPCo note that, the day after comments on the Complaint were due, Wisconsin Electric informed LSEs within the ATC zone that it was splitting its single LBA into two, increasing the number of LBAs within ATC from five to six.[123] WPSC/UPPCo state that the split required no review by ATC or MISO, nor approval by the Wisconsin Commission or the Commission, but that it will shift $20 million a year from Wisconsin Electric's Wisconsin customers to its Michigan customers. WPSC/UPPCo argue that the unilateral LBA split underscores the arbitrariness of using LBA boundaries for cost allocation.

53. WPSC/UPPCo argue that SSR costs are not equivalent to VLR costs because VLR commitments are intended to address day-to-day local reliability issues and VLR costs are incurred only when (1) a resource is committed by MISO in either the day-ahead or real-time energy market and (2) the revenue from the energy market is insufficient to cover the variable costs of the resource.[124] WPSC/UPPCo state that, by contrast, an SSR agreement is a last-resort measure that commits a unit to uneconomic dispatch for an extended period of time and is intended to remain in place until a transmission reliability upgrade is completed. WPSC/UPPCo state that MISO's SSR payments to a generator cannot be considered the provision of SSR service or generator service, because

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[123] *Id.* at 12.

[124] *Id.* at 13-14.

the MISO Tariff offers no generation service and there is no such thing as SSR service.[125]

54. ATC submitted a limited answer asserting that it has no substantive position on the issues presented in the Complaint, but is concerned that certain parties blur the distinction between (1) MISO's allocation of costs associated with SSR service within the ATC footprint pursuant to the MISO Tariff and (2) the allocation of costs related to providing transmission service within the ATC footprint pursuant to the MISO Tariff.[126] ATC states that cost allocation for transmission service in the ATC footprint is not expressly addressed in the Complaint; thus, any discussion of cost allocation for providing such transmission service is outside the scope of this proceeding. WPSC/UPPCo respond that they do not argue that MISO's SSR Tariff provisions are not distinct from its Tariff provisions governing transmission service, only that SSR costs should be allocated in the same way as transmission upgrade costs that would replace the SSR Unit.[127]

VII. Discussion

A. Complaint

1. Procedural Matters

55. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2013), the notice of intervention and timely, unopposed motions to intervene in Docket No. EL14-34-000 serve to make the entities that filed them parties to the

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[125] WPSC/UPPCo Additional Answer at 5.

[126] ATC Answer, Docket No. EL14-34-000, at 3-4 (filed May 20, 2014).

[127] WPSC/UPPCo Additional Answer at 7.

proceeding. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2013), the Commission grants Missouri Joint Municipal Electric Utility Commission's late-filed motion to intervene given its interest in the proceedings, the early stages of the proceedings, and the absence of undue prejudice or delay.

56. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 213(a)(2) (2013), prohibits an answer unless otherwise ordered by the decisional authority. We accept the answers filed by the Wisconsin Commission, Wisconsin Power, ATC, and WPSC/UPPCo because they provided information that assisted us in our decision-making process.

57. We grant Wisconsin Electric's request for a waiver of Rule 203(b)(3) of the Commission's Rules of Practice and Procedure[128] to permit inclusion of additional persons on the Commission's service list.

58. We reject the Mines' claim that the Complaint should be dismissed because it contains what is labeled a "protective order" and a draft non-disclosure certificate instead of a draft "protective agreement" as required by 18 C.F.R. § 388.112(b)(2) (2013). We find that the Mines' argument places form above substance, and that the protective order and the non-disclosure certificate filed with the Complaint are consistent with Commission regulations and practice. The Commission's regulations allow intervenors to request copies of non-public documents upon execution of the protective agreement filed with the non-public document. We find that Wisconsin Commission's protective order and draft non-disclosure certificate contain the same provisions governing the use of all

[128] 18 C.F.R. § 385.203(b)(3) (2013).

privileged documents that would be contained in a protective agreement, and thus they properly allow the Wisconsin Commission to respond to requests for privileged documents.[129] Indeed, the Wisconsin Commission stated that it sent Cliffs a copy of the protective order and a non-disclosure certificate so that it might provide Cliffs with a copy of the privileged version of the Complaint, but that Cliffs did not sign the certificate.[130]

2. Substantive Matters

a. The ATC *Pro Rata* SSR Cost Allocation is Unjust, Unreasonable, Unduly Discriminatory, or Preferential

59. We find that the Wisconsin Commission has met its burden under section 206 of the FPA to show that the ATC *pro rata* cost allocation provision in MISO's Tariff is unjust, unreasonable, unduly discriminatory, or preferential because, as demonstrated in the application of this provision under Rate Schedule 43G, it does not follow cost causation principles. Therefore, as further discussed below, we grant the Complaint and direct MISO in a compliance filing due within 30 days of the date of this order to remove the ATC *pro rata* cost allocation provision from section 38.2.7.k of its Tariff.

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[129] In addition, we note that the Commission has previously found that the Commission's Model Protective Order may be used as a guide for protective agreements. *See Filing of Privileged Materials and Answers to Motions*, Order No. 769, FERC Stats. & Regs. ¶ 31,337 at P15 (2012) (cross-referenced at 141 FERC ¶ 61,049, at P 15 (2012)).

[130] Wisconsin Commission Answer at 1 n.4.

60. The underlying facts on which the Wisconsin Commission bases its Complaint are undisputed. Section 38.2.7.k of MISO's Tariff states in full:

> Allocation of SSR Unit Costs. The costs pursuant to the SSR Agreement shall be allocated to the LSE(s) which require(s) the operation of the SSR Unit for reliability purposes, and shall be specified in the SSR Agreement. For the purposes of this Section, any costs of operating an SSR Unit allocated to the footprint of [ATC] shall be allocated to all LSEs within the footprint of [ATC] on a *pro rata* basis.

Because MISO found that the costs of operating the Presque Isle SSR Units were to be allocated to the ATC footprint, Rate Schedule 43G assigns cost recovery for those units on a *pro rata* basis to all LSEs in the ATC footprint, as required by MISO's Tariff. Using this allocation method, most of the costs of the Presque Isle SSR Agreement (approximately 92 percent) are allocated to Wisconsin LSEs, because that is where the bulk of load in the ATC footprint is located. However, during its assessment of the Attachment Y Notice submitted by Wisconsin Electric for Presque Isle Units 5-9, MISO conducted a load-shed analysis to determine which load in each of the LBAs within the ATC footprint benefits from continued operation of Presque Isle Units 5-9. The preliminary load-shed analysis showed that 58 percent of the reliability impact of the Presque Isle SSR Agreement is located in the Upper Peninsula, while only 42 percent of the benefitting load is in Wisconsin.

61. We agree with the Wisconsin Commission that the *pro rata* ATC cost allocation method applied in Rate Schedule 43G, which would allocate 92 percent

of the Presque Isle SSR costs to LSEs located in Wisconsin even though MISO's preliminary load-shed study indicates that such LSEs only receive 42 percent of the reliability benefit, does not satisfy the Commission's fundamental cost causation principle that "all approved rates [must] reflect to some degree the costs actually caused by the customer who pays them."[131] Indeed, there are no studies or other evidence in the record that support an allocation of 92 percent of the Presque Isle SSR costs to customers in Wisconsin, as would occur under the existing ATC allocation methodology, and there is substantial evidence in the record demonstrating that the methodology does not reflect a proper allocation of costs to those customers. We find that the preliminary nature of the load-shed study does not undermine our determination, because it demonstrates that a cost allocation for SSR Units based on reliability benefits would be different from the current ATC *pro rata* cost allocation, which bears little, if any, relation to the benefits provided under the Presque Isle SSR Agreement.

62. We find that the assignment of SSR costs to all LSEs within the ATC footprint based on their load share ratio is contrary to the Commission's previously stated support for a nexus between the reliability benefits of SSR Units and the allocation of those SSR costs. When the Commission initially approved MISO's SSR program in 2004, the Commission found the SSR proposal to be "a reasonable reliability assurance measure consistent with our recently enunciated policy on reliability compensation issues," which required that a proposal to assure market reliability: "(1) has a clear triggering event; (2) explains why

[131] *Black Oak v. FERC*, 725 F.3d at 364.

market design options are not appropriate; and (3) *assigns costs to beneficiaries*."[132] When MISO proposed revisions to its general SSR cost allocation method in 2012, MISO explained that its modifications would ensure that SSR costs are allocated to market participants based upon the reliability benefits received.[133] In the 2012 SSR Order accepting the revisions, the Commission rejected an element of MISO's proposal that would have excluded recovery of costs for environmental upgrades, noting the implications of not affording such cost recovery:

> SSRs are required to continue operating to preserve the reliability of MISO's system and… it is reasonable to allocate the costs resulting from their continued operations to the [LSEs] that necessitated the SSR designation. Moreover, failure to ensure that SSRs appropriately recover the costs associated with their continued operations could cause the associated costs to be allocated in a manner inconsistent with cost causation principles.[134]

The Commission described MISO's proposal in the 2012 SSR Order as one that "allocat[ed] the costs of compensating SSRs to the [LSEs] that benefit from the operation of the SSR Unit" and found MISO's proposed revisions to be just and reasonable.[135] Although both the 2004 SSR Order and the 2012 SSR Order also accepted the ATC-specific *pro rata* SSR cost allocation

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[132] 2004 SSR Order, 108 FERC ¶ 61,163 at P 371 n.226 (emphasis added).

[133] 2012 SSR Order, 140 FERC ¶ 61,237 at P 147.

[134] *Id.* P 136.

[135] *Id.* PP 147, 153.

provision alongside the general benefits-based SSR cost allocation, we now find that, based on the record before us, the ATC *pro rata* cost allocation in MISO's Tariff can result in an unjust and unreasonable SSR cost allocation.

63. We disagree with the argument that the Commission specifically approved the ATC *pro rata* cost allocation Tariff provision in the *Escanaba* order, where it found that the "*pro rata* allocation of SSR costs to LSEs throughout the ATC footprint" was "just and reasonable."[136] The factual record in *Escanaba* did not establish that the ATC *pro rata* allocation provision was unjust and unreasonable, that is, the Commission applied the filed rate. By contrast, in this section 206 complaint proceeding, the Wisconsin Commission challenges the filed rate and establishes a record that illustrates the unjust and unreasonable application of the ATC *pro rata* cost allocation provision.

64. We disagree with the protesters' suggestion that the unresolved contingencies in the load-shed study indicate the potential for large-scale voltage collapse throughout ATC, thereby rendering *pro rata* sharing of Presque Isle SSR costs among all LSEs within the ATC footprint just and reasonable. We find this argument to be speculative, and note that in the event the final load-shed study directed below indicates the potential for such voltage collapse, MISO would be required to allocate Presque Isle SSR costs to all LSEs that require the Presque Isle SSR Units for reliability in that circumstance. We do not address the protesters' suggestion that the costs of SSR Units should be allocated in the same manner as the costs of

[136] *Escanaba,* 142 FERC ¶ 61,170 at P 72.

transmission reliability assets that are built to obviate the need for SSR Units, i.e., on a pricing zone basis. We find that reaching these arguments is unnecessary to the Commission's finding that the record in this proceeding demonstrates that allocating SSR costs *pro rata* among all load in the ATC footprint violates cost causation principles and the Commission's prior statements that SSR cost allocation should be commensurate with reliability benefits received from continued operation of an SSR Unit.

65. We are not persuaded that the history of the ATC SSR cost allocation provision requires a different determination. Although ATC may have been originally formed as a single pricing zone within MISO in order to promote the sharing of costs for regional transmission planning, that original intent does not require all costs to be shared equally in perpetuity. We agree with the Wisconsin Commission that the original intent of ATC formation is not served by the *pro rata* sharing of SSR costs to all LSEs in the ATC footprint, because decisions concerning the operational status of ATC member utilities' generation assets are not subject to the ATC transmission planning process; thus, *pro rata* cost sharing of SSR Units will not promote any regional decision-making. In any event, the desire to serve the original intent of ATC formation does not, in and of itself, render the proposed cost allocation just and reasonable, nor does it override the requirement in MISO's Tariff and Commission policy that SSR costs be allocated to market participants based upon the reliability benefits received from the designation of the SSR Unit in order to satisfy cost causation principles. Furthermore, we are not persuaded that removing the ATC *pro rata* cost allocation provision from MISO's Tariff contradicts

Wisconsin law requiring that ATC "[a]pply for membership in [MISO] as a single zone for pricing purposes that includes the transmission area"[137] or "elect to be included in a single zone for the purpose of any [MISO Tariff.]"[138] As Wisconsin Power explains, this law only applies to transmission companies – it does not require that the costs of individual member utilities' SSR Units be allocated as a single rate within the ATC footprint.[139]

b. Relief Granted

66. We direct MISO to remove the ATC *pro rata* SSR cost allocation provision from section 38.2.7.k of its Tariff in a compliance filing due within 30 days of the date of this order, thereby extending to the ATC footprint the general SSR cost allocation Tariff language, which requires MISO to allocate SSR costs to "the LSE(s) which require(s) the operation of the SSR Unit for reliability purposes." We find that this general SSR cost allocation provision provides a just and reasonable method of allocating SSR costs in the ATC footprint because it satisfies the Commission's fundamental cost causation principle that all approved rates reflect the costs actually caused by the customer who pays them. Under this general SSR cost allocation language, MISO has flexibility in how it will identify the particular LSEs that require the SSR Unit for reliability. We find that the preliminary load-shed study conducted by MISO during its assessment of the Attachment Y Notice for Presque Isle Units 5-9 reflects a just and reasonable method to ensure that those LSEs requiring use of the Presque Isle SSR

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[137] Wis. Stat. § 196.485(3m)(a)1.d.

[138] Wis. Stat. § 196.485(3m)(a)1.f.

[139] Wisconsin Power Answer at 4.

Units are allocated the costs incurred under the Presque Isle SSR Agreement.[140] However, in order to ensure that costs will be allocated to those LSEs that benefit from the Presque Isle SSR Units, we direct MISO to submit a final load-shed study in the compliance filing due within 30 days from the date of this order. We further direct MISO to submit in the compliance filing revised Tariff sheets amending Rate Schedule 43G so that the Presque Isle SSR Unit costs are allocated according to the percentages in MISO's final load-shed study.

67. In cases where, as here, the Commission institutes an investigation on complaint under section 206 of the FPA, section 206(b) requires the Commission to establish a refund effective date that is no earlier than the date a complaint was filed, but no later than five months after the filing date.[141] Consistent with our general policy,[142] we set the refund effective date at April 3, 2014.

68. The Commission's general policy when ordering changes to a cost allocation or rate design under sec-

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[140] No party to these proceedings argues that MISO's load-shed study methodology is not reliable in identifying the LSEs that require the SSR Units for reliability. In addition, MISO's general practice in allocating SSR costs to non-ATC areas is to conduct such a load-shed study to determine the relative reliability impact to LSEs of operation without the SSR unit. *See* MISO Transmission Planning Business Practice Manual, BPM-020-r10 § 6.2.6 (effective Apr. 10, 2014).

[141] 16 U.S.C. § 824e(b) (2012).

[142] *See, e.g.*, *Seminole Elec. Coop., Inc. v. Fla. Power & Light Co.*, 65 FERC ¶ 61,413, at 63,139 (1993); *Canal Elec. Co.*, 46 FERC ¶ 61,153, at 61,539 (1989), *reh'g denied*, 47 FERC ¶ 61,275 (1989).

tion 206 of the FPA is that such changes be implemented prospectively, without refunds.[143] However, the Commission has broad equitable discretion in determining whether and how to apply remedies in any particular case.[144] Based on the record in this proceeding, we find it appropriate to exercise our discretion in fashioning remedies and order refunds as of the date the Complaint was filed. First, we note that the revised cost allocation does not represent a new cost allocation methodology, but rather conforms the allocation of SSR costs in the ATC footprint to the existing methodology applied throughout the rest of the MISO region. Furthermore, the costs at issue in this case are limited to those associated with a single SSR Unit, to be allocated among a defined set of customers within a limited geographic area, for a limited period of less than four months. Finally, these refunds will not require broader adjustments to MISO's markets. Accordingly, we direct MISO to refund, with interest,[145] any costs allocated to LSEs under Rate Schedule 43G from April 3, 2014 until the date of this order that were in excess of the costs to be allocated to those LSEs under MISO's final load-shed study.

69. Because the Commission's determination in this order is to extend the generally applicable SSR cost allocation method in section 38.2.7.k of MISO's Tariff to the ATC footprint, the Commission need not

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[143] *See, e.g., Entergy*, 142 FERC ¶ 61,211 at P 51.

[144] *See Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967) (the Commission's breadth of discretion is "at its zenith" when fashioning remedies).

[145] Interest should be calculated pursuant to 18 C.F.R. § 35.19a (2013).

address the alternative relief proposed by the various commenters.[146]

B. Merits of Presque Isle SSR Agreement and Rate Schedule 43G

70. As noted above, in its April 1 Order, the Commission accepted for filing and suspended for a nominal period, to be effective February 1, 2014, the Presque Isle SSR Agreement and Rate Schedule 43G, subject to refund and further Commission order. In this further order, we address arguments concerning the reliability need for Presque Isle Units 5-9 as SSR Units and establish hearing and settlement procedures on the issue of SSR compensation under the Presque Isle SSR Agreement, as discussed below. We also require a compliance filing that amends Rate Schedule 43G in accordance with the Commission's determination on the Complaint, as discussed below.

1. Presque Isle SSR Agreement

a. Attachment Y Study, Required Number of Units

i. Filing

71. MISO states that it conducted an Attachment Y Study in order to determine if designation of Presque Isle Units 5-9 as SSR Units is necessary for transmission system reliability.[147] MISO conducted a reliability analysis for both summer peak and shoulder peak

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[146] *See, e.g.*, *Oxy USA, Inc. v. FERC*, 64 F.3d 679, 691 (D.C. Cir. 1995); *Cities of Bethany v. FERC*, 727 F.2d 1131, 1136 (D.C. Cir. 1984); *California Indep. Sys. Operator, Corp.*, 124 FERC ¶ 61,271, at P 107 (2008); *Midwest Indep. Transmission Sys. Operator, Inc.*, 140 FERC ¶ 61,060, at P 129 (2012).

[147] Presque Isle SSR Agreement Filing, Ex. B (Attachment Y Study Report) at 6.

load conditions to determine: (1) whether system performance of Presque Isle was within equipment design voltage and thermal limitations; and (2) whether the system remained stable for applicable contingencies within NERC Transmission Planning Standards, should Presque Isle Units 5-9 be suspended.[148] MISO asserts that the reliability analysis showed that several NERC Category B and C contingencies would result in thermal criteria violations and voltage collapse for both summer peak and shoulder load conditions if Presque Isle Units 5-9 go offline.[149] MISO states that it also performed voltage stability analysis to determine the number of Presque Isle units required in order to meet transmission system reliability criteria.[150] According to MISO, all five Presque Isle units will be needed as SSR Units. MISO asserts that four units are necessary due to both steady state and voltage stability operating limits, and one additional unit is needed to ensure unit maintenance and necessary environmental retrofits.[151]

72. MISO states that it provided for an open stakeholder planning process to assess feasible alternatives to an SSR agreement. MISO states that it reviewed the reliability analysis with stakeholders on November 20, 2013 and January 17, 2014 to assess available alternatives to the Presque Isle SSR Agreement, including new generation or generator dispatch, system reconfiguration and operation guidelines, demand

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[148] *Id.* at 2.

[149] *Id.* at 2, 12. NERC Category B contingencies result in the loss of a single element. NERC Category C contingencies result in the loss of two or more elements.

[150] *Id.* at 13.

[151] *Id.*

response, and transmission projects. According to MISO, the stakeholder discussions concluded that: (1) new generation would not be available before the end of the proposed suspension period for Presque Isle Units 5-9; (2) generation re-dispatch would not mitigate all of the system reliability issues observed; (3) demand response would not be available over a large enough area in order to make it practical as an alternative; (4) reconfiguration would be insufficient to resolve the reliability problems; and (5) few, if any, transmission upgrades adjustments could be implemented within the timeframe for the suspension period.[152] Thus, MISO concludes that the reliability issues observed if Presque Isle Units 5-9 are suspended could not be mitigated by other means, and that all five units should be included in the Presque Isle SSR Agreement.[153] MISO notes that it has not planned transmission upgrades for service after the Presque Isle SSR Agreement terminates.[154]

ii. Comments

73. The Public Interest Organizations state that they are concerned that MISO did not adequately model demand response alternatives. They first note that in its filing, MISO states that 370 MW of load shed is the optimal amount of load shed necessary to eliminate all voltage stability, thermal, and voltage criteria violations for 2014 summer peak load conditions for NERC Category B contingencies.[155] Yet the

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[152] *Id.* at 15-16.

[153] *Id.* at 19.

[154] *Id.*, Transmittal Letter at 8.

[155] Comments of the Public Interest Organizations, Docket Nos. ER14-1242-000 and ER14-1243-000, at 18 (filed Feb. 21, 2014) (Public Interest Organizations Comments).

Public Interest Organizations state that MISO has neither defined "optimal load shed" nor explained why 370 MW of load shed is necessary to eliminate or reduce the reliability issues caused by the suspension of Presque Isle Units 5-9 in the event of a NERC Category B contingency. The Public Interest Organizations comment that MISO modeled 116 MW of demand response coming from the Empire mine, which could result in one fewer Presque Isle SSR Unit needed for reliability, but that MISO has not explained why it did not take advantage of this demand response.[156] They also note that MISO did not model demand response for the Tilden mine.[157] The Public Interest Organizations request that the Commission order MISO to clarify its generic demand response study by: (1) defining "optimal load shed"; (2) explaining why more megawatts of demand response are needed than Presque Isle Units 5-9 are capable of providing; (3) explaining how much demand response would be needed to mitigate the most severe NERC Category C contingencies; (4) explaining why it did not include demand response from the Empire mine as a way of eliminating the need for one of the Presque Isle units; (5) explaining why it did not model demand response, or some other load reduction or automatic load shed, at the Tilden mine; and (6) modeling the effects of demand response from the Tilden mine.[158]

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[156] *Id.* at 19.

[157] *Id.* According to the Public Interest Organizations, the Tilden mine comprises a large portion (more than 164 MWs) of Presque Isle's load.

[158] *Id.* at 18-20.

74. The Public Interest Organizations state that, based on discussion during stakeholder meetings, it is unclear whether the fifth spare back-up Presque Isle unit is in fact necessary under the SSR to maintain reliability.[159] They request that the Commission direct MISO to: (1) identify how many units will typically be needed to maintain reliability; (2) explain whether there is currently available an additional unit that would ensure unit maintenance and necessary retrofits; and (3) explain why an additional unit is necessary.[160]

iii. MISO Answer

75. MISO responds that the "optimal load shed" of 370 MW is the least load shed associated with eliminating reliability issues, and that this amount exceeds the capacity of Presque Isle Units 5-9.[161] MISO explains that loads identified for curtailment are typically distributed more widely among several locations that do not have the same impact on the constraints as that from the loss of the Presque Isle plant, and so more demand response is required to achieve a similar amount of relief for the reliability issues that occur when there is a loss of the generation resource. MISO states that its stakeholder meetings did not reveal any entity willing to commit to the demand response requirement identified, whether at the Tilden mine or otherwise. MISO also states that

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[159] *Id.* at 20.

[160] *Id.* at 20-21.

[161] Answer of MISO, Docket Nos. ER14-1242-000 and ER14-1243-000, at 10 (filed Mar. 10, 2014) (MISO Answer).

it conducted demand response analysis related to the Empire mine in response to stakeholder interest.[162]

76. MISO asserts that the Attachment Y Study adequately documented the need for all five Presque Isle units to be designated as SSR Units.[163] MISO asserts that four of the five generating units must be online around the clock to maintain reliability in the Upper Peninsula, and because the units cannot be operated all the time, each unit must be rotated offline for maintenance.

iv. Commission Determination

77. We find that MISO has properly followed the SSR study and review process in accordance with the Tariff, and we accept MISO's explanation of its alternatives assessment. We find that MISO has adequately demonstrated that it sought alternatives from stakeholders in meetings held on November 20, 2013 and January 17, 2014, and stakeholders determined that demand response would not be available over a large enough area in order to make it practical as an alternative. We find it unnecessary for MISO to conduct further study on demand response because MISO has indicated that no entity would be willing to commit to any identified demand response requirement. We find that MISO has justified the need for the units and has provided sufficient evidence demonstrating that they are necessary to mitigate NERC Category B and C contingencies required by NERC reliability standards TPL-002-0b (System Performance Following Loss of a Single Bulk Electric System

[162] *Id.* at 11.

[163] *Id.*

Element (Category B)) and TPL-003-0a (System Performance Following Loss of Two or More Bulk Electric System Elements (Category C)),[164] respectively, and that the units will continue to be necessary until transmission upgrades can be put into service. We also find that MISO has adequately shown that all five Presque Isle units are needed for reliability. We accept MISO's explanation that four Presque Isle units are necessary due to both steady state and voltage stability operating limits, and one unit must be rotated offline to ensure unit maintenance and implement any necessary environmental retrofits.

b. SSR Cost Determination

i. Filing

78. MISO states that the Presque Isle SSR Agreement provides for recovery of both fixed and variable going-forward costs to maintain the availability of Presque Isle Units 5-9 for reliability.[165] Under Exhibit 2 of the SSR Agreement, MISO will pay Wisconsin Electric a fixed monthly payment of $4,352,832 to compensate Wisconsin Electric for maintaining the availability of the SSR Units.[166] MISO asserts that this rate is just and reasonable and no more than is necessary to maintain the availability of the SSR Units as long as needed for reliability. MISO notes that Wisconsin Electric agreed to this amount in the interests of regulatory approval and certainty even

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[164] *See* N. Am. Elec. Reliability Corp., *Reliability Standards for the Bulk Electric Systems of North America* (July 26, 2013), *available at:* http://www.nerc.com/pa/Stand/Reliability%20Standards%20Complete%20Set/RSCompleteSet.pdf.

[165] Presque Isle SSR Agreement Filing, Ex. E (Akkala Test.) at 6.

[166] *Id.*, Transmittal Letter at 10.

though it felt that a higher level of compensation would be justified under the Tariff. MISO notes that the agreement does not contain compensation for environmental upgrades associated with meeting the Environmental Protection Agency's Mercury and Air Toxics Standards (MATS) in 2016.[167]

79. MISO states that the fixed cost component of the SSR compensation is based on historical actual costs for the Presque Isle units for the three-year period between 2010-2012 and includes the following cost components: (1) operations and maintenance (O&M) costs; (2) ongoing capital expenditure, and (3) return on inventories.[168] According to testimony submitted with the filing, the O&M cost component is comprised only of plant labor and non-labor O&M costs that Wisconsin Electric would be able to avoid upon suspension of Presque Isle Units 5-9 – it does not include any allocations of corporate overhead, utilities costs, landfill maintenance, or costs of keeping a skeleton crew at the plant during suspension.[169] MISO states that an ongoing capital expenditures recovery of $13.5 million, based on the historical three-year annual level, is necessary to maintain the operation of the SSR Units during the term of the Presque Isle SSR Agreement.[170] MISO explains that the third cost component is a return on historical inventory levels to compensate Wisconsin Electric for the carrying cost of

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[167] *Id.*

[168] *Id.*, Ex. E (Akkala Test.) at 6.

[169] *Id.* at 7.

[170] *Id.* MISO's testimony states that cost recovery is limited to the difference between what the costs would be if Presque Isle Units 5-9 were suspended from operation versus what they would be if Wisconsin Electric were required to maintain the units' availability for reliability. *Id.* at 6.

coal and oil fuel inventories and materials and supplies (M&S) inventories.[171] MISO asserts that the Presque Isle SSR Agreement includes an 11.53 percent rate annual carrying cost, which is based on Wisconsin Electric's approved economic cost of capital from its Wisconsin retail rate case.[172]

80. MISO states that the fixed cost component does not compensate Wisconsin Electric for the marginal costs of generating, and so the Presque Isle SSR Agreement also provides for variable generation costs when MISO dispatches an SSR Unit to maintain system reliability.[173] Specifically, Wisconsin Electric will offer Presque Isle Units 5-9 in each available hour at cost when necessary for reliability. Each time that MISO dispatches an SSR Unit, MISO will pay Wisconsin Electric its Production Cost (reflecting the actual cost of physically operating the SSR Unit to provide energy) and its Operating Reserve Cost (reflecting the actual cost to provide Operating Reserves). Through the MISO settlement process, MISO states that it will make applicable make-whole payments in the hours when the applicable market-clearing price is less than the dispatch price, and it will debit the settlement statements for each hour in which the applicable market-clearing price is above the dispatch rate.[174] MISO states that this process ensures that Wisconsin Electric will not recover more than its cost-based offer from MISO's

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[171] *Id.* at 9.

[172] *Id.*

[173] *Id.* at 7, 10.

[174] *Id.*, Transmittal Letter at 10.

reliability-related dispatches while receiving SSR compensation.[175]

ii. Comments in Support

81. Wisconsin Electric states that the proposed SSR compensation is just and reasonable because each fixed cost component in the proposed compensation is limited to the difference between what costs would be if the Presque Isle SSR Units were suspended for operation versus what they would be if Wisconsin Electric were required to maintain the units' availability for reliability.[176]

82. Wisconsin Electric notes that the three-year average annual actual O&M costs for operating Presque Isle Units 5-9 was $39 million, but that the annual revenue requirement only includes the cost of plant labor and non-labor O&M costs that Wisconsin Electric would be able to avoid upon suspension, about $35 million.[177] Wisconsin Electric states that $13.5 million in capital costs are reasonably included in the annual SSR compensation because they are necessary to maintain the operation of the Presque Isle units. According to Wisconsin Electric, these costs include essential repairs that enable the continued operation of the units that were capitalized to reflect the benefit to future accounting periods.[178] Wisconsin Electric justifies its carrying costs of inventory by noting that it excluded M&S inventories specific to Presque Isle

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[175] *Id.*, Ex. E (Akkala Test.) at 11.

[176] Comments in Support of Filings of Wisconsin Electric Power Company, Docket Nos. ER14-1242-000 and ER14-1243-000, at 4-5 (filed Feb. 21, 2014) (Wisconsin Electric Comments).

[177] *Id.* at 6.

[178] *Id.* at 5.

that could not be used at other Wisconsin Electric generating facilities in the event of suspension, which amounted to 90 percent of inventory. Thus, Wisconsin Electric states that it included only 10 percent of the historical M&S inventories in the carrying cost calculation for the purpose of developing the annual SSR compensation.[179] Wisconsin Electric maintains that the Presque Isle SSR Agreement is just and reasonable because it would compensate Wisconsin Electric for prudently-incurred going-forward costs associated with maintaining availability of Presque Isle Units 5-9, where all cost estimates are based on a three-year average of actual costs incurred at the facility.

iii. Other Comments

83. WPPI Energy asserts that MISO's filing does not provide sufficient data to enable the Commission and stakeholders to assess the reasonableness of the proposed rate.[180] WPPI Energy maintains that if MISO proposes to extend the Presque Isle SSR Agreement beyond its initial 12-month term, it should engage in a more inclusive and transparent process so that affected LSEs can have more comfort that the negotiated rates are reasonable. In addition, WPPI Energy submits that MISO's audit rights under the agreement should be accompanied by provisions for accountability and transparency to stakeholders.

84. The Public Interest Organizations state that they are concerned that the Presque Isle SSR Agreement overcompensates Wisconsin Electric with regard

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[179] *Id.* at 6.

[180] Comments of WPPI Energy, Docket Nos. ER14-1242-000 and ER14-1243-000, at 13 (filed Feb. 21, 2014) (WPPI Energy Comments).

to capital costs. They note that the proposed amount of $13.5 million in capital costs for the one-year term of the agreement is not based on any specific capital projects that will be undertaken, but rather was derived from an annual average of capital expenditures undertaken at the Presque Isle plant between 2010 and 2012.[181] The Public Interest Organizations note that neither MISO nor Wisconsin Electric has provided any evidence as to why an average of past years' capital expenditures is likely to be representative of a year in which the plant is only running for reliability purposes.[182] They state that MISO has not provided a capital budget that identifies the capital expenditures expected to be required during the term of the agreement, and indeed, that MISO has only identified one $2.8 million capital project that will be undertaken. The Public Interest Organizations argue that in the absence of specific evidence showing that the proposed compensation for capital expenditures is actually needed to ensure that the plant is able to run for reliability purposes during the term of the Presque Isle SSR Agreement, MISO should not provide compensation for these expenditures.[183]

85. In addition, the Public Interest Organizations argue that MISO failed to justify the 11.53 percent rate of return on capital costs of inventory. They note that this proposed rate of return is identical to the rate of return that Wisconsin Electric received in a prior rate case before the Wisconsin Public Service Commission.[184] The Public Interest Organizations argue that

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[181] Public Interest Organizations Comments at 14-15.

[182] *Id.* at 15.

[183] *Id.*

[184] *Id.* at 16.

allowance for the capital costs of carrying inventory should reflect the owner's demonstrated capital costs, rather than a hypothetical rate of return based on a prior rate case, which includes a profit margin for the company that would not be justifiable to include in an SSR context.[185] The Public Interest Organizations request that the Commission reject MISO's proposal and direct MISO to resubmit a proposal for capital cost compensation that is based on evidence of the actual cost to Wisconsin Electric of carrying inventory at the Presque Isle plant during the term of the Presque Isle SSR Agreement.

86. Wisconsin Power argues that in the event the Presque Isle plant is sold or continues to operate after no longer being designated as an SSR Unit, any capital expenditures that were included in SSR payments should be credited back (with interest and less depreciation) to the entities that funded the costs.[186] Wisconsin Power argues that any potential future owner of the Presque Isle units should not enjoy the benefits of the capital expenditures while being spared the costs.[187]

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[185] *Id.* at 17. The Public Interest Organizations also state that MISO has failed to justify the discrepancy between the 11.5 percent rate of return proposed here and the 7.85 percent rate of return on carrying costs of inventory proposed in another pending SSR filing for the Coleman facility in Docket Nos. ER14-292-000 and ER14-294-000, which is owned by the Big Rivers Electric Cooperative.

[186] Comments of Wisconsin Power and Light Company, Docket Nos. ER14-1242-000 and ER14-1243-000, at 9 (filed Feb. 21, 2014) (Wisconsin Power Comments).

[187] *Id.* at 9.

iv. Answers

87. Wisconsin Electric refutes the claim that inclusion of $13.2 million in capital expenditures will overcompensate Wisconsin Electric for capital costs. Wisconsin Electric states that the Presque Isle plant will continue to be committed and dispatched under the Presque Isle SSR Agreement in the same manner as it has operated in the last three years, and it is therefore reasonable to anticipate that expenditures will be in line with past spending.[188] Wisconsin Electric also argues that the issue of crediting capital expenditures back to entities paying the SSR costs in the event the plant is sold or continues to operate after no longer being designated as SSR Units is premature, and is more appropriately addressed upon occurrence of either event.[189] MISO adds that the capital costs are akin to fixed O&M costs reasonably needed to operate the SSR Units during the term of the Presque Isle SSR Agreement, and thus are properly included in the SSR compensation calculation as "capital costs associated with continued operation" under section 38.2.7.i of MISO's Tariff.[190] MISO also argues that refund opportunities are only provided under section 38.2.7.d.ii of the Tariff for capital expenditures needed to meet environmental regulations or for network upgrades that were necessitated by the Attachment Y Notice, where the owner or operator of the SSR Unit rescinds its decision to suspend or retire the unit.[191] MISO

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[188] Answer of Wisconsin Electric Power Company, Docket Nos. ER14-1242-000 and ER14-1243-000, at 5 (filed Mar. 10, 2014) (Wisconsin Electric Answer).

[189] *Id.*

[190] MISO Answer at 9.

[191] *Id.*

states that no such capital expenditures are involved here.

88. Wisconsin Electric rejects the claim that the carrying costs of inventories should reflect the company's actual costs of capital, as that approach goes beyond what the Commission requires. Wisconsin Electric states that the Commission has found that SSR compensation is negotiated, and cost-of-service rate design precision is not required.[192] Wisconsin Electric argues that the annual carrying costs are just and reasonable as they: (1) only include about 10 percent of Wisconsin Electric's historical M&S inventories; (2) are based off of Wisconsin Electric's Wisconsin Commission-approved 11.53 percent economic cost of capital from its Wisconsin rate case; and (3) only permit recovery of the difference between what costs would be if the Presque Isle units were suspended for operation, versus what they would be if Wisconsin Electric were required to maintain the units' availability for reliability.[193] MISO argues that the Public Interest Organizations assume, without analysis, that the 11.53 percent rate of return that Wisconsin Electric received in a prior rate case would be an inappropriately high rate of return for all SSR contracts.[194] MISO argues that it cannot conduct complete rate cases in preparation for each of its SSR agreements, and that it was just and reasonable to negotiate a rate of return for the calculation of going-forward

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[192] Wisconsin Electric Answer at 6 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 140 FERC ¶ 61,237, at P 140 (2012)).

[193] *Id.* at 6-7.

[194] MISO Answer at 10.

compensation based upon a state regulatory rate of return.

v. Commission Determination

89. Based upon a review of the filing and the comments, our preliminary analysis indicates that the fixed cost component of the SSR compensation has not been shown to be just and reasonable, and may be unjust, unreasonable, unduly discriminatory, or otherwise unlawful. For instance, we find that MISO has not adequately supported: (1) the proposed 11.53 percent annual rate of return on capital costs of inventory; and (2) the proposed $13.5 million compensation for the capital costs associated with keeping the SSR Units operational for the term of the Presque Isle SSR Agreement. Accordingly, we set for hearing the fixed cost component of Presque Isle SSR compensation, subject to refund. While we are setting this matter for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their disputes before hearing procedures are commenced. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.[195] If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding, otherwise the Chief Judge will select a judge for this purpose.[196] The settlement judge shall report to

[195] 18 C.F.R. § 385.603 (2013).

[196] If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of the date of this order. The Commission's website contains a list of Commission judges available for settlement proceedings and a summary of their

the Chief Judge and the Commission within 30 days of the date of the appointment of the settlement judge concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

90. We also find that Exhibit 2 of the Attachment Y-1 form agreement does not include any language relating to compensation when the SSR Unit operates for economic rather than reliability purposes. Therefore, we direct MISO, in the compliance filing to be made within 30 days of this order, to submit Tariff revisions adding the following paragraph to the end of Exhibit 2:[197]

> Whenever the SSR Unit operates in the MISO Market for purposes other than system reliability, the SSR Unit will be committed, dispatched, and settled pursuant to the MISO Tariff, except in those hours where the SSR Unit Compensation is less than the SSR Unit Energy and Operating Reserve Credit. Under this exception, MISO will debit Participant (such debit to be equal to the difference between the SSR Unit Energy and Operating Reserve Credit and the SSR Unit Compensation).

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background and experience (http://www.ferc.gov/legal/adr/avail-judge.asp).

[197] *See Midwest Indep. Transmission Sys. Operator, Inc.,* 148 FERC ¶ 61,057, at P 157 (2014) (Ameren Complaint Order); MISO Edwards Year 1 SSR Agreement Filing, Docket No. ER13-1962-000, Ex. E (Attachment Y-1 Form Agreement, Ex. 2 § B) (filed July 11, 2013).

91. With respect to stakeholder input into the rate associated with the Presque Isle SSR Agreement, we note that MISO's Tariff requires MISO, as the Transmission Provider, to work with the generation owner (i.e., the Market Participant) to negotiate "the level of compensation due the Market Participant for the SSR Unit" that is then submitted to the Commission under section 205 of the FPA as part of the overall SSR Agreement.[198] We find that interested parties have sufficient opportunity to challenge the proposed rate such that further protections, as described by the protestors, are not necessary.

92. With respect to capital expenditures, Wisconsin Power requests that if the Presque Isle power plant is sold or continues to operate after no longer being designated as an SSR Unit, any capital expenditures that were included in SSR payments should be credited back (with interest and less depreciation) to the entities that funded the costs. We note that in the order on MISO's compliance filing directed by the 2012 SSR Order, the Commission required further compliance in order to address the "treatment of SSRs that later return to service."[199] Specifically, the Commission directed MISO to ensure that the Tariff addresses: (1) the treatment of resources that were previously designated SSRs but are no longer operating pursuant to an SSR agreement (e.g., retired or suspended resources with expired SSR agreements) that later return to service; (2) the treatment of suspended SSRs that later return to service on schedule

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[198] MISO, FERC Electric Tariff, Module C, § 38.2.7.i (31.0.0).

[199] *Midwest Indep. Transmission Sys. Operator, Inc.,* 148 FERC ¶ 61,056 at P 44 (citing 2012 SSR Order, 140 FERC ¶ 61,237 at P 138).

and without rescinding a decision to suspend operations (e.g., resources that return to service consistent with an initial Attachment Y Notice to suspend operations); and (3) the treatment of other, i.e., non-environmental, capital costs associated with their continued operation.[200] We further note that details regarding payback of such capital costs could be accomplished on a case-by-case basis by the SSR owner through a section 205 filing that proposes a payback schedule when the unit returns to service.

93. Finally, we note that the issue of SSR compensation was recently considered by the Commission in its order on the complaint submitted by AmerenEnergy Resources Generating Company. In that order, the Commission required MISO to revise its Tariff to provide SSR owners the right to make their own SSR compensation filings, effective July 22, 2014.[201] As such, we note that Wisconsin Electric could seek to make its own FPA section 205 filing to revise, prospectively, the compensation currently included in the Presque Isle SSR Agreement.

c. Modification to Attachment Y-1 Form Agreement

i. Filing

94. MISO states that there are novel legal issues or other unique factors that justify departures from the *pro forma* SSR agreement contained in Attachment Y-1 to MISO's Tariff.[202] These changes to the *pro forma* agreement include: (1) Section 3.A(5) provides for at least 180 days' notice for extension of the agreement,

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[200] *Id.*

[201] Ameren Complaint Order, 148 FERC ¶ 61,057 at P 93.

[202] Presque Isle SSR Agreement Filing, Transmittal Letter at 3.

instead of the *pro forma* 90 days, to account for the unusually long planning period for the coal procurement and shipping process;[203] (2) new section 7.D states that, if the SSR Units are designated as Capacity Resources pursuant to Module E-1 of MISO's Tariff, those SSR Units will be subject to the Module E-1 capacity testing requirements that became effective on October 1, 2012;[204] (3) new section 7.E states that MISO and Wisconsin Electric will coordinate their schedules to permit Wisconsin Electric to undergo both testing for capacity and for other requirements (such as for environmental and insurance requirements); and (4) new provisions in section 9.E provide a mechanism for Wisconsin Electric to receive cost recovery for unanticipated repairs required to maintain system reliability.[205]

95. MISO further states that the operation provisions in section 8 of the *pro forma* agreement have been revised to clarify maintenance, planning data, and delivery obligations to be consistent with

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[203] *Id.* at 4.

[204] Module E-1 of MISO's Tariff specifies MISO's resource adequacy requirement procedures. The Tariff requires LSEs in the MISO region to have sufficient Planning Resources to meet their anticipated peak demand requirements, plus an appropriate reserve margin. Capacity Resources are a type of Planning Resource that may be used by an LSE to account for the entity's resource performance and availability. MISO Resource Adequacy Business Practice Manual, BPM-011-r12 §§ 1.2, 5.6 (effective Aug. 1, 2013) (Resource Adequacy BPM).

[205] Presque Isle SSR Agreement Filing, Transmittal Letter at 4-6. MISO states that it will make a section 205 filing before any unanticipated repair costs are incurred by Wisconsin Electric, except in the case of emergency repairs. MISO's proposed language states that unanticipated repairs do not include the costs of complying with MATS standards.

other Tariff provisions. For instance, section 8.C has been revised to clarify that (1) MISO shall notify Wisconsin Electric of the hours and levels, if any, that the SSR Unit is to operate through day-ahead commitment and real-time dispatch for system reliability and (2) the set-point in the real-time dispatch shall be considered the "delivery plan" for the purposes of the Presque Isle SSR Agreement.[206] According to MISO, these changes ensure that MISO and Wisconsin Electric have a common understanding of how the SSR Units are to be made available to MISO for system reliability and how the SSR Units may be otherwise operated.

ii. Comments

96. WPPI Energy argues that the Presque Isle SSR Agreement frustrates the intended use of the SSR Units as Planning Resources that can earn Planning Reserve revenues under Module E-1 of MISO's Tariff.[207] WPPI Energy notes that section 7.D of the Presque Isle SSR Agreement contemplates that SSR Units may be designated as Capacity Resources under Module E-1, and section 8.C(1) encourages market participants to offer their available Zonal Resource Credits into the Planning Reserve Auction.[208] However, WPPI Energy argues that the Presque Isle SSR

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[206] *Id.* at 5.

[207] MISO assesses charges against LSEs that have not met their resource adequacy obligations, and revenues from these charges are distributed among certain LSEs that have met their obligations. Resource Adequacy BPM §§ 1.2, 5.6.

[208] WPPI Energy Comments at 9. Zonal Resource Credits are MW units of Planning Resources that have been converted into a credit that is eligible to be offered by a market participant into the Planning Resource Auction, which establishes the clearing

Agreement is not structured to enable Wisconsin Electric to offer the Presque Isle SSR Units into the auction for the June 1, 2014 to May 31, 2015 planning year because the agreement is proposed to terminate on January 31, 2015.[209] Even if the agreement were to be extended beyond the January 31, 2015 termination date, WPPI Energy states that the agreement requires 180 days' notice of such extension, which would not be required until several months after the Planning Resource Auction is run in April 2014.[210]

97. Wisconsin Power notes that section 9.E of the proposed Presque Isle SSR Agreement allows for additional compensation to be requested for unanticipated repairs, which are defined by MISO as "repairs for which compensation is not provided for in the Annual SSR Amount contained in Exhibit 2 to the [agreement]."[211] But Wisconsin Power states that Exhibit 2 does not provide information on any compensation for repairs that may be already included in the SSR payment amount. Wisconsin Power requests that the Commission require MISO to: (1) clarify the definition of "unanticipated repairs"; (2) explain what constitutes an unanticipated repair; and (3) explain how it

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price needed to satisfy an LSE's resource adequacy obligations for a planning year. Resource Adequacy BPM § 5.5.

[209] WPPI Energy Comments at 10. Section 69A.5(a) of MISO's Tariff requires resources to be available for the entire planning year to qualify as Planning Resources.

[210] *Id.* at 10. WPPI Energy notes that the 180-day notice would not be required until August 2014, while the Planning Resource Auction would be run in April 2014.

[211] Wisconsin Power Comments at 8.

will be determined if an unanticipated repair cost should be included in Presque Isle's SSR payments.[212]

iii. Answers

98. Wisconsin Electric challenges the claim that the 180-day renewal notice provision improperly prevents Wisconsin Electric from committing Presque Isle Units 5-9 for the Planning Reserve Auction for the June 1, 2014 planning year.[213] Wisconsin Electric argues that this amount of notice is necessary to fuel the plant in the event that a renewal is required, because the planning and procurement process for coal must be scheduled well in advance and coordinated with lake vessel availability and weather limitations. In addition, Wisconsin Electric states that 180 days constitutes sufficient notice to Presque Isle employees and the community at large before a termination of operations at one or more units. MISO adds that the Presque Isle SSR Agreement does not require Wisconsin Electric to offer capacity into the Planning Resource Auction for the SSR Units because the extra costs resulting from this requirement are expected to be larger than the revenues Wisconsin Electric might receive.[214]

99. MISO also addresses comments on unanticipated repairs and capital costs. MISO states that the fixed monthly payments under Exhibit 2 to the Presque Isle SSR Agreement compensate Wisconsin Electric for ongoing capital expenditures at the historical three-year annual actual level of $13.5 million,

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[212] *Id.*

[213] Wisconsin Electric Answer at 4.

[214] MISO Answer at 12.

which essentially amounts to compensation for anticipated repairs.[215] MISO states that capitalized expenditures in amounts that fall well outside the historical three-year average, such as for a significant failure during the period of the Presque Isle SSR Agreement, could be submitted by Wisconsin Electric for recovery under section 9.E of the agreement as an unanticipated repair. MISO alleges that the Commission has previously accepted this arrangement for compensation.[216]

iv. Commission Determination

100. We find the proposed modifications to the Attachment Y-1 form agreement to be just and reasonable. We find it reasonable to allow 180 days' notice for extending the Presque Isle SSR Agreement to reflect the longer planning period for the coal procurement and delivery process. We also find that MISO has adequately clarified the type of additional compensation that might be requested for unanticipated repairs under section 9.E of the Presque Isle SSR Agreement, and we find this provision consistent with a similar provision accepted in *Harbor Beach*.[217] However, we note that, as proposed, section 9.E does not adequately address the issue of how unanticipated repairs can impact Misconduct Events. Therefore, we require MISO, in the compliance filing due within 30 days of the date of this order, to submit Tariff revisions

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[215] *Id.* at 8.

[216] *Id.* at 8-9 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 144 FERC ¶ 61,151 (2013) (*Harbor Beach*)).

[217] *Harbor Beach*, 144 FERC ¶ 61,151 at P 25.

adding the following language to the sixth sentence of the first paragraph of section 9.E:[218]

> Participant shall not be deemed to have a Misconduct Event, nor shall Participant be subject to any other performance penalties under this agreement or the MISO Tariff for the period of time after Participant notifies MISO of the need for repairs as provided in this Section 9.E until repairs have been completed.

d. Application of Voltage and Local Reliability Payment Provisions

i. Filing

101. Exhibit 2 of MISO's proposed Presque Isle SSR Agreement provides: "During the Term of the Agreement, compensation for reliability commitments shall be paid to Participant under this Exhibit 2 and not according to Voltage and Local Reliability payment provisions." Thus, for all reliability unit commitments during the period in which the Presque Isle SSR Agreement is in force, the SSR payments would replace the compensation the Presque Isle units might otherwise receive under MISO's RSG Tariff provisions for VLR unit commitments.

ii. Comments

102. Wisconsin Power argues that MISO has not provided any support or rationale for overriding the application of the Tariff's VLR payment provisions through the Presque Isle SSR Agreement. Wisconsin Power recognizes that Presque Isle Units 5-9 have been committed to run in the past for reasons related

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[218] *See* Ameren Complaint Order, 148 FERC ¶ 61,057 at P 215.

to issues with transmission system voltage or other local reliability concerns, and that these commitments have been considered by MISO to be VLR commitments.[219] Commenters state that, pursuant to the MISO Tariff, any RSG costs associated with VLR commitments must be allocated directly to the electrically-close local areas that benefit from the commitment costs and which do nothing to relieve the need for the VLR commitment.[220] Commenters argue that the added language to Exhibit 2 would replace this Tariff compensation mechanism for VLR commitments with *pro rata* allocation of VLR costs to all LSEs in the ATC footprint. Commenters argue that this language inappropriately shifts costs from the LSEs that directly benefit from the VLR commitments to other LSEs that are not receiving any direct benefits from the commitments.[221]

iii. Answers

103. Wisconsin Electric argues that the language in Exhibit 2 is required by section 38.2.7.k of MISO's Tariff, which states that any costs of operating an SSR Unit in the footprint of ATC shall be allocated to all LSEs within the footprint of ATC on a *pro rata* basis.[222] WPPI Energy argues that MISO's proposed language is consistent with language recently approved by the Commission in Docket No. ER14-202, where the Commission found that "when SSRs are required to

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[219] Wisconsin Power Comments at 4.

[220] *Id.* at 6-7; Wisconsin Customers Coalition Comments, Docket Nos. ER14-1242-000 and ER14-1243-000, at 8 (filed Feb. 21, 2014).

[221] Wisconsin Power Comments at 6-7; Wisconsin Customers Coalition Comments at 8.

[222] Wisconsin Electric Answer at 3.

run for reliability purposes, they will be compensated pursuant to the appropriate SSR agreement and are ineligible for make-whole payments."[223] WPPI Energy states that challenges to the proposed language in Exhibit 2 are prohibited collateral attacks on the Commission's express acceptance of the concept that, when a unit becomes subject to an SSR agreement, its compensation for reliability-related unit commitment is made exclusively pursuant to the SSR agreement and not under the VLR provisions (which would produce a different cost allocation).[224] MISO further notes that applying VLR cost allocation methods to SSR Units was also rejected in *Escanaba* in the context of the Commission's consideration of the SSR cost allocation to the ATC footprint.[225]

104. Wisconsin Power asserts that MISO must not ignore its VLR Tariff provisions if Presque Isle Units 5-9 are called for VLR service while designated as SSR Units, and that any costs incurred for VLR commitments associated with the dispatch of the Presque Isle units should be allocated locally as required by the Tariff.[226] Wisconsin Power asserts that this approach is consistent with the Commission's statement in the order establishing the VLR Tariff provisions that "local load is the primary beneficiary of VLR

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[223] Answer of WPPI Energy, Docket Nos. ER14-1242-000 and ER14-1243-000, at 11 (filed Mar. 10, 2014) (citing *Midcontinent Indep. Sys. Operator, Inc*., 145 FERC ¶ 61,276, at P 11 (2013)).

[224] *Id*. at 4.

[225] MISO Answer at 5 (citing *Harbor Beach*, 144 FERC ¶ 61,151 at P 39).

[226] Wisconsin Power and Light Company Answer, Docket Nos. ER14-1242-000 and ER14-1243-000, at 3-5 (filed Mar. 18, 2014).

commitments, and therefore [allocating] these costs predominantly to local load is reasonable."[227]

105. Wisconsin Power also argues that *Escanaba* is distinguishable because the proposed language in Exhibit 2 of the Presque Isle SSR Agreement (allowing MISO to avoid VLR cost allocation) was not included in the *Escanaba* case.[228] Instead, Wisconsin Power states that the Commission in *Escanaba* rejected a proposal to completely replace the ATC SSR cost allocation method with the MISO VLR cost allocation method.[229] Wisconsin Power also argues that MISO and WPPI Energy mistakenly rely on a prior Commission proceeding in Docket No. ER14-202-000 that dealt with dispatch and related communications between MISO and market participants that operate SSR Units.[230] Wisconsin Power asserts that the proposed Tariff changes in that proceeding adjusted the notification requirements associated with dispatch of SSRs in order to treat them similarly to other, non-SSR Units in MISO.[231] Wisconsin Power states that in this case, SSR Units should also be treated similarly to non-SSR Units with respect to the determination of VLR payments and related cost allocation.

106. Wisconsin Power clarifies that it does not advocate a separate monthly compensation process for the Presque Isle SSR Units; rather, it proposes that VLR revenues received would be an input into the

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[227] *Id*. at 5 (citing *Midwest Indep. Transmission Sys. Operator, Inc*., 140 FERC ¶ 61,171 at P 78).

[228] *Id*. at 6.

[229] *Id*. at 4 (citing *Escanaba*, 142 FERC ¶ 61,170 at P 72).

[230] *Id*. at 6.

[231] *Id*. (citing *Midwest Indep. Transmission Sys. Operator, Inc*., 145 FERC ¶ 61,276 at P 10).

monthly MISO SSR settlement process that ensures the Presque Isle Units are kept whole for remaining online for system reliability.[232] Wisconsin Power notes that MISO's Tariff states: "any compensation to the SSR Unit will be reduced by…any other compensation paid under the market."[233] Wisconsin Power argues that VLR revenues qualify as "any other compensation paid under the market," and should therefore be deducted from the Presque Isle SSR costs during the settlement process.

iv. Commission Determination

107. We find the proposed language in Exhibit 2 of the Presque Isle SSR Agreement to be just and reasonable, as the language is narrowly written to address reliability commitments. That is, when Presque Isle is run for reliability purposes, the Presque Isle SSR Agreement applies. We note that SSR agreements are distinguished from units providing VLR service because the SSR Unit owner has sought to retire or suspend the SSR Unit and is receiving compensation to remain online. Consistent with MISO's existing Tariff, SSR-designated units are permitted to run for economic reasons when such runs do not diminish availability to perform for reliability purposes. As the Commission has stated previously, when SSR Units are required to run for reliability purposes, they will be compensated pursuant to the appropriate SSR agreement and are ineligible for make-whole payments.[234] Further, when SSR Units

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[232] *Id*. at 7.

[233] *Id*. (citing section 38.2.7.i(ii) of MISO's Tariff).

[234] *See Midcontinent Indep. Sys. Operator, Inc.*, 145 FERC ¶ 61,276 at P 11.

operate in the market economically, any costs associated with make-whole payments will be recovered pursuant to the relevant Tariff provisions which the Commission has already determined to be just and reasonable.[235]

e. Effective Date and Duration of the Presque Isle SSR Agreement

i. Filing

108. MISO stated that the Presque Isle SSR Agreement appears to be required for the entirety of the 16-month suspension period proposed by Wisconsin Electric.[236] However, in accordance with Section 38.2.7e of the Tariff, MISO proposed a term of 12 months for the agreement. MISO stated that it retains the right to terminate the Presque Isle SSR Agreement prior to the end of the term by giving 90 days written notice to Wisconsin Electric. MISO also stated that it will annually review the Presque Isle units and grid characteristics to determine whether the units remain qualified for SSR designation.

109. MISO requested that the Commission waive the prior notice requirement and grant an effective date of February 1, 2014 for the Presque Isle SSR Agreement.[237] MISO stated that the Presque Isle SSR Agreement was submitted as soon as possible following the complex process of notification, evaluation, decision-making, and negotiation, including assessing the feasibility of possible alternatives to the designation of Presque Isle Units 5-9 as SSR Units. MISO stated that the Presque Isle SSR Agreement could

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[235] *Id.*

[236] Presque Isle SSR Agreement Filing, Transmittal Letter at 8.

[237] *Id.* at 8-9.

not be negotiated before the proposed suspension of Presque Isle Units 5-9. According to MISO, good cause exists to grant the waiver because, if the February 1, 2014 effective date is not granted, Wisconsin Electric will have provided SSR service on an uncompensated basis while the required Tariff process took its course.[238] Alternatively, MISO requested an effective date of February 1, 2014, consistent with the Commission's rule that service agreements must be filed within 30 days of commencing service.[239] MISO stated that the Presque Isle SSR Agreement is a *pro forma* agreement included in the Tariff, the executed version of which is therefore a service agreement.[240] In the April 1 Order, the Commission granted the requested waiver and allowed the Presque Isle SSR Agreement to go into effect on February 1, 2014.[241]

ii. Comments

110. Commenters contend that MISO has not explained its process for resolving reliability issues in the Upper Peninsula should the suspension of Presque Isle Units 5-9 continue beyond the initial 16-month period.[242] Specifically, commenters state that MISO

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[238] *Id.* at 9.

[239] *Id.*

[240] MISO noted that 18 C.F.R. § 35.10(a) (2013) allows public utilities to adopt standard form of service agreements as part of the utility's tariff on file with the Commission. MISO further stated that under 18 C.F.R. § 35.3(a)(2) (2013), service agreements (defined at 18 C.F.R. § 35.2 as "an agreement that authorizes a customer to electric service under the terms of the Tariff") need only be filed within 30 days after service has commenced.

[241] April 1 Order, 147 FERC ¶ 61,004 at P 12.

[242] Public Interest Organizations Comments at 21; Comments of the Customers First! Coalition, Docket Nos. ER14-1242-000

has not put forth any long-term alternatives for reducing the reliability issues (such as new generation and/or transmission) and that it will most likely continue to be uneconomical for Wisconsin Electric to continue to operate Presque Isle Units 5-9, especially due to the anticipated future need to pay for costs related to the MATS standards by April 2016.[243] The Public Interest Organizations state that because the anticipated future need for retrofit costs are not addressed by the Presque Isle SSR Agreement, continued operation of Presque Isle Units 5-9 may become even less economical over time.[244] Commenters request that the Commission order MISO to fully explain its plan for the long-term solution to meet reliability should the Presque Isle SSR Agreement extend beyond January 31, 2015 or the 16-month extension period.[245]

111. WPPI Energy states that there is no certainty as to the future of the Presque Isle plant, because Wisconsin Electric has issued a request for proposals to sell the plant before June 2015.[246] WPPI Energy states that MISO's unsupported claim of resumption of operation in June 2015 does not recognize the need for a permanent solution to the reliability problems in the Upper Peninsula. WPPI Energy notes that MISO's Attachment Y Study indicated that elimination of the Empire mine load would reduce reliability

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and ER14-1243-000, at 5 (filed Feb. 20, 2014) (Customers First! Coalition Comments).

[243] Public Interest Organizations Comments at 21-22; Customers First! Coalition Comments at 5.

[244] Public Interest Organizations Comments at 22.

[245] *Id.*; WPPI Energy Comments at 6.

[246] WPPI Energy Comments at 6.

need to four Presque Isle SSR Units.[247] WPPI Energy suggests that the Presque Isle SSR Agreement be restructured such that, in the event that the Empire mine ceases operations before the end of the initial term of the agreement (or an extension term), ATC ratepayers are not saddled with SSR costs unnecessary for reliability.[248]

iii. Answers

112. Wisconsin Electric and MISO argue that any comments alleging that the filing fails to propose a permanent solution to the reliability problem in the Upper Peninsula are premature.[249] Wisconsin Electric states that MISO's Attachment Y Study was appropriately limited to the term of the Presque Isle SSR Agreement because Wisconsin Electric notified MISO that it would suspend plant operations, not retire the plant. Although Wisconsin Electric states that it issued a request for proposals to purchase the Presque Isle plant, this request was conditioned upon continued operation of the plant. Wisconsin Electric states that if it decides to retire the plant, it will submit a new Attachment Y Notice to MISO.[250] MISO adds that addressing retrofit costs in the Presque Isle SSR Agreement, as proposed by the Public Interest Organizations, would be inappropriate considering Wisconsin Electric's intention to continue operating the plant.[251]

113. MISO addresses WPPI Energy's concern that the Presque Isle SSR Agreement does not take account

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[247] *Id*. at 10.

[248] *Id*. at 11-12.

[249] Wisconsin Electric Answer at 3-4; MISO Answer at 6-7.

[250] Wisconsin Electric Answer at 4.

[251] MISO Answer at 7.

of changed circumstances that may alter the need for continued operation of all five Presque Isle units, such as elimination of the Empire mine load. MISO states that the Empire mine has announced plans for continued operations through the end of 2017.[252] In any event, MISO asserts that it may terminate the agreement if circumstances change, and Exhibit 2 of the agreement permits termination of less than all five Presque Isle SSR Units.[253]

iv. Commission Determination

114. We find that the April 1 Order appropriately granted waiver of the prior notice requirement and allowed the Presque Isle SSR Agreement to be effective February 1, 2014, as requested, for a term of 12 months.[254] As the Commission stated in *Escanaba*, "all SSR units should be fully compensated for any costs incurred because of their extended service" and "nothing in the SSR program would require a generator to absorb any uncompensated going-forwards costs."[255] Here, the record indicates that Presque Isle Units 5-9 have been providing reliability service pursuant to the Presque Isle SSR Agreement since February 1, 2014. Thus, it is appropriate that Wisconsin Electric be made whole for the costs it incurred while providing SSR service. We agree with Wisconsin Electric and MISO that any comments alleging that the filing fails to propose a permanent solution to the reliability problem in the Upper Peninsula are premature. However, we note that the circumstances surrounding the

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[252] *Id*. at 11.

[253] *Id*. at 11-12.

[254] April 1 Order, 147 FERC ¶ 61,004 at P 12.

[255] *Escanaba*, 142 FERC ¶ 61,170 at P 84 (citing 2004 SSR Rehearing Order, 109 FERC ¶ 61,157 at P 293).

need for this SSR agreement indicate that Presque Isle Units 5-9 may be needed after January 31, 2015. If MISO determines that Presque Isle Units 5-9 are needed beyond January 31, 2015, MISO must file a revised SSR agreement with the Commission and must justify that no alternatives exist to designation of Presque Isle Units 5-9 as SSR units.

2. Rate Schedule 43G

a. Filing

115. MISO submitted proposed Rate Schedule 43G in Docket No. ER14-1243-000 that would authorize MISO to allocate SSR costs that are associated with the Presque Isle SSR Units. MISO proposes to allocate the SSR costs among all LBAs in the footprint of ATC based on each LBA's peak load within a month, and then to all LSEs within those LBAs based upon each entity's contribution to the peak of its LBA.[256] MISO states that Rate Schedule 43G accomplishes this allocation based upon peak usage of transmission facilities in each month, as determined by each LSE's actual energy withdrawals during the monthly peak hour for each LBA. In this way, MISO notes that the percentage of costs allocated to each LSE will vary each month based on the entity's coincident peak hour energy usage during that month. MISO states that the cost allocation in Schedule 43G is consistent with section 38.2.7.k of MISO's Tariff and with the allocation previously accepted by the Commission.[257]

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[256] Rate Schedule 43G Filing, Transmittal Letter at 3.

[257] *Id.* at 3 (citing *Midcontinent Indep. Sys. Operator, Inc.*, Docket Nos. ER14-109 and ER14-111, Letter Order at 2 (December 12, 2013)).

116. MISO requested waiver of the prior notice requirement to allow Rate Schedule 43G to go into effect on February 1, 2014 to correspond with the effective date of the Presque Isle SSR Agreement. MISO stated that good cause exists to grant the waiver for the same reasons given in Docket No. ER14-1242-000. In the April 1 Order, the Commission granted the requested waiver and allowed Rate Schedule 43G to go into effect on February 1, 2014.[258]

b. Comments and Commission Determination

117. Many parties provided comments both in support of and in protest of the *pro rata* cost allocation in Rate Schedule 43G. These comments align with the comments submitted in the Complaint in Docket No. EL14-34-000.

118. We require MISO to submit a compliance filing that aligns cost allocation under Rate Schedule 43G with the Commission's determination on the Complaint in Docket No. EL14-34-000. As previously discussed, the Commission has granted the Complaint and found that: (1) the ATC *pro rata* SSR cost allocation provision in section 38.2.7.k of MISO's Tariff is not just and reasonable; (2) the general benefits-based SSR cost allocation method in section 38.2.7.k of MISO's Tariff should be applied to the ATC footprint; and (3) the cost allocation in Rate Schedule 43G must be revised accordingly, effective April 3, 2014. As stated above, MISO must submit a compliance filing within 30 days of the date of this order containing revised Tariff sheets amending the SSR cost allocation under Rate Schedule 43G in accordance

[258] April 1 Order, 147 FERC ¶ 61,004 at P 12.

with the Commission's determination on the Complaint, with such revised cost allocation to be effective as of April 3, 2014. We also affirm the Commission's determination in the April 1 Order granting waiver of the prior notice requirement and allowing Rate Schedule 43G to be effective on February 1, 2014.

C. Request for Rehearing

1. Request for Rehearing

119. In their request for rehearing of the April 1 Order, the Public Interest Organizations argue that the Commission's decision-making approach undermines MISO's review process and is likely to result in unjust and unreasonable rates.[259] The Public Interest Organizations contend that MISO has no process in place for resolving the reliability problems that are causing the need for the Presque Isle SSR Agreement, and MISO's failure to consider alternatives increases the likelihood that the Presque Isle SSR Agreement will continue indefinitely. They argue that approval of the Presque Isle SSR Agreement and Rate Schedule 43G without considering them on their merits is likely to perpetuate the indefinite SSR agreement, and consumers will continue to pay millions of dollars each month with no retirement date in sight.[260]

120. According to the Public Interest Organizations, the Presque Isle SSR Agreement includes a provision which creates additional likelihood of delay. Section 3.A.5 of the Agreement requires MISO to notify Wisconsin Electric by July 31, 2014 (six months

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[259] Public Interest Organizations Rehearing Request at 3.

[260] *Id*. at 3. The Public Interest Organizations state that total annual payments under the Presque Isle SSR Agreement could approach $100 million per year.

prior to the end of the one year term on January 31, 2015) if it intends to renew the agreement. The Public Interest Organizations state that there have been no recent stakeholder meetings to address the reliability issues that could allow the units to eventually retire, and they argue that MISO is less likely to develop solutions to reduce or eliminate the reliability issues associated with retiring the Presque Isle facility until it is clear whether or not the Commission will overturn its conditional approval of the Presque Isle SSR Agreement.[261]

121. The Public Interest Organizations also express concern that the Commission's conditional approval of the Presque Isle SSR Agreement will discourage stakeholders and MISO from examining all potentially achievable alternatives in future generation retirement processes.[262] They state that the Commission's acceptance of SSR agreements without ruling on the merits perpetuates costly agreements, thereby harming the public interest and increasing the likelihood of unjust and unreasonable rates. The Public Interest Organizations request that the Commission grant rehearing and reject MISO's proposed Presque Isle SSR Agreement and Rate Schedule 43G, and order MISO to more properly evaluate demand response alternatives and to explain and initiate a process that will eventually allow the units to retire. Alternatively, they request that the Commission provide a reasoned explanation for its decision to accept the Presque Isle SSR Agreement and Rate Schedule 43G.

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[261] *Id.* at 4.

[262] *Id.* at 5.

2. Commission Determination

122. The request for rehearing is denied. To the extent the Public Interest Organizations are concerned about the implications of conditional approval of the Presque Isle SSR Agreement and Rate Schedule 43G without considering them on their merits, the Commission finds that those concerns are moot upon the issuance of this order. The Public Interest Organizations' concerns about MISO's consideration of the alternatives to the Presque Isle SSR Agreement are addressed above, in the body of this order.

The Commission orders:

(A) The Complaint filed by the Wisconsin Commission in Docket No. EL14-34-000 is hereby granted, as discussed in the body of this order.

(B) MISO is hereby directed to submit Tariff revisions and a final load-shed study in a compliance filing, within 30 days of the date of this order, as discussed in the body of this order.

(C) The fixed cost component of SSR compensation under the Presque Isle SSR Agreement, filed by MISO in Docket No. ER14-1242-000, is hereby set for hearing and settlement judge procedures, as discussed in the body of this order.

(D) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the Federal Power Act and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R., Chapter I), a public hearing shall be held concerning certain provisions of the Presque Isle SSR Agreement,

as discussed in the body of this order. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (E) and (F) below.

(E) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2013), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within 15 days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge within five days of the date of this order.

(F) Within 30 days of the appointment of the settlement judge, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every 60 days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(G) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within 15 days of the date of the presiding judge's designation, convene a prehearing conference in this proceeding in a hearing room of the Commission, 888 First Street, NE, Washington, DC 20426. Such a

conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss) as provided by the Commission's Rules of Practice and Procedure.

(H) The Public Interest Organizations' request for rehearing filed in Docket Nos. ER14-1242-001 and ER14-1243-001 is hereby denied, as discussed in the body of this order.

(I) The refund effective date established in Docket No. EL14-34-000 pursuant to section 206(b) of the FPA is set at April 3, 2014.

(J) MISO is hereby directed to make refunds to LSEs in the ATC footprint as necessary to give effect to the revised cost allocation in Rate Schedule 43G, as described in the body of this order.

(K) MISO is hereby directed to submit a refund report within 30 days after refunds are granted to affected customers.

By the Commission.

(SEAL)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION
155 FERC ¶ 61,134

Docket Nos.
ER14-2952-005
ER14-2952-006
ER14-1243-008
ER14-1725-004
ER14-2180-004

Midcontinent Independent System Operator, Inc.

(Issued May 3, 2016)

Before Commissioners: Norman C. Bay, Chairman; Cheryl A. LaFleur, and Tony Clark

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ORDER ON REHEARING AND COMPLIANCE

1. On October 19, 2015, several parties[1] filed requests for rehearing of the Commission's September 17, 2015 order,[2] in which the Commission, among

[1] These parties include the Michigan Public Service Commission (Michigan Commission); Tilden Mining Company L.C. and Empire Iron Mining Partnership (the Mines), Verso Corporation (Verso), City of Mackinac Island, The Sault Ste. Marie Tribe of Chippewa Indians, and Upper Peninsula Power Company (UPPCo) (collectively, Michigan Aligned Parties); the City of Escanaba, Michigan (City of Escanaba); Cloverland Electric Cooperative, Inc. (Cloverland); UPPCo; and Verso.

[2] *Midcontinent Indep. Sys. Operator, Inc.*, 152 FERC ¶ 61,216 (2015) (SSR Cost Allocation Compliance Order).

other things, accepted, subject to condition, Midcontinent Independent System Operator Inc.'s (MISO) proposed System Support Resource (SSR)[3] cost allocation methodology (SSR Cost Allocation Methodology), finding that it generally complied with the directives of the Commission's February 2015 order.[4] Specifically, the Commission found that, as modified, the SSR Cost Allocation Methodology assigns SSR costs directly to load-serving entities (LSEs) serving loads that would require the operation of the Presque Isle, Escanaba, and White Pine SSR Units[5] for reliability purposes, as required by the Tariff, under conditions that are representative of actual manual and/or automatic responses taken during reliability events.[6]

2. On October 8, 2015, as directed by the Commission in the SSR Cost Allocation Compliance Order, MISO made a compliance filing in Docket No. ER14-2952-005 (October Compliance Filing), submitting proposed revisions to its Tariff, as explained more fully below.

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[3] MISO's Open Access Transmission, Energy and Operating Reserve Markets Tariff (Tariff) defines SSRs as "Generation Resources or [SCUs] that have been identified in Attachment Y – Notification to this Tariff and are required by the Transmission Provider for reliability purposes, to be operated in accordance with the procedures described in Section 38.2.7 of this Tariff." MISO, FERC Electric Tariff, Module A, § 1.S "System Support Resource (SSR)" (39.0.0).

[4] *Pub. Serv. Comm'n of Wisconsin v. Midcontinent Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,104, at PP 73-79 (2015) (February 2015 Order).

[5] Each of these SSR Units is described more fully below.

[6] SSR Cost Allocation Compliance Order, 152 FERC ¶ 61,216 at P 61.

3. In this order, we deny the requests for rehearing, accept MISO's compliance filing, and direct MISO to file a detailed refund report within 45 days of the date of this order.

VIII. Background[7]

4. Under MISO's Tariff, market participants that have decided to retire or suspend a Generation Resource or Synchronous Condenser Unit (SCU) must submit a notice (Attachment Y Notice), pursuant to Attachment Y (Notification of Potential Resource/SCU Change of Status) of the Tariff, at least 26 weeks prior to the resource's retirement or suspension effective date. During this 26-week notice period, MISO will conduct a study (Attachment Y Study) to determine whether all or a portion of the resource's capacity is necessary to maintain system reliability, such that SSR status is justified. If so, and if MISO cannot identify an alternative to the SSR that can be implemented prior to the retirement or suspension effective date, then MISO and the market participant shall enter into an agreement, as provided in Attachment Y-1 (Standard Form SSR Agreement) of the Tariff, to ensure that the resource continues to operate, as needed.[8]

5. On July 25, 2012, in Docket No. ER12-2302-000, MISO submitted proposed Tariff revisions regarding the treatment of resources that submit Attachment Y Notices. On September 21, 2012, the Commission accepted, subject to condition, MISO's proposed Tariff revisions effective September 24, 2012, subject to two

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[7] A more complete history of this proceeding can be found in the SSR Cost Allocation Compliance Order. *See id.* PP 2-12.

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

compliance filings due within 90 and 180 days of the date of the order.[9] On July 22, 2014, the Commission accepted MISO's compliance filing, subject to condition.[10] On December 17, 2015, the Commission issued an order on rehearing and accepted MISO's further compliance filing, subject to condition.[11]

6. In the February 2015 Order, the Commission affirmed a previous finding that it is unjust, unreasonable, unduly discriminatory, or preferential for MISO to allocate SSR costs on a *pro rata* basis to all LSEs in the footprint of the American Transmission Company (ATC) within MISO, and that MISO must instead require that SSR costs be allocated to the LSEs that require the operation of the SSR Units for reliability purposes.[12] The Commission directed MISO to file, within 60 days of the date of the order, a new

[9] *Midwest Indep. Transmission Sys. Operator, Inc.*, 140 FERC ¶ 61,237 (2012).

[10] *Midwest Indep. Transmission Sys. Operator, Inc.*, 148 FERC ¶ 61,056 (2014) (SSR Compliance Order).

[11] *Midwest Indep. Transmission Sys. Operator, Inc.*, 153 FERC ¶ 61,313 (2015).

[12] February 2015 Order, 150 FERC ¶ 61,104 at PP 73-79.

study methodology that will allocate the costs associated with the Presque Isle,[13] Escanaba,[14] and White Pine[15] SSR Units directly to benefitting LSEs, as required by MISO's Tariff.[16] The Commission stated

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[13] Presque Isle Units 5-9 are located in Marquette, Michigan within the ATC footprint and provide up to 344 MW of capacity, and were operated under an SSR agreement between MISO and Wisconsin Electric Power Company (Wisconsin Electric). On April 17, 2015, in Docket Nos. ER15-1070-000 and ER15-1071-000, the Commission accepted MISO's notice of termination of the SSR agreement and cancellation of Rate Schedule 43G for the Presque Isle SSR Units effective February 1, 2015 due to Wisconsin Electric's rescission of its Attachment Y Notice of retirement for Presque Isle Units 5-9. *See Midcontinent Indep. Sys. Operator, Inc.*, 151 FERC ¶ 61,051 (2015).

[14] Escanaba SSR Units 1 and 2 are located in Escanaba, Michigan within the ATC footprint and provide up to 25 MW of capacity, and were operated under an SSR agreement between MISO and the City of Escanaba, Michigan. On May 15, 2015, in Docket Nos. ER15-1505-000 and ER15-1506-000, the Commission accepted for filing MISO's notice of termination of the SSR agreement and its request to cancel Rate Schedule 43 for the Escanaba SSR Units effective June 15, 2015. *See Midcontinent Indep. Sys. Operator, Inc.*, Docket No. ER15-1505-000 and ER15-1506-000 (May 15, 2015) (delegated letter order).

[15] The White Pine SSR Unit refers to White Pine SSR Unit No. 1, which is located in White Pine, Michigan within the ATC footprint and provides up to 20 MW of capacity, and is operated under an SSR agreement between MISO and White Pine Electric Power, LLC.

[16] February 2015 Order, 150 FERC ¶ 61,104 at PP 86, 89, 113, 132. This new study methodology would replace the practice described in MISO's Business Practice Manual, whereby MISO employed an optimal load-shed methodology to determine the relative reliability impact to each MISO Local Balancing Authority (LBA) of operation without the SSR Units, and the load shed values for each contingency were organized by LBA location and accumulated to determine the total load shed for each LBA

that, in order to assign SSR costs directly to LSEs based on the extent to which the loads that they serve benefit from the SSR Unit, MISO could determine the SSR benefits of specific LSEs based on their actual energy withdrawals at elemental pricing nodes (EPNodes) rather than commercial pricing nodes (CPNodes).[17] The Commission stated that the study methodology should identify the LSEs that require the operation of these SSR Units for reliability purposes under conditions that are representative of actual manual and/or automatic responses taken during reliability events.[18] The Commission directed MISO to submit Tariff revisions adjusting the SSR cost allocation under the rate schedules associated with the Presque Isle, Escanaba, and White Pine SSR Units, such that the SSR Units' costs are allocated in accordance with the new study methodology, with such revised cost allocation to be effective as follows: on June 15, 2014 for the Escanaba SSR Units; on April

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along with the corresponding share ratio (the optimization-LBA approach).

[17] *Id.* P 87. MISO's Tariff defines an EPNode as a single bus node where locational marginal price is calculated. *See* MISO, FERC Electric Tariff, Module A, § 1.E "Elemental Pricing Node (EPNode)" (38.0.0). MISO's Tariff defines a CPNode as an EPNode or aggregate price node in the Commercial Model used to schedule and settle market activities. CPNodes include resources, hubs, load zones and/or interfaces. *See* MISO, FERC Electric Tariff, Module A, § 1.C "Commercial Pricing Node (CPNode)" (35.0.0). The Commercial Model is a financial representation of the relationships between MISO market participants and their resources, CPNodes, and the physical Network Model. *See* MISO, FERC Electric Tariff, Module A, § 1.C "Commercial Model" (35.0.0).

[18] February 2015 Order, 150 FERC ¶ 61,104 at P 86.

16, 2014 for the White Pine SSR Units; and on April 3, 2014 for the Presque Isle SSR Units.[19]

7. The Commission also rejected requests for rehearing of its previous finding that refunds of Presque Isle SSR costs are warranted back to April 3, 2014, with those refunds consisting of costs allocated to LSEs that were higher than the costs to be allocated to those LSEs according to the forthcoming SSR cost allocation methodology modified to comply with the Commission's directives.[20] The Commission likewise found it appropriate to uphold similar refunds of SSR costs associated with the White Pine and Escanaba SSR Units.[21] The Commission stated that implementation of the refund requirements for these SSR Units would be addressed in a future order addressing MISO's new study methodology.[22]

8. On May 20, 2015, in Docket No. ER14-2952-003, MISO submitted a compliance filing in response to the

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[19] *Id.* P 89. The effective dates for the White Pine and Escanaba SSR Units aligned with the effective dates of previous compliance filings accepted, subject to condition, by the Commission, while the effective date for the Presque Isle SSR Units aligned with the refund effective date set in the Wisconsin Commission Complaint Order. *See Midcontinent Indep. Sys. Operator, Inc.*, 148 FERC ¶ 61,116, at P 37 (2014); *Midcontinent Indep. Sys. Operator, Inc.*, 148 FERC ¶ 61,136, at PP 43-44 (2014); *Midcontinent Indep. Sys. Operator, Inc.*, 148 FERC ¶ 61,071, at P 68 (2014) (Wisconsin Commission Complaint Order).

[20] February 2015 Order, 150 FERC ¶ 61,104 at P 90.

[21] *Id.* P 93.

[22] The Commission also noted that other issues raised in the rehearing requests with respect to refunds are more appropriately addressed once the Commission has addressed MISO's new study methodology and MISO has filed a detailed refund report. *Id.* P 93 n.231.

Commission's directives in the February 2015 Order.[23] MISO's compliance filing included a generic Rate Schedule 43A that described the SSR Cost Allocation Methodology, which did not rely upon an optimal load-shed study or LBA boundaries.[24] Instead, MISO proposed to base cost allocation on the impact of load on constraints that are identified in an Attachment Y Study.[25] MISO explained that the method recognizes the physical location of the loads in relation to the issues that are caused by the units subject to SSR designation; thus, loads that would contribute to the thermal or voltage violations in the absence of the SSR Unit benefit by keeping the unit available as an SSR Unit to avoid the reliability issues.

9. In the SSR Cost Allocation Compliance Order, the Commission accepted, subject to condition, MISO's SSR Cost Allocation Methodology, finding that it generally complied with the directives of the February 2015 Order in that it assigns SSR costs directly to LSEs serving loads that would contribute to thermal or voltage reliability violations in the absence of the Presque Isle, Escanaba, and White Pine SSR Units under conditions that are representative of actual manual and/or automatic responses taken during reliability events. The Commission rejected MISO's proposed Rate Schedule 43A as a generally applicable rate schedule, and directed MISO, in a compliance filing, to incorporate the SSR Cost Allocation Meth-

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[23] MISO May 20, 2015 SSR Cost Allocation Compliance Filing, Docket No. ER14-2952-003, Transmittal Letter, at 1 (filed May 20, 2015) (May Compliance Filing).

[24] *Id.*, Tab A, MISO FERC Electric Tariff, Schedule 43A, Allocation of System Support Resources Costs (31.0.0).

[25] *Id.*, Transmittal Letter at 3.

odology (modified by the SSR Cost Allocation Compliance Order) directly into the rate schedules applicable to the Presque Isle, Escanaba, and White Pine SSR Units. Additionally, subject to the compliance directives described below, the Commission accepted revised Rate Schedule 43 (Allocation of SSR Costs Associated with Escanaba Unit Nos. 1 & 2), revised Rate Schedule 43G (Allocation of SSR Costs Associated with the Presque Isle Unit Nos. 5-9), and revised Rate Schedule 43H (Allocation of SSR Costs Associated with White Pine Unit No. 1) to be effective on the following dates, as requested: June 15, 2014 for Escanaba Rate Schedule 43; April 3, 2014 for Presque Isle Rate Schedule 43G; and April 16, 2014 for White Pine Rate Schedule 43H.

10. As noted above, on October 8, 2015, as directed by the Commission in the SSR Cost Allocation Compliance Order, MISO made the October Compliance Filing in Docket No. ER14-2952-005; and on October 19, 2015, several parties sought rehearing of the SSR Cost Allocation Compliance Order.

IX. Notice and Responsive Pleadings

11. Notice of MISO's October Compliance Filing in Docket No. ER14-2952-005 was published in the *Federal Register*, 80 Fed. Reg. 63,762 (2015), with protests and interventions due on or before October 29, 2015. The Michigan Commission, the City of Escanaba, and the Mines each filed a timely protest on October 29, 2015.[26] On November 5, 2015, MISO filed a motion to answer and answer in response to the protests.

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[26] None of these parties was required to seek intervention because they were already parties to the proceeding.

12. On November 3, 2015, Verso filed a motion for leave to answer and answer in response to Cloverland's request for rehearing.

X. Discussion

A. Procedural Matters

13. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2015), prohibits an answer to a request for rehearing. Accordingly, we will reject Verso's answer. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2015), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We are not persuaded to accept MISO's answer and will, therefore, reject it.

B. Substantive Matters

1. Rehearing of SSR Cost Allocation Compliance Order

a. Model Assumptions

i. SSR Cost Allocation Compliance Order

14. In the SSR Cost Allocation Compliance Order, the Commission determined that MISO's SSR Cost Allocation Methodology "generally compli[ed] with the directives of the February 2015 Order in that it assigns SSR costs directly to LSEs serving loads that would contribute to the thermal or voltage violations in the absence of the Presque Isle, Escanaba, and White Pine SSR Units."[27] The Commission rejected Cloverland's argument that MISO inappropriately allocated Presque Isle SSR costs because MISO

[27] SSR Cost Allocation Compliance Order, 152 FERC ¶ 61,216 at P 60.

modeled temporary and atypical operating conditions that do not reflect historical or future power flows within the Upper Peninsula.[28] The Commission stated that, as MISO explained in its answer to the protests, the Presque Isle SSR Agreement was in effect from February 1, 2014 through January 31, 2015, during which time Cloverland was regularly being served from the western Upper Peninsula (where the Presque Isle SSR Units are located). The Commission found it proper for MISO to model the system conditions present during the time that the Presque Isle SSR Agreement was actually in effect in order to determine appropriate allocation of Presque Isle SSR costs to those LSEs that benefitted from the operation of the SSR Units.

15. With respect to the technical concerns raised regarding MISO's SSR Cost Allocation Methodology, the Commission found that, excluding the specific elements the Commission directed MISO to address on compliance, the SSR Cost Allocation Methodology is just and reasonable.[29] The Commission found problems with four aspects of MISO's proposed methodology: (1) MISO did not provide an explanation for how MISO will calculate load distribution factors to identify benefitting load; (2) MISO did not justify its proposal to select load buses that have the highest 80 percent effect on the constraint as beneficiaries of SSR Unit operation; (3) MISO did not justify its proposal to allocate SSR costs at the CPNode level based on a non-coincident monthly peak volume for each CPNode; and (4) MISO did not adequately explain the terms "Daily

[28] *Id.* P 68.

[29] *Id.* PP 65-73.

Load Weighting Factor" and "aggregate distribution factor" in its proposed Tariff language.

ii. Requests for Rehearing

16. Cloverland argues that the Commission erred when it failed to require MISO to modify the SSR Cost Allocation Methodology to include those periods when the system was operated significantly different from the modelled conditions.[30] Specifically, Cloverland argues that, when determining the SSR benefits of the Presque Isle SSR Units, MISO, in modeling the system conditions present during construction of an HVDC transmission project (which overlapped with the term of the Presque Isle SSR Agreement), ignored periods when Cloverland was served from the Lower Peninsula and assumed Cloverland was served continuously from the Upper Peninsula throughout the construction of the HVDC and other projects. Cloverland argues that the Commission ignored this argument in the SSR Cost Allocation Compliance Order and only addressed whether MISO should have modelled operational characteristics of the system from periods when construction of the HVDC system was not occurring.[31]

17. The Michigan Commission argues that the Commission erred in the SSR Cost Allocation Compliance Order by finding that the Michigan Commission failed to show that the two factors utilized by MISO in the SSR Cost Allocation Methodology (i.e., the extent to which load contributed to thermal reliability constraints and the extent to which load would cause voltage violations in the absence of the SSR Unit) are insufficient to identify LSEs that benefit from the SSR

[30] Cloverland Request for Rehearing at 3-6.

[31] *Id.* at 4-6.

Units, and that the Michigan Commission failed to identify other factors that MISO should have considered in order to identify a broader geographical area of benefiting load.[32]

18. For example, the Michigan Commission argues that it expressly stated that MISO's failure to include the same NERC contingencies utilized by ATC to identify load affected by the retirement of generation to also identify the load and LSEs that benefit from the operation of Presque Isle, White Pine, and Escanaba SSR Units is unjust and unreasonable.[33] The Michigan Commission contends that MISO's inclusion of only two NERC P1 contingencies[34] to identify load benefitting from the Presque Isle SSR Units remaining in operation ignores the fact that operating the transmission system in the Upper Peninsula without the Presque Isle SSR Units operating leaves a large portion of the ATC zone outside of the Upper Peninsula vulnerable to outages if one Upper Peninsula transmission line fails, and it is unreasonable for MISO to effectively assume that these other areas would be protected by curtailment of firm load in the Upper Peninsula. Accordingly, the

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[32] Michigan Commission Request for Rehearing at 10.

[33] *Id.* at 10-11 (citing Michigan Commission June 10, 2015 Protest at 6 n.26).

[34] NERC's Transmission System Planning Performance Requirements defines a Category P1 contingency as the loss of one of the following: (1) generator; (2) transmission circuit; (3) transformer; (4) shunt device; or (5) single pole of a DC line. *See* North American Reliability Corporation, Transmission System Planning Performance Requirements, Standard TPL-001-4, Table 1 – Steady State & Stability Performance Planning Events, http://www.nerc.com/_layouts/PrintStandard.aspx?standardnumber=TPL-001-4&title=Transmission%20System%20Planning%20Performance%20Requirements (last visited Feb. 2, 2016).

Michigan Commission argues, charging load in the Upper Peninsula for the vast majority of costs related to maintaining operation of Presque Isle SSR Units is unjust and unreasonable because maintaining such generation in operation could also benefit load located in large areas of ATC's footprint outside of the Upper Peninsula, such as Wisconsin.[35] Related to these arguments, the Michigan Commission argues that the Commission erred by rejecting the Michigan Commission's request for a hearing to develop a record to resolve the factual disputes relating to whether MISO's use of only two contingencies accurately identifies all loads that benefit from the continued operation of the SSR Units for reliability.[36]

iii. Commission Determination

19. We deny the rehearing requests of Cloverland and the Michigan Commission concerning MISO's modelling assumptions. We disagree with Cloverland's argument that MISO did not take into consideration the atypical operating conditions present during the term of the Presque Isle SSR Agreement when it allocated SSR costs to Cloverland. As the Commission stated in the SSR Cost Allocation Compliance Order, the Presque Isle SSR Agreement was in effect from February 1, 2014 through January 31, 2015 and the Commission found it proper for MISO to model the system conditions present during the time that the Presque Isle SSR Agreement was actually in effect in order to determine the appropriate allocation of Presque Isle SSR costs to those LSEs that benefitted

[35] Michigan Commission Request for Rehearing at 9-11.

[36] *Id.* at 12.

from the operation of the SSR Units.[37] In response to Cloverland's argument that MISO's model inputs did not reflect actual system operation, Cloverland has not persuaded us to change our determination that MISO demonstrated in its June 2015 answer that, while there were changes in system configuration due to the opening and closing of circuits at the Hiawatha substation, any changes were of limited duration and impact, such that Cloverland was regularly being served by the Upper Peninsula during the duration of the Presque Isle SSR Agreement.[38]

20. We also disagree with the Michigan Commission that MISO must include the same NERC contingencies utilized by ATC to identify load affected by the retirement of generation to also identify the load and LSEs that benefit from the operation of the Presque Isle, White Pine, and Escanaba SSR Units. As an initial matter, we note that much of what the Michigan Commission is arguing here is provided for the first time on rehearing, which is prohibited.[39] Nevertheless, we affirm the finding in the SSR Cost Allocation Compliance Order that the SSR Cost Allocation Methodology as modified – which allocates SSR costs directly to the LSEs serving loads that would contribute to the thermal or voltage violations

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[37] SSR Cost Allocation Compliance Order, 152 FERC ¶ 61,216 at P 68.

[38] MISO Answer, Docket No. ER14-2952-003, *et al*., at 11 (filed June 25, 2015).

[39] *See, e.g.*, *W. Grid. Dev., LLC*, 133 FERC ¶ 61,029, at P 14 (2010) ("It is well established that a request for rehearing is not the appropriate procedural vehicle for raising issues for the first time because it is disruptive to the administrative process and denies the parties the opportunity to respond.") (citation omitted).

in the absence of the Presque Isle, Escanaba, and White Pine SSR Units – allocates costs to those LSEs that benefit as required by the Tariff and is just and reasonable.[40] Last, nothing raised here persuades us that the Commission's decision declining to set this matter for hearing was in error.

b. Disclosure of Data and Formula Rates

i. SSR Cost Allocation Compliance Order

21. In the SSR Cost Allocation Compliance Order, the Commission rejected requests that the Commission refrain from accepting MISO's SSR Cost Allocation Methodology "without requiring the submission of further workpapers, testimony, affidavits, or underlying studies."[41] The Commission found that, generally, MISO's explanation of the SSR Cost Allocation Methodology in its filing and its answers to the protests, along with its submission of a thorough, step-by-step formula for the allocation of SSR costs in its proposed Tariff language, was sufficient to show that the SSR Cost Allocation Methodology avoids the shortcomings of MISO's optimization-LBA approach and allocates SSR costs directly to the LSEs that benefit from

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[40] SSR Cost Allocation Compliance Order, 152 FERC ¶ 61,216 at P 60. *See, e.g.*, *Oxy USA, Inc. v. FERC*, 64 F.3d 679, 692 (D.C. Cir. 1995) (finding that under the FPA, as long as the Commission finds a methodology to be just and reasonable, that methodology "need not be the only reasonable methodology, or even the most accurate one"); *cf. City of Bethany v. FERC*, 727 F.2d 1131, 1136 (D.C. Cir. 1984) (when determining whether a proposed rate was just and reasonable, the Commission properly did not consider "whether a proposed rate schedule is more or less reasonable than alternative rate designs").

[41] SSR Cost Allocation Compliance Order, 152 FERC ¶ 61,216 at P 63.

operation of the Presque Isle, Escanaba, and White Pine Units. The Commission concluded that MISO had "sufficiently described the conditions, assumptions, and calculations underlying its revised study methodology, and further data submissions or development of the record were not necessary to show that MISO's proposed methodology is just and reasonable."[42] The Commission added that requests for critical energy infrastructure information (CEII) or settlement information to non-MISO members was similarly not necessary to make a finding that MISO's SSR Cost Allocation Methodology is just and reasonable.

ii. Requests for Rehearing

22. Verso, UPPCo, the Michigan Commission, and the Michigan Aligned Parties argue that the Commission erred when it concluded that MISO need not disclose the underlying data implementing the SSR formula rate and the resulting rates in order to determine whether the methodology was just and reasonable. Verso and the Michigan Aligned Parties contend that this conclusion is inconsistent with the Commission's precedent and policies requiring that there be transparency in the formula rate process to ensure just and reasonable rates.[43] Verso contends that the Commission should immediately reopen the

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[42] *Id.*

[43] Verso Request for Rehearing at 1-2, 6; Michigan Aligned Parties Request for Rehearing at 19-22 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 143 FERC ¶ 61,149, at P 17 (2013); *Westar Energy, Inc.*, 148 FERC ¶ 61,033 (2014); *Midwest Indep. Transmission Sys. Operator, Inc.*, 140 FERC ¶ 61,060 (2012); *Hilt Truck Line, Inc. v. United States*, 548 F.2d 214, 216 (7th Cir. 1977); *Secretary of Agriculture v. United States*, 347 U.S. 645, 652-53 (1954)).

proceedings and order that MISO disclose, to the Commission and the parties, all data regarding the SSR Cost Allocation Methodology, the actual allocation of such costs, and the implementation of that methodology, including the underlying inputs and studies as applied to the formula methodology producing the actual rates (subject to any appropriate protective agreements ordered by the Commission).[44] Verso and the Michigan Aligned Parties accept that the Commission can authorize a formula rate, but contend that the Commission must ensure, and must allow ratepayers to ensure, that the formula was correctly applied. Verso argues that information regarding inputs, calculations, and implementation of the SSR formula rate cost-allocation methodology is necessary to understand and evaluate the justness and reasonableness of all aspects of MISO's compliance filing, and that the revised formula rate protocols for MISO's transmission owners under section 206 of the Federal Power Act (FPA)[45] require such transparency.[46] Additionally, Verso contends that the Commission acted contrary to *West Deptford Energy, LLC*,[47] which, Verso argues, struck a balance between the

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[44] Verso Request for Rehearing at 2.

[45] 16 U.S.C. § 824e (2012).

[46] Verso Request for Rehearing at 6-7 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 143 FERC ¶ 61,149, at P 17 (2013) (stating that "[b]oth a formula rate and its inputs must be transparent" and that "to be just and reasonable, the MISO formula rate protocols must be revised to provide interested parties with the information necessary to understand and evaluate the implementation of the formula rate for either the correctness of inputs and calculations, or the reasonableness of the costs to be recovered in the formula rate.")).

[47] *West Deptford Energy, LLC*, 134 FERC ¶ 61,189 (2011) (*West Deptford*).

interest of parties like Verso that have a right to participate meaningfully in Commission proceedings and the right of opposing parties to protect confidential or proprietary information exchanged during Commission proceedings.

23. The Michigan Commission and the Michigan Aligned Parties argue that in reaching the conclusion that information concerning the end result of the SSR Cost Allocation Methodology is not necessary to show that such methodology is just and reasonable, the Commission ignored the longstanding U.S. Supreme Court precedent of *Colorado Interstate Gas Co. v. FPC*.[48] The Michigan Commission and the Michigan Aligned Parties also argue that the Commission ignored prior Commission findings, which support disclosing the end result of the allocation of SSR costs prior to the Attachment Y analysis of alternatives to SSR Units as necessary to enable LSEs to better understand their potential responsibility for SSR costs and participate in identifying any SSR alternative.[49]

24. The City of Escanaba argues that although the Commission can accept a formula rate under section 205 and deem it just and reasonable without inspecting every bill that results from that formula, the premise for accepting formula rates is their "fixed,

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[48] Michigan Commission Request for Rehearing at 8-9; Michigan Aligned Parties Request for Rehearing at 13-15 (citing *Colo. Interstate Gas Co. v. FPC*, 324 U.S. 581, 603 (1945) (It is "the result reached not the method employed which is controlling.") (citation omitted).

[49] Michigan Commission Request for Rehearing at 8-9; Michigan Aligned Parties Request for Rehearing at 13-15 (citing SSR Compliance Order, 148 FERC ¶ 61,056 at P 35).

predictable nature."[50] The City of Escanaba argues that, unlike a traditional transmission formula rate, which is fixed and predictable, MISO here developed a new methodology that has never been used before and has not yet been fixed.

25. UPPCo argues that, by rejecting parties' arguments regarding the underlying information and data, the Commission deprived UPPCo and other customers of their due process rights under the Fifth Amendment of the U.S. Constitution. UPPCo argues that Constitutional due process requires that a party affected by governmental action be given "the opportunity to be heard at a meaningful time and in a meaningful way."[51] UPPCo contends that the proposed formula rate is very complicated and cannot be understood fully without the underlying workpapers and technical studies. UPPCo argues that in addition to the four problems with the formula rate identified by the Commission, there would likely be additional problems identified if parties had the underlying workpapers and technical studies. As an example, UPPCo explains that the Commission accepted MISO's minimum load distribution factor cutoff of one percent, but in the abstract, without the underlying workpapers and technical studies to see how many load buses fell below and above the one percent cutoff, it is difficult to determine if the one percent cutoff was established correctly. UPPCo adds that although the Commission has an interest in protecting commercially sensitive and CEII information from unnecessary disclosure, the Commission has well-established procedures for

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[50] City of Escanaba Request for Rehearing at 8 (citing *Ocean State Power II*, 69 FERC ¶ 61,146, at 61,552 (1994)).

[51] UPPCo Request for Rehearing at 6 (citing *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976)).

protecting commercially sensitive and CEII information under appropriate protective orders and, thus, the fiscal and administrative burden on the Commission of requiring the release of the underlying workpapers and technical studies to determine whether the allocation of SSR costs is unjust, unreasonable, unduly discriminatory or preferential significantly outweighs the minimal burden on the Commission. UPPCo also argues that the Commission deviated from its established precedent without a reasoned explanation when it shifted the burden of showing the necessity of the requested information to the customers. According to UPPCo, in deciding whether to grant access to confidential information when a protective order is available, the Commission has consistently determined that "a party claiming that confidential information should be withheld entirely will be expected to show that a protective order will not adequately safeguard its interests."[52]

26. The City of Escanaba argues that the Commission erred by accepting MISO's May Compliance Filing as just and reasonable while also finding serious technical deficiencies. The City of Escanaba also contends that the SSR Cost Allocation Compliance Order contains internal inconsistencies. For example, the City of Escanaba argues that the Commission stated in the SSR Cost Allocation Compliance Order that "further data submissions or development of the record are not necessary"[53] but then directed MISO to submit a compliance filing to provide additional

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[52] *Id.* at 9 (citing *West Deptford,* 134 FERC ¶ 61,189 at P 27; *Mojave Pipeline Co.*, 38 FERC ¶ 61,249 at 61,842 (1987)).

[53] City of Escanaba Request for Rehearing at 5-6 (citing SSR Cost Allocation Compliance Order, 152 FERC ¶ 61,216 at P 63).

explanation and justification.[54] Additionally, the City of Escanaba argues that the Commission initially rejected the argument that MISO did not justify the use of uniform distribution factors but later required MISO to describe how load distribution will be calculated because MISO's SSR Cost Allocation Methodology does not provide an explanation for how MISO will calculate load distribution factors to identify benefitting load.[55]

27. The City of Escanaba also contends that the Commission's decision not to require MISO to submit more information compounded the difficulties experienced by the City of Escanaba in being asked throughout this proceeding to react to highly complex methodologies.[56] Specifically, the City of Escanaba argues that the Commission erred in ordering a change to coincident peak load because there was no basis in the record to support such a change. The City of Escanaba contends that MISO's May Compliance Filing did not say anything about this portion of the methodology, and in the SSR Cost Allocation Compliance Order the Commission states that MISO did not respond to arguments against using non-coincident peak load. The City of Escanaba argues that the change to coincident peak load could have a significant impact on the cost allocation, and the degree to which the change results in a cost shift

[54] *Id.* (citing SSR Cost Allocation Compliance Order, 152 FERC ¶ 61,216 at PP 71-74).

[55] *Id.* (citing SSR Cost Allocation Compliance Order, 152 FERC ¶ 61,216 at PP 65-70).

[56] *Id.* at 8.

among customer classes is completely unexplored on the record.[57]

iii. Commission Determination

28. We deny the requests for rehearing arguing that MISO must disclose the underlying data implementing the SSR Cost Allocation Methodology. In doing so, we reject arguments that MISO must show the actual allocation of Presque Isle, Escanaba, and White Pine SSR costs resulting from the SSR Cost Allocation Methodology in its compliance filing before the Commission can make a determination as to whether that methodology is just and reasonable. The Commission determined in the SSR Cost Allocation Compliance Order that MISO's SSR Cost Allocation Methodology generally complied with the directives of the February 2015 Order in that it assigns SSR costs directly to LSEs serving loads that would contribute to the thermal or voltage violations in the absence of the Presque Isle, Escanaba, and White Pine SSR Units.[58] The Commission further determined that MISO's proposed SSR cost allocation was properly designed so as to identify the LSE beneficiaries of the SSR Units and allocate costs directly to those beneficiaries, as required by the February 2015 Order.[59] The Commission was able to make a determination as to whether the SSR Cost Allocation Methodology assigns SSR costs directly to LSEs serving loads that would contribute to the thermal or voltage violations in the absence of the Presque Isle, Escanaba, and White Pine SSR Units without analyzing the underlying data

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[57] *Id.* at 9.

[58] SSR Cost Allocation Compliance Order, 152 FERC ¶ 61,216 at P 60.

[59] *Id.* P 62.

deemed necessary by intervenors, or reviewing the implementation of the methodology and the resulting rates.[60] Nothing that has been raised here on rehearing persuades us otherwise.

29. In response to arguments that the SSR Cost Allocation Methodology is neither transparent nor fixed, and therefore the inputs into this formula-type cost allocation methodology must be made available before a party can determine whether its cost allocation is just and reasonable, we note that the methodology at issue in this proceeding is like many in MISO's market rules and Tariff, in that it relies on inputs derived from Tariff-defined sources, as discussed further, below. We find that, as conditioned, MISO's methodology is of comparable specificity to other market rules in MISO's Tariff and other RTO tariffs, and is sufficiently specific for the purpose of finding that it is just and reasonable and will produce just and reasonable results. While different in nature than a conventional cost-of-service transmission formula rate, like such cost-of-service formula rates, the specific inputs are largely not required for approval of the SSR Cost Allocation Methodology; rather, the Commission approves "the formula itself, which becomes the filed rate."[61] In other words, in this case, the SSR Cost Allocation Methodology is the filed rate. We also find that, as with other aspects of MISO's market rules and Tariff, it would be impractical for MISO to disclose all of the inputs to the SSR Cost Allocation Methodology in the same manner as it would the inputs to a cost-of-service transmission formula rate due to the

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[60] *Id.* PP 62-63.

[61] *See Va. Elec. & Power Co.*, 123 FERC ¶ 61,098, at P 31 (2008).

multi-step manner in which the inputs to the SSR Cost Allocation Methodology are updated (i.e., by reference to other Tariff-defined sources). Nevertheless, the SSR Cost Allocation Methodology is both transparent and fixed in that it uses inputs derived from Tariff-defined sources, including the Commercial Model,[62] the Network Model,[63] the State Estimator,[64] and the Attachment Y Reliability Study in order to allocate costs as required by MISO's Tariff. In addition, MISO's Business Practices Manual 5 (Market Settlements) details the use of the Network and Commercial Models (which in turn rely on the State Estimator) in the settlement process.[65] The use of these models and studies is not new in MISO's market processes and settlements and, in this instance, ensures that SSR costs are allocated to the LSEs which require the operation of the SSR Unit for reliability purposes, as required by MISO's Tariff, consistent with the Commission's directive in the SSR Cost Allocation Compliance Order.[66] For example, the Commission has previously accepted a cost allocation methodology in the context of voltage or local reliability (VLR)

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[62] MISO, FERC Electric Tariff, Module A, § 1.C "Commercial Model" (38.0.0). MISO also provides further clarity and explanation in its BPM. *See* MISO Business Practices Manual, BPM-010-r8, § 4 at 23.

[63] MISO, FERC Electric Tariff, Module A, § 1.N "Network Model" (35.0.0). *See also* MISO Business Practices Manual, BPM-010-r8, § 3 at 11.

[64] MISO, FERC Electric Tariff, Module A, § 1.S "State Estimator" (41.0.0). *See also* MISO Business Practices Manual, BPM-010-r8, § 2 at 9.

[65] MISO Business Practices Manual, BPM-005-r14, § 2.4 at 29.

[66] SSR Cost Allocation Compliance Order, 152 FERC ¶ 61,216 at PP 70-73.

commitments[67] that is similar to the SSR Cost Allocation Methodology in that the VLR methodology likewise relies on Tariff-defined sources of information.[68]

30. We also disagree with the City of Escanaba's argument that the Commission erred in ordering a change to coincident peak load because there was no basis in the record to support such a change. Several parties raised this issue in their protests and the Commission ultimately determined, based on the record, that MISO had not justified its proposal to allocate SSR costs at the CPNode level based on a non-coincident monthly peak volume for each CPNode.[69]

31. We disagree with the City of Escanaba's argument that the Commission erred by accepting MISO's compliance filing as just and reasonable while also finding technical deficiencies and find that the City of Escanaba's examples of supposed inconsistencies in the SSR Cost Allocation Compliance Order were taken out of context. In the SSR Cost Allocation Compliance Order, the Commission found that MISO "generally" complied with the directives of the February 2015 Order and directed MISO to make a compliance filing to address certain aspects of the methodology that had

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[67] *See Midwest Indep. Transmission Sys. Operator, Inc.*, 140 FERC ¶ 61,171 (2012).

[68] For instance, the allocation methodology in section A.2 of Schedule 44 of the MISO Tariff determines available headroom through use of Unit Dispatch Data. Section A.3.c of Schedule 44 methodology also relies on non-public generator-specific information such as No Load Cost and Incremental Energy Cost. Additional section B.6.c of Schedule 44 describes how MISO determines the Elemental Pricing Nodes that impact VLR constraints.

[69] SSR Cost Allocation Compliance Order, 152 FERC ¶ 61,216 at P 72.

not been shown to be just and reasonable.[70] The Commission's acceptance of the compliance filing subject to further compliance does not constitute an internal inconsistency; rather, it reflects that there was enough record evidence for the Commission to find that, on balance, MISO's filing met the requirements of the February 15 Order, but that further specificity was required to ensure that the methodology is just and reasonable. For instance, the Commission accepted MISO's proposal to use uniform distribution factors to identify load that contributes to voltage violations or voltage stability issues, finding that all loads within the boundary benefit the same, regardless of geographical proximity to the generator, by keeping the SSR Units available to maintain area voltage stability.[71] However, the Commission found that MISO did not properly explain how it would calculate those load distribution factors.[72]

32. As for the Michigan Commission's and the Michigan Aligned Parties' argument that disclosing the end result of the allocation of SSR costs prior to the Attachment Y analysis of alternatives to SSR Units is necessary in order to enable LSEs to better understand their potential responsibility for SSR costs and participate in identifying any SSR alternative, we find that section 38.2.7 of the Tariff requires MISO to post on its OASIS the results of Attachment Y studies indicating reliability concerns. Such postings, which occur prior to the evaluation of alternatives, must include "how the associated SSR Unit costs would be allocated in the event that the Transmission Owner

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[70] *Id.* PP 70-73.

[71] *Id.* P 66.

[72] *Id.* P 70.

enters into an SSR Agreement." In this proceeding, and through stakeholder meetings, MISO has described to interested parties how the SSR costs would be allocated by describing the methodology through which such allocation would take place. Because the Commission has found MISO's cost allocation methodologies unjust and unreasonable or in need of additional revisions, it was not reasonably possible for MISO to provide the specific cost allocation results to the extent such methodologies were subject to review and revision by the Commission.[73]

33. Last, we disagree that UPPCo and other customers were deprived of their due process rights under the Fifth Amendment of the U.S. Constitution. UPPCo and other parties were able to participate in MISO's stakeholder process leading up to the filing of the methodology on compliance and were given the opportunity to participate meaningfully in this proceeding.

c. Retroactive Application of Cost Allocation Methodology

i. SSR Cost Allocation Compliance Order

34. The Commission rejected all arguments relating to the ability of the Commission to order refunds of SSR costs as beyond the scope of compliance in the SSR Cost Allocation Compliance Order. The Commission also determined that it would not address implementation of the refund requirement for the Presque Isle, Escanaba, and White Pine SSR Units until MISO's SSR Cost Allocation Methodology is approved

[73] *See* MISO, FERC Electric Tariff, Module C, § 38.27, System Support Resources (42.0.0).

in its entirety and MISO has filed a detailed refund report.[74]

ii. Requests for Rehearing

35. Several parties raise arguments that the Commission erred in making the SSR Cost Allocation Methodology effective on April 3, 2014 for the Presque Isle SSR Units (i.e., the refund effective date established in the Wisconsin Commission Complaint Order), as well as making it effective for the Escanaba SSR Units and the White Pine SSR Unit effective as of the effective date of their respective SSR agreements (i.e., April 16, 2014 for the White Pine SSR and June 15, 2014 for the Escanaba SSR Units). These parties also object to the Commission ordering refunds dating from these effective dates.[75] Related to these arguments, the Michigan Commission and the Michigan Aligned Parties also argue that the SSR Cost Allocation Compliance Order approved a new methodology for allocating costs in the ATC footprint that is different from the existing SSR cost allocation methodology applicable to the rest of the MISO region, and therefore, a new effective date must be established for prospective application.[76] The Michigan Commission and the Michigan Aligned Parties also argue that either retroactive or prospective application of the SSR Cost Allocation Methodology is problematic as the

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[74] SSR Cost Allocation Compliance Order, 152 FERC ¶ 61,216 at P 74.

[75] Michigan Commission Request for Rehearing at 3-8; Michigan Aligned Parties Request for Rehearing at 4-11; UPPCo Request for Rehearing at 10-14; City of Escanaba Request for Rehearing at 10-14. We decline to fully summarize these arguments here as they have largely been raised previously.

[76] Michigan Commission Request for Rehearing at 5; Michigan Aligned Parties Request for Rehearing at 5.

methodology itself does not include either the percentage of SSR cost responsibility or the dollar amount associated with an LSE's purchases of service, thereby denying customers adequate notice of the consequences of their purchasing decisions.[77] Moreover, the Michigan Aligned Parties argue that the rationale for a retroactive effective date in the Wisconsin Commission Complaint Order directing refunds back to April 3, 2014 does not apply to the new SSR allocation methodology approved more than a year later.[78]

36. The City of Escanaba argues that the Commission has not yet "fixed" a new rate in this case, as is required under section 206 of the FPA. The City of Escanaba contends that in the formula rate context, the formula itself is the rate, and since the Commission keeps ordering MISO to change the formula, the applicable rate has not yet been "fixed" under section 206 of the FPA.[79] The City of Escanaba argues that the Commission has held that a formula rate is considered "fixed" under section 206 of the FPA when affected customers are able to "supply their own inputs to the formula and thereby know the numerical rates," which the City of Escanaba argues cannot be done.[80]

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[77] Michigan Commission Request for Rehearing at 6-7; Michigan Aligned Parties Request for Rehearing at 6-7. UPPCo makes similar arguments. *See* UPPCo Request for Rehearing at 10-14.

[78] Michigan Aligned Parties Request for Rehearing at 7-8.

[79] City of Escanaba Request for Rehearing at 11-12.

[80] *Id.* at 12 (citing *Indep. Energy Producers Ass'n v. Cal. Indep. Sys. Operator Corp.*, 128 FERC ¶ 61,165 at P 2 (2009) (citing *City of Anaheim*, 558 F.3d 521, 524 (D.C. Cir. 2009))).

iii. Commission Determination

37. We reject all rehearing arguments related to the establishment of effective dates for the SSR Cost Allocation Methodology and the ability of the Commission to order refunds of SSR costs back to those effective dates (i.e., April 3, 2014 for the Presque Isle SSR Units, April 16, 2014 for the Escanaba SSR Units, and June 15, 2014 for the White Pine SSR Unit) as beyond the scope of the current proceeding, which involves the Commission's prior acceptance of MISO's new study methodology. In the February 2015 Order, the Commission upheld the establishment of the effective dates and refund obligations while indicating that it would address implementation of the refund requirement for the Presque Isle, Escanaba, and White Pine SSR Units when the Commission has approved MISO's SSR Cost Allocation Methodology in its entirety and when MISO has filed a detailed refund report.[81] In this order, we approve MISO's SSR Cost Allocation Methodology in its entirety and, as discussed below, we direct MISO to file a detailed refund report within 45 days; thus, the Commission will address arguments related to the effective dates and refund obligations upon the filing of the refund report and upon addressing the requests for rehearing of the February 2015 Order.

d. SSR Cost Allocation Methodology

i. SSR Cost Allocation Compliance Order

38. In the SSR Cost Allocation Compliance Order, the Commission limited the application of the SSR

[81] February 2015 Order, 150 FERC ¶ 61,104 at P 93 n.231; SSR Cost Allocation Compliance Order, 152 FERC ¶ 61,216 at P 74.

Cost Allocation Methodology to the Presque Isle, Escanaba, and White Pine SSR Units.[82] The Commission rejected MISO's proposed Rate Schedule 43A determining that MISO was directed in the February 2015 Order to "submit an alternative methodology to the optimization-LBA approach specifically for the Presque Isle, Escanaba, and White Pine SSR Units."[83]

ii. Requests for Rehearing

39. The Michigan Aligned Parties argue that the Commission erred when it limited the application of MISO's revised SSR Cost Allocation methodology to only the Presque Isle, Escanaba, and White Pine SSR Units. The Michigan Aligned Parties contend that the Commission re-established a form of rate discrimination by rejecting MISO's proposed generally applicable Rate Schedule 43A and ordering MISO to incorporate its proposed SSR Cost Allocation Methodology directly into the rate schedules applicable to the Presque Isle, Escanaba, and White Pine SSR Units. The Michigan Aligned Parties argue that the Commission cannot establish a discriminatory rate without justification.[84]

iii. Commission Determination

40. We deny the Michigan Aligned Parties' request for rehearing, as we disagree with the Michigan Aligned Parties that by limiting the application of the SSR Cost Allocation Methodology to only the Presque Isle, Escanaba, and White Pine SSR Units we are establishing a discriminatory rate. As we stated in the SSR Cost Allocation Compliance Order, no findings

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[82] SSR Cost Allocation Compliance Order, 152 FERC ¶ 61,216 at PP 59-60.

[83] *Id.* P 59.

[84] Michigan Aligned Parties Request for Rehearing at 12-13.

were made as to whether the optimization-LBA approach outlined in MISO's Business Practice Manual, which was found to be inappropriate for the Presque Isle, Escanaba, and White Pine SSR Units, might produce just and reasonable cost allocations for other SSR Units.[85] Pursuant to the February 2015 Order, should MISO propose to apply the optimization-LBA approach in any future SSR rate schedule filings, MISO must address the concerns with that methodology identified in the February 2015 Order and show that that methodology or whatever other methodology it uses allocates SSR costs to those LSEs that require the operation of the SSR Unit for reliability purposes consistent with its Tariff.[86]

2. Compliance Matters

a. MISO's Compliance Filing

41. On October 8, 2015, MISO submitted its October Compliance Filing pursuant to the Commission's directives in the SSR Cost Allocation Compliance Order. MISO's October Compliance Filing addresses revisions to the methodology used by MISO to assign the costs associated with the Presque Isle,

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[85] SSR Cost Allocation Compliance Order, 152 FERC ¶ 61,216 at P 60.

[86] *See* February 2015 Order, 150 FERC ¶ 61,104 at P 86 n.210 (stating that "[w]e make no findings as to whether the BPM cost allocation methodology might produce just and reasonable cost allocations for other SSR Units. If MISO proposes to apply its BPM methodology in future filings, MISO must address the concerns with the methodology that we identify here and show that the methodology allocates SSR costs to those LSEs that require the operation of the SSR Unit for reliability purposes, such that assignment of costs is commensurate with the benefits received by such LSEs.").

Escanaba, and White Pine SSR Units and adds additional detail that was directed by the Commission.

42. Pursuant to the SSR Cost Allocation Compliance Order, MISO revised the placement of the SSR Cost Allocation Methodology, which was originally proposed to be part of Rate Schedule 43A. MISO submitted revisions incorporating the methodology originally described in Rate Schedule 43A into the rate schedules applicable to the Presque Isle, Escanaba, and White Pine SSR Units (Rate Schedules 43G, 43, and 43H, respectively).[87]

43. In addition, MISO revised the SSR Cost Allocation Methodology to include additional descriptions and adjustments to the methodology. MISO included a description of the calculation for load distribution factors in the new schedules under Step One, subsection "a," with an expanded description in a footnote to the same sub-section.[88] Also, MISO revised its SSR Cost Allocation Methodology to include a description of the Daily Load Weighting Factor and the aggregate load distribution factor. The Daily Load Weighting Factor description is in a footnote contained in Step Four, sub-section "a" of the methodology. The aggregate load distribution factor is located in a new sub-section within Step Four, which contains an equation that defines the term using the load distribution factors that are introduced in Step One of the cost allocation methodology.[89]

44. In response to the Commission's directives, MISO revised its SSR Cost Allocation Methodology to

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[87] MISO October Compliance Filing at 2.

[88] *Id.* at 2-3.

[89] *Id.* at 4.

remove the 80 percent threshold from the SSR cost allocation. In order to accomplish this, MISO deleted procedures that were originally proposed in Step One, sub-section "a", parts "iii" through "vii".[90] MISO also changed the references in its SSR Cost Allocation Methodology from "non-coincident peak volume" to "volume during the coincident peak hour" in Step Three of the cost allocation methodology.[91]

b. Protests

45. The City of Escanaba argues that the SSR Cost Allocation Methodology has not been shown to be just and reasonable. The City of Escanaba contends that the actual impacts on customers are not known and MISO has failed to demonstrate that its methodology accurately identifies beneficiaries of the applicable SSR Units. The City of Escanaba argues that the Commission should exercise its discretion to apply the new SSR Cost Allocation Methodology only on a prospective basis.[92]

46. The City of Escanaba submits that MISO has not changed its cost allocation on compliance. The City of Escanaba states that the underlying study results on affected EPNodes, cited in the October Compliance Filing, are the same results used in support of MISO's May Compliance Filing. The City of Escanaba argues that MISO has not provided an explanation for the results, as it appears that the results remain completely unchanged after removing the 80 percent cutoff.[93]

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[90] *Id.* at 3.

[91] *Id.*

[92] City of Escanaba Protest at 3-4.

[93] *Id.* at 4.

47. In addition, the City of Escanaba reiterates its objection to the proposed retroactive effective dates for the compliance rate schedules included in the October Compliance Filing. The City of Escanaba also suggests that the Commission order MISO to file a detailed refund report which specifically includes information on surcharges.[94]

48. The City of Escanaba and the Mines argue that MISO's October Compliance Filing is insufficiently detailed to adequately analyze whether MISO has indeed complied with the SSR Cost Allocation Compliance Order. The City of Escanaba states that MISO did not provide any substantive discussion or supporting testimony describing if any of the changes to the methodology had an impact on the results.[95] The Mines state that MISO's October Compliance Filing offers no supporting description that justifies MISO's use of the Daily Load Weighting Factor.[96]

49. The Mines argue that MISO's use of the Daily Load Weighting Factor contravenes the Commission's directive to allocate SSR Costs based on coincident system peak loads. The Mines contend that rather than carry the coincident peak approach throughout MISO's allocation formula, MISO inexplicably utilizes Daily Load Weighting Factor in Step Four of its proposed methodology to determine the portion of the Load Zone CPNode benefitting from the SSR for the billing month.[97]

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[94] *Id.* at 5.

[95] *Id.*

[96] The Mines Protest at 7.

[97] *Id.*

50. The Mines argue that Daily Load Weighting Factors are not well-suited for transmission allocations because they are a daily energy ratio based on state estimated data from real time operations. The Mines argue that a daily (24 hour) energy ratio from data supplied by the State Estimator in real time, without regard to whether such a period was during a system coincident peak load, is not an appropriate basis for SSR cost allocation because the purpose of the SSR Cost Allocation Methodology, as defined by the Commission, is to allocate costs to loads that benefit from the SSR operation during periods of system coincident peak loads.[98]

51. The Mines argue that a monthly coincident peak weighting factor is needed for each EPNode associated with the Load Zone CPNode in order to permit mapping of the monthly peak CPNode to the EPNodes in Step Four of MISO's proposed SSR cost allocation process. The Mines state that this approach will maintain synchronism throughout the totality of the SSR cost allocation process and consistency with other, traditional coincident peak-based cost allocations.[99]

52. The Michigan Commission argues that the formula set forth in MISO's October Compliance Filing is complicated and it is difficult to determine the end result allocation. The Michigan Commission argues that absent such end result, there is no basis for determining whether the SSR Cost Allocation Methodology produces a just and reasonable allocation of SSR costs. The Michigan Commission argues that in the October Compliance Filing, MISO explained that

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[98] *Id.* at 8.

[99] *Id.* at 9.

rather than using the coincident peak volume for the system, it has calculated the peak hour for purposes of determining actual energy withdrawal volumes based on the CPNodes that contain impacted load buses. The Michigan Commission argues that withdrawals at the CPNodes impacted by MISO's study do not necessarily correspond to the MISO system coincident peak. The Michigan Commission requests that the Commission facilitate the analysis and understanding of the SSR Cost Allocation Methodology by directing MISO to provide calculation of the actual coincident peak and the resulting allocation of SSR costs that would be produced by the new methodology.[100]

c. Commission Determination

53. We find that the October Compliance Filing complies with the directives of the SSR Cost Allocation Compliance Order. We accept Revised Tariff Schedule 43, to be effective June 15, 2014; Revised Tariff Schedule 43G, to be effective April 3, 2014; and Revised Tariff Schedule 43H, to be effective April 16, 2014. We direct MISO to file a detailed refund report within 45 days of the date of this order, including a description of how MISO intends to effectuate the payment of refunds to those LSEs that were over-charged under the optimization LBA-approach formerly used for the Presque Isle SSR Units, the Escanaba SSR Unit, and the White Pine SSR Unit.

54. We reject the City of Escanaba's and the Michigan Commission's arguments raising objections to the SSR Cost Allocation Methodology as a collateral attack on the SSR Cost Allocation Compliance Order. We note that we address above similar arguments

[100] Michigan Commission Protest at 3.

raised by City of Escanaba and the Michigan Commission raised on rehearing of the SSR Cost Allocation Compliance Order. We also reject the City of Escanaba's objection to the proposed retroactive effective dates for the Presque Isle, Escanaba, and White Pine SSR Units for the same reasons as discussed above in our determinations on similar requests for rehearing of the SSR Cost Allocation Compliance Order.

55. In response to the City of Escanaba's argument that MISO has not changed its cost allocation on compliance, we reaffirm that MISO complied with the directives of the SSR Cost Allocation Compliance Order, including the directive that MISO remove the 80 percent threshold, and the City of Escanaba's concern regarding the specific allocation of costs will be addressed when MISO files a detailed refund report.

56. We reject arguments that the October Compliance Filing is insufficiently detailed. We find that MISO has complied with Commission's directives to provide clarification and additional detail to the respective Tariff schedules.

57. Last, we reject arguments that MISO's use of the Daily Load Weighting Factor in Step Four of the SSR Cost Allocation Methodology contravenes the Commission's directives. The Commission directed MISO to use coincident peak rather than non-coincident peak and to explain the term Daily Load Weighting Factor to the extent it still exists in its revised Tariff, but did not direct MISO to remove the Daily Load Weighting Factor from Step Four of the methodology. Regarding the Mines' argument that a monthly coincident peak weighting factor is needed for each EPNode, the Mines should have raised this issue on rehearing of the SSR Cost Allocation Compliance

Order and we consider it a collateral attack on the SSR Cost Allocation Compliance Order. In any event, we interpret Schedule 43 as determining the EPNode Volume by multiplying the monthly peak for each CPNode by the Daily Load Weighting Factor for that corresponding monthly peak. Consequently, there is no inconsistency between use of the coincident peak CPNode data and the Daily Load Weighting Factor.

The Commission orders:

(A) We deny the requests for rehearing of the SSR Cost Allocation Compliance Order, as discussed in the body of this order.

(B) We accept Revised Tariff Schedule 43, to be effective June 15, 2014; Revised Tariff Schedule 43G, to be effective April 3, 2014; and Revised Tariff Schedule 43H, to be effective April 16, 2014; as discussed in the body of this order.

(C) We direct MISO to file a detailed refund report within 45 days of the date of this order, as discussed in the body of this order.

By the Commission. Commissioner Honorable is not participating.

(SEAL)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

156 FERC ¶ 61,205

Docket No.
EL14-34-003

PUBLIC SERVICE COMMISSION OF WISCONSIN

v.

MIDCONTINENT INDEPENDENT SYSTEM OPERATOR, INC.

Docket Nos.
ER14-1242-005
ER14-1243-007
ER14-1724-003
ER14-1725-003
ER14-2176-003
ER14-2180-003
ER14-2860-002
ER14-2862-002
ER14-2952-002
ER14-2952-005

MIDCONTINENT INDEPENDENT SYSTEM OPERATOR, INC.

Docket No.
EL15-7-001

MICHIGAN PUBLIC SERVICE COMMISSION

v.

MIDCONTINENT INDEPENDENT SYSTEM OPERATOR, INC.

(Issued September 22, 2016)

Before Commissioners: Norman C. Bay, Chairman; Cheryl A. LaFleur, Tony Clark

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ORDER ON REHEARING AND CLARIFICATION AND ORDER ON REFUND REPORT

1. On March 23, 2015, several parties requested rehearing and/or clarification of the Commission's February 19, 2015 order addressing several proceedings related to the refund of previously allocated costs associated with the operation of System Support Resource (SSR)[1] Units located in the American Transmission Company LLC (ATC) service territory under the MISO Tariff. In this order, we grant in part and dismiss as moot in part the requests for clarification, and deny the requests for rehearing. We also find that the refund reports submitted by MISO meet the Commission's requirements as stated in the May 3,

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

2016 order directing a refund report,[2] and direct MISO to provide parties that have submitted a non-disclosure certificate with a complete, un-redacted copy of the refund reports. However, we direct MISO to suspend refunds for certain SSR Units and file an updated refund report when the Commission issues an order on the Initial Decision in Docket No. ER14-1242-006, *et al*.

I. Background

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

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[2] *Midcontinent Indep. Sys Operator, Inc.*, 155 FERC ¶ 61,134, at P 37 (2016) (May 2016 Order).

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

SSR agreement filed with the Commission, a separate rate schedule must be filed to provide for recovery of the costs identified in the SSR agreement, in accordance with the SSR cost allocation provision in section 38.2.7.k of MISO's Tariff.

3. On July 25, 2012, in Docket No. ER12-2302-000, MISO submitted proposed Tariff revisions regarding the treatment of resources that submit Attachment Y Notices. On September 21, 2012, the Commission conditionally accepted MISO's proposed Tariff revisions effective September 24, 2012, subject to two compliance filings due within 90 and 180 days of the date of the order.[4] On July 22, 2014, the Commission accepted MISO's compliance filing, subject to condition.[5] On December 17, 2015, the Commission issued an order on rehearing and accepted MISO's further compliance filing, subject to condition.[6] On June 16, 2016, the Commission issued an order accepting in part and rejecting in part MISO's further compliance filing, subject to the outcome of Docket No. ER16-521.[7]

4. On January 31, 2014, MISO filed an SSR Agreement (in Docket No. ER14-1242-000) (Presque Isle SSR Agreement) and Rate Schedule 43G (in Docket No. ER14-1243-000) for Presque Isle Units

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[4] *Midwest Indep. Transmission Sys. Operator, Inc.*, 140 FERC ¶ 61,237 (2012), *order on compliance*, 148 FERC ¶ 61,056 (2014) (SSR Compliance Order).

[5] SSR Compliance Order, 148 FERC ¶ 61,056.

[6] *Midwest Indep. Transmission Sys. Operator, Inc.*, 153 FERC ¶ 61,313 (2015).

[7] *Midwest Indep. Transmission Sys. Operator, Inc.,* 155 FERC ¶ 61,274 (2016).

5-9,[8] which are located in the ATC service territory within MISO. Rate Schedule 43G allocated the costs of the Presque Isle SSR Units to all load-serving entities (LSEs) within the ATC footprint on a *pro rata* basis, consistent with language in section 38.2.7.k of MISO's Tariff as it then existed. This cost allocation methodology allocated most costs to Wisconsin ratepayers, who constitute the bulk of load in the ATC footprint. On April 1, 2014, the Commission accepted the Presque Isle SSR Agreement and Rate Schedule 43G for filing, suspended them for a nominal period, to be effective February 1, 2014, subject to refund and subject to further Commission order.[9]

5. On April 3, 2014, in Docket No. EL14-34-000, the Public Service Commission of Wisconsin (Wisconsin Commission) submitted a complaint (Wisconsin Commission Complaint) pursuant to sections 206 and 306 of the Federal Power Act (FPA)[10] and Rule 206 of the Commission's Rules of Practice and Procedure.[11] The Wisconsin Commission alleged that the ATC SSR *pro rata* cost allocation provision in section 38.2.7.k of MISO's Tariff was unjust, unreasonable, and unduly discriminatory or preferential, in itself and as applied in Rate Schedule 43G.[12] The Wisconsin Commission stated that, according to a preliminary load-shed

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[8] Presque Isle Units 5-9 are located in Marquette, Michigan and provide up to 344 MW of capacity. *See* MISO SSR Agreement Filing, Docket No. ER14-1242-000, Transmittal Letter, at 2 (filed Jan. 31, 2014).

[9] *Midcontinent Indep. Sys. Operator, Inc.*, 147 FERC ¶ 61,004 (2014).

[10] 16 U.S.C. §§ 824e, 825e (2012).

[11] 18 C.F.R. § 385.206 (2016).

[12] Wisconsin Commission Complaint, Docket No. EL14-34-000, at 4 (filed Apr. 3, 2014).

study conducted by MISO, the majority of the costs associated with the Presque Isle SSR Units would be allocated to LSEs in Wisconsin, even though Wisconsin LSEs would not receive the majority of the reliability benefits associated with the units.[13]

6. On July 29, 2014, the Commission granted the Wisconsin Commission Complaint and found that the ATC SSR *pro rata* cost allocation provision was unjust, unreasonable, unduly discriminatory, or preferential because, as demonstrated in the application of the provision under Rate Schedule 43G, it did not follow cost causation principles.[14] The Commission directed MISO to remove the ATC SSR *pro rata* cost allocation provision from section 38.2.7.k of its Tariff, thereby extending to the ATC footprint the general SSR cost allocation Tariff language, which requires MISO to allocate SSR costs to "the LSE(s) which require(s) the operation of the SSR Unit for reliability purposes."[15] The Commission also required MISO to conduct a final load-shed study and submit a compliance filing to align the allocation of Presque Isle SSR Unit costs with the Commission's determination.[16] Additionally, the Commission directed MISO to refund, with interest, any Presque Isle SSR Unit costs allocated to LSEs from April 3, 2014 (the date of the Wisconsin Commission Complaint) until the date of the Wisconsin Commission Complaint Order that were in excess of

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[13] *Id.* at 14.

[14] *Midcontinent Indep. Sys. Operator, Inc.*, 148 FERC ¶ 61,071, at PP 59-61 (2014) (Wisconsin Commission Complaint Order).

[15] *Id.* P 66.

[16] *Id.* P 118.

the costs to be allocated to those LSEs under MISO's final load-shed study.[17] The Commission stated that:

> [t]he Commission's general policy when ordering changes to a cost allocation or rate design under section 206 of the FPA is that such changes be implemented prospectively, without refunds. However, the Commission has broad equitable discretion in determining whether and how to apply remedies in any particular case. Based on the record in this proceeding, we find it appropriate to exercise our discretion in fashioning remedies and order refunds as of the date the [Wisconsin Commission Complaint] was filed. First, we note that the revised cost allocation does not represent a new cost allocation methodology, but rather conforms the allocation of SSR costs in the ATC footprint to the existing methodology applied throughout the rest of the MISO region. Furthermore, the costs at issue in this case are limited to those associated with a single SSR Unit, to be allocated among a defined set of customers within a limited geographic area, for a limited period of less than four months. Finally, these refunds will not require broader adjustments to MISO's markets.[18]

In compliance with the Commission's directives in the Wisconsin Commission Complaint Order, MISO filed revisions to update the cost allocation methodology in Rate Schedule 43G in order to allocate SSR costs to LSEs that require the SSR Unit for reliability

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[17] *Id.* P 68.

[18] *Id.* P 66 (citations omitted).

purposes.[19] MISO's practice in implementing its general SSR cost allocation methodology at the time relied on Local Balancing Authority (LBA) boundaries. MISO explained that its Transmission Planning Business Practice Manual (BPM)[20] provided that it first allocate costs to LBAs using an optimal load-shed methodology to determine the reliability benefits of the SSR Units to each MISO LBA.[21] MISO explained that these load shed values for each North American Electric Reliability Corporation (NERC) contingency are organized by LBA and accumulated to determine the total load shed for each LBA along with the corresponding cost share ratio. The costs are then allocated to LSEs within each LBA based upon peak usage of transmission facilities in each month, as determined by each LSE's actual energy withdrawals during the monthly peak hour for each LBA (the optimization-LBA methodology). The load-shed ratios proposed by MISO under the revised Presque Isle Rate Schedule 43G allocated over 93 percent of the Presque Isle SSR costs to the Wisconsin Electric LBA.

7. During the Commission's consideration of requests for rehearing of the Wisconsin Commission Complaint Order, the NERC approved a proposal by Wisconsin

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[19] *See* MISO Revised Rate Schedule 43G Filing, Docket No. ER14-1242-000 (filed Aug. 11, 2014); MISO Revised Rate Schedule 43G Filing, Docket No. ER14-2862-000 (filed Sept. 12, 2014).

[20] MISO Transmission Planning Business Practices Manual, BPM-020-r10 (dated Apr. 10, 2014) at § 6.2.6 (System Support Resource Agreement Cost Allocation Methodology), https://www.misoenergy.org/Library/BusinessPracticesManuals/Pages/BusinessPractices Manuals.aspx.

[21] *See* MISO Revised Rate Schedule 43G Filing, Docket No. ER14-1242-000, Tab C (Presque Isle SSR Cost Allocation Analysis Results) (filed Aug. 11, 2014).

Electric Power Company (Wisconsin Electric) to split the Wisconsin Electric LBA in two, one covering Wisconsin and one covering the Upper Peninsula of Michigan. In recognition of the upcoming split of the Wisconsin Electric LBA, MISO proposed, in Docket No. ER14-2952-000, to apply its general SSR cost allocation methodology to recover the costs not only for the Presque Isle SSR Unit, but also for other SSR Units located in the ATC footprint: White Pine SSR Unit No. 1 (the White Pine SSR Unit)[22] and the Escanaba SSR Units.[23] Using the optimization-LBA methodology outlined in the BPM, the newly-constituted Michigan Upper Peninsula LBA would have been allocated the majority of SSR costs.

8. On February 19, 2015, the Commission granted clarification of and denied rehearing of the Wisconsin Commission Complaint Order. The Commission affirmed its finding that it is unjust, unreasonable, unduly discriminatory, or preferential for MISO to allocate SSR costs on a *pro rata* basis to all LSEs in the ATC footprint and that SSR costs must instead be allocated to the LSEs that require the operation of the

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[22] The White Pine SSR Unit is a generator turbine located in White Pine, Michigan within the ATC footprint with a nameplate capacity of 20 MW and is operated under an SSR agreement and Rate Schedule 43H between MISO and White Pine Electric Power, LLC. *See* MISO White Pine SSR Agreement Filing, Docket No. ER14-1724-000, Transmittal Letter, at 2 (filed Apr. 15, 2014).

[23] The Escanaba SSR Units are located in Escanaba, Michigan within the ATC footprint and are rated at approximately 12.5 MW each. The Escanaba SSR Units were operated under an SSR agreement and Rate Schedule 43 between MISO and the City of Escanaba, Michigan. *See* MISO Escanaba SSR Agreement Filing, Docket No. ER14-2176-000, Transmittal Letter, at 2 (filed June 13, 2014).

SSR Units for reliability purposes.[24] The Commission rejected arguments that there was evidence in the record to support an allocation of the majority of Presque Isle SSR Unit costs to Wisconsin customers; specifically, Integrys cited to a retail rate allocator used by Wisconsin Electric that allocated the majority of Wisconsin Electric's embedded costs of generation to its Wisconsin customers.[25] The Commission found that retail rate treatment is not relevant to setting the just and reasonable level of compensation for Commission-jurisdictional service provided by an SSR Unit under the MISO Tariff. The Commission also found that it need not address Integrys' argument that Wisconsin Electric is double-recovering SSR costs, because Wisconsin Electric's retail rates were not before the Commission, as such retail rates fall within the relevant state commissions' jurisdiction.

9. The Commission granted clarification of the Wisconsin Commission Complaint Order and found that MISO's optimization-LBA cost allocation methodology, when applied to the allocation of SSR costs associated with SSR Units located in the ATC footprint (the Presque Isle SSR Units, the Escanaba SSR Units, and the White Pine SSR Unit), failed to allocate SSR costs directly to the LSEs that benefit from those SSR Units.[26] The Commission found that the optimization-LBA methodology: (1) did not adequately identify the LSEs that require the operation of the Presque Isle, Escanaba, and White Pine SSR Units;[27]

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[24] *Midcontinent Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,104, at PP 73-79 (2015) (February 2015 Order).

[25] *Id.* P 75.

[26] *Id.* PP 83-86.

[27] *Id.* P 83.

(2) may result in the allocation of costs to LSEs that do not benefit from SSR Units; and (3) appears to be insufficient on its own to provide an all-inclusive identification of load that can be reasonably expected to benefit from the operation of the SSR Units under every circumstance.[28]

10. Due to the shortcomings of MISO's general SSR cost allocation practice as applied to the SSR Units in the ATC footprint, the Commission directed MISO to file a new study methodology that would allocate the costs associated with the Presque Isle, Escanaba, and White Pine SSR Units directly to benefitting LSEs, as required by MISO's Tariff.[29] The Commission stated that MISO should submit a study methodology that identifies the LSEs that require the operation of the SSR Units for reliability purposes under conditions that are more representative of actual manual and/or automatic responses taken during reliability events, rather than the ideal conditions that are used by MISO in the optimal load-shed study, and that determines the SSR benefits of specific LSEs based on their actual energy withdrawals at elemental pricing nodes.[30] The Commission directed MISO to submit Tariff revisions adjusting the SSR cost allocation under the rate schedules associated with the Presque Isle, Escanaba, and White Pine SSR Units in accordance with the new study methodology, with such revisions effective as follows: on April 3, 2014 for the Presque Isle SSR Units; on June 15, 2014 for the

[28] *Id.* PP 85, 86.

[29] *Id.* PP 86, 89.

[30] *Id.* PP 86, 87.

Escanaba SSR Units; and on April 16, 2014 for the White Pine SSR Unit.[31]

11. The Commission also rejected requests for rehearing of its finding in the Wisconsin Commission Complaint Order that refunds of Presque Isle SSR costs be calculated back to the refund effective date of April 3, 2014.[32] The Commission noted that several parties challenged the justifications for refunds, but the Commission affirmed its prior findings and reiterated that the parties had reasonable notice that MISO's allocation of Presque Isle SSR costs might be held unjust or unreasonable as of the filing of the Wisconsin Commission Complaint on April 3, 2014 and the setting of that filing date as the refund effective date. The Commission similarly found it appropriate to continue to order refunds of SSR costs associated with the White Pine and Escanaba SSR Units because: (1) those SSR agreements took effect

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[31] *Id.* P 89. The effective dates for the White Pine and Escanaba SSR Units aligned with the effective dates of the respective SSR Agreements and rate schedules accepted subject to condition by the Commission, while the effective date for the Presque Isle SSR Units aligned with the refund effective date set in the Wisconsin Commission Complaint Order. *See* Wisconsin Commission Complaint Order, 148 FERC ¶ 61,071 at P 68; *Midcontinent Indep. Sys. Operator, Inc*., 148 FERC ¶ 61,116, at PP 37-38 (2014) (ordering refunds of any Escanaba SSR costs allocated to LSEs under Rate Schedule 43 from June 15, 2014 until the date of the order that were higher than the costs to be allocated to those LSEs according to a forthcoming load-shed study); *Midcontinent Indep. Sys. Operator, Inc*., 148 FERC ¶ 61,136, at PP 44-45 (2014) (ordering refunds of any White Pine SSR costs allocated to LSEs under Rate Schedule 43H from April 16, 2014 until the date of the order that were higher than the costs to be allocated to those LSEs according to a forthcoming load-shed study).

[32] February 2015 Order, 150 FERC ¶ 61,104 at P 90.

after the Wisconsin Commission Complaint was filed; (2) the SSR Units shared common characteristics with the Presque Isle SSR Units; and (3) the SSR Units applied the same ATC SSR *pro rata* cost allocation methodology that was found to be unjust and unreasonable in the Wisconsin Commission Complaint Order.[33] Therefore, the Commission continued to require MISO to refund any White Pine SSR costs allocated to LSEs that were higher than the costs to be allocated to those LSEs according to the forthcoming study for the White Pine SSR Unit, with such refunds to begin April 16, 2014.[34] The Commission also continued to require MISO to refund any Escanaba SSR costs allocated to LSEs that were higher than the costs to be allocated to those LSEs according to the forthcoming study for the Escanaba SSR Units, with such refunds to begin June 15, 2014.[35] The Commission stated that implementation of the refund requirements for these SSR Units would be addressed in a future order addressing MISO's new study methodology. The Commission also stated that other issues raised in the rehearing requests with respect to refunds are more appropriately addressed once the Commission has addressed MISO's new study methodology and MISO has filed a detailed refund report.[36]

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[33] *Id.* P 93.

[34] *Id.* The Commission noted that the effective date for the required revision aligned with the effective date of the SSR agreement and rate schedule ordered by the Commission in Docket No. ER14-1725-000.

[35] *Id.* The Commission noted that the effective date for the required revision aligned with the effective date of the SSR agreement and rate schedule ordered by the Commission in Docket No. ER14-2180-000.

[36] *Id.* n.231.

12. On September 17, 2015, the Commission accepted MISO's proposed SSR cost allocation methodology, subject to condition and subject to MISO submitting a further compliance filing, finding that the methodology generally complied with the directives of the February 2015 Order.[37] The Commission rejected all arguments relating to the ability of the Commission to order refunds of SSR costs as beyond the scope of compliance with the February 2015 Order. The Commission also determined that it would not address implementation of the refund requirement for the Presque Isle, Escanaba, and White Pine SSR Units until MISO's SSR cost allocation methodology is approved in its entirety and MISO has filed a detailed refund report.[38]

13. On May 3, 2016, the Commission accepted MISO's revised SSR cost allocation methodology.[39] The Commission directed MISO to file a detailed refund report within 45 days of the date of the order, including a description of how MISO intends to effectuate the payment of refunds to those LSEs that were overcharged under the optimization-LBA cost allocation methodology formerly used for the Presque Isle SSR Units, the Escanaba SSR Unit, and the White Pine SSR Unit. The Commission rejected all rehearing arguments related to the establishment of effective dates for the SSR cost allocation methodology and the ability of the Commission to order refunds of SSR costs back to those effective dates (i.e., April 3, 2014 for the Presque Isle SSR Units, April 16, 2014 for the

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[37] *Midcontinent Indep. Sys. Operator, Inc.*, 152 FERC ¶ 61,216 (2015).

[38] *Id.* P 74.

[39] May 2016 Order, 155 FERC ¶ 61,134 at P 53.

Escanaba SSR Units, and June 15, 2014 for the White Pine SSR Unit) as beyond the scope of the proceeding accepting MISO's new study methodology.[40] The Commission stated that, as MISO's SSR cost allocation methodology is now approved in its entirety and MISO has been directed to file a detailed refund report, the Commission would address arguments related to the effective dates and refund obligations upon the filing of the refund report and upon addressing the requests for rehearing of the February 2015 Order.[41]

14. On June 14, 2016, in Docket No. ER14-2952-005, MISO submitted a detailed refund report (Refund Report) as directed by the Commission in public and non-public versions. The non-public Refund Report includes a refund table containing the amounts to be refunded to some entities and amounts to be charged to others due to the reallocation of SSR costs for the Presque Isle, Escanaba, and White Pine SSR Units; the table provides monthly calculations, by affected LSE and by SSR Agreement.[42] These amounts include the difference between the cost allocation methodologies and an estimated interest amount. MISO notes that it will submit the final statement of such interest amounts in a filing following conclusion of the resettlement process. MISO states that the monthly table of refunds/charges and interest calculations are redacted from the public report because this level of detail provides insight into monthly load patterns, and therefore this information qualifies as business

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[40] *Id.* P 37.

[41] *Id.* P 53.

[42] Refund Report, Docket No. ER14-2952-005, Transmittal Letter at, 2-3 (filed June 14, 2016).

confidential information that is subject to the protections of section 38.9.1 of the MISO Tariff (Access by Market Participants and Others).[43] The effective period for refunds under the Refund Report are April 3, 2014 to January 31, 2015 for the Presque Isle SSR Units, June 15, 2014 to June 14, 2015 for the Escanaba SSR Units, and April 16, 2014 to April 15, 2015 for the White Pine SSR Unit.[44] MISO states that it will undertake the resettlement in 14 monthly statements, as the payment of SSR costs under the Presque Isle, Escanaba, and White Pine SSR Agreements would normally have been paid over a 14.5 month period (April 3, 2014 to June 14, 2015), with the first installment beginning July 8, 2016.

15. On June 15, 2016, in Docket No. ER14-2952-005, in connection with the non-public version of the Refund Report, MISO filed a proposed protective agreement pursuant to 18 C.F.R. § 388.112(b)(2)(i) (2016) (Protective Agreement).[45]

16. On July 20, 2016, MISO made an errata filing to correct certain values contained in the Refund Report, continuing the treatment of the monthly refund table as business confidential information and including a proposed protective agreement (Errata Refund Report).[46]

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[43] *Id.* at 3.

[44] *Id.* at 4.

[45] MISO Supplemental Protective Agreement Filing, Docket No. ER14-2952-005 (filed June 15, 2016) (Protective Agreement Filing).

[46] MISO Errata Refund Report Filing, Docket No. ER14-2952-005 (filed July 20, 2016).

II. Notice and Responsive Pleadings

17. Notice of the Refund Report was published in the *Federal Register*, 81 Fed. Reg. 39,920 (2016), with interventions and protests due on or before July 5, 2016. Notice of the Protective Agreement Filing was published in the *Federal Register*, 81 Fed. Reg. 40,692 (2016), with interventions and protests due on or before July 6, 2016. Notice of the Errata Refund Report was published in the *Federal Register*, 81 Fed. Reg. 50,607 (2016), with interventions and protests due on or before August 10, 2016.

18. On June 20, 2016, Wisconsin Electric and the Wisconsin Public Service Corporation (together, the Wisconsin Parties) filed a protest and objection to the disclosure of confidential information pursuant to the Protective Agreement Filing. They filed an amended protest on June 21, 2016. On July 1, the Michigan Aligned Parties[47] filed an answer in support of the Protective Agreement Filing. On August 1, 2016, the Wisconsin Parties filed an answer to the Michigan Aligned Parties' answer.

19. Timely protests of the Refund Report were filed by: the City of Escanaba, Michigan (the City of Escanaba); the Marquette Board of Light and Power (Marquette); Cloverland; Constellation Energy Services, Inc. (Constellation Energy); the Michigan Commission, the Michigan Agency for Energy, and

[47] For the purposes of this order, the Michigan Aligned Parties are: The Michigan Public Service Commission (Michigan Commission); Tilden Mining Company L.C. and Empire Iron Mining Partnership (together, the Mines); Cloverland Electric Cooperative (Cloverland); Verso Corporation (Verso); the City of Mackinac Island; The Sault Ste. Marie Tribe of Chippewa Indians (the Tribe); and Upper Peninsula Power Company (UPPCo).

Michigan Attorney General Bill Schuette (together, the Joint Michigan Parties); UPPCo; the Michigan Aligned Parties; and the Michigan Commission. The Wisconsin Commission filed timely comments in support of the Refund Report.

20. Motions for leave to answer and answer to the protests of the Refund Report were filed by: MISO; the Wisconsin Commission; and WPPI Energy. The Michigan Commission and the Michigan Aligned Parties filed a motion to answer the Wisconsin Commission's answer. The Citizens Utility Board of Wisconsin and the Wisconsin Industrial Energy Group filed a motion to answer the Michigan Commission and the Michigan Aligned Parties' answer. The Michigan Commission and the Michigan Aligned Parties filed an answer in opposition to the Citizens Utility Board of Wisconsin and the Wisconsin Industrial Energy Group's answer.

III. Requests for Rehearing and Clarification

21. Requests for clarification and rehearing of the February 2015 Order were filed by the Michigan Commission and the City of Escanaba. Requests for rehearing were filed by: Integrys Energy Services, Inc. (Integrys); the Mines; the City of Mackinac Island; and the Tribe.

22. The City of Escanaba filed a limited request for clarification or, in the alternative, rehearing, along with a limited motion to intervene out of time in Docket Nos. ER14-1724 and ER14-1725 (addressing White Pine SSR costs). The City of Escanaba states that good cause exists to grant the out-of-time intervention because the February 2015 Order raises issues across multiple proceedings, and the City of

Escanaba is a party to all other captioned dockets.[48] The City of Escanaba agrees to accept the record in Docket Nos. ER14-1724 and ER14-1725 as it stands, and does not seek to delay the proceeding.

A. Requests for Clarification and Requests for Rehearing of the SSR Cost Allocation Methodology

23. The City of Escanaba asks the Commission to clarify that it did not intend to categorically reject all use of an optimal load-shed methodology or the use of LBA boundaries in identifying the LSEs that require the SSR Units for reliability, if necessary to produce just and reasonable results.[49] If such clarification is not granted, the City of Escanaba requests rehearing of the Commission's categorical rejection, as it argues that MISO should not be prevented from using tools that may lead to a just and reasonable allocation of SSR costs.[50]

24. The Michigan Commission asks for clarification that the Commission did not make a finding in the February 2015 Order that the new study methodology ordered by the Commission will result in a just and reasonable and not unduly discriminatory allocation of SSR costs, as the Michigan Commission argues that an analysis of the new study is needed to make this determination.[51] The Michigan Commission also

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[48] Limited Request for Clarification or, in the Alternative, Rehearing, and Limited Motion to Intervene Out of Time of the City of Escanaba, Michigan, Docket No. EL14-34-001, *et al*., at 5 (filed Mar. 23, 2015).

[49] *Id.* at 3.

[50] *Id.* at 4.

[51] Motion for Clarification or, in the Alternative, Request for Rehearing of the Michigan Public Service Commission, Docket

expresses concern regarding the Commission's directive to include in the new study methodology conditions that are more representative of actual responses taken during reliability events and to use energy withdrawals at elemental pricing nodes. The Michigan Commission argues that such a governing standard may not account for possible extreme events.[52] The Michigan Commission asks the Commission to clarify that parties are not prohibited from responding to MISO's proposed study methodology and proposing revisions or alternate methodologies to identify the LSEs that require the operation of the SSR Units for reliability.[53] The Michigan Commission further asks the Commission to clarify that its rejection of requests for a hearing on issues related to MISO's optimal load-shed study is without prejudice to any such requests for a hearing on issues related to MISO's new study methodology.[54]

25. To the extent the Commission rejects its requested clarifications with respect to the SSR cost allocation methodology, the Michigan Commission requests rehearing. The Michigan Commission states that the Commission erred by finding, prior to MISO's compliance filing, that the new study methodology ordered in the February 2015 Order will avoid the deficiencies of MISO's optimal load-shed study and

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No. EL14-34-001, *et al*., at 5 (filed Mar. 23, 2015) (Michigan Commission Request for Rehearing).

[52] *Id.* at 5-6.

[53] *Id.* at 6-8.

[54] *Id.* at 9-10.

produce a just, reasonable and not unduly discriminatory allocation of SSR costs.[55] The Michigan Commission argues that the Commission erred by directing MISO to submit a new study methodology for allocating SSR costs without allowing interested parties to submit alternative allocation methodologies for consideration.[56] The Michigan Commission contends that the Commission erred by finding that a hearing is unnecessary to resolve issues related to MISO's new study methodology.[57]

26. The Michigan Commission seeks clarification that the Commission's denial of requests for rehearing of the refund effective dates for the Presque Isle, Escanaba, and White Pine SSR Units constitutes a final order applicable to the effective dates of refunds under the new study methodology.[58] The Michigan Commission notes that the Commission rejected requests for rehearing of the April 3, 2014 refund effective date for Presque Isle SSR costs, and also directed MISO to submit revisions adjusting SSR cost allocations for the Escanaba and White Pine SSR Units, to be effective on dates aligning with the effective dates of previous compliance filings ordered by the Commission for the Escanaba and White Pine SSR Units. The Michigan Commission requests clarification that the Commission's directive for MISO to file Tariff sheets with retroactive refund dates for the Presque Isle, Escanaba, and White Pine SSR Units does not constitute a new finding, but simply restates the previous application of the same refund effective

[55] *Id.* at 13-14.

[56] *Id.* at 14-15.

[57] *Id.* at 16.

[58] *Id.* at 10.

dates in the Wisconsin Commission Complaint Order and the related orders addressing compliance filings for the White Pine and Escanaba SSR Units.[59] Absent such clarification, the Michigan Commission seeks rehearing of such refund effective dates, as described below.

B. Requests for Rehearing: Compensation for SSR Service

27. The Mines state that the Presque Isle SSR costs included in the SSR rates are the same Presque Isle SSR costs included in Wisconsin Electric's 2014 retail rates, such that Wisconsin Electric is double-recovering the Wisconsin share of its Presque Isle SSR costs.[60] The Mines, the City of Mackinac Island, and the Sault Ste. Marie Tribe of Chippewa Indians argue that the Commission erred when it refused to consider the implications of Wisconsin Electric's double-recovery of SSR costs on the justness and reasonableness of MISO's Presque Isle SSR rates.[61] The Mines argue that the Commission cannot assume that the Wisconsin Commission has the power to retroactively alter Wisconsin Electric's 2014 retail rates to avoid double-recovery; indeed, the Mines state that such a retroactive alteration of retail rates would violate the general prohibition against retroactive

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[59] *Id.* at 11.

[60] Request for Rehearing of Tilden Mining Company L.C. and Empire Iron Mining Partnership, Docket No. ER14-1242-000, *et al.*, at 5-7 (filed Mar. 23, 2015) (The Mines Request for Rehearing).

[61] *Id.*; The City of Mackinac Island's Request for Rehearing, Docket No. ER14-1242-002, *et al.*, at 3 (filed Mar. 23, 2015); The Sault Ste. Marie Tribe of Chippewa Indians' Request for Rehearing, Docket No. ER14-1242-002, *et al.*, at 2-3 (filed Mar. 23, 2015).

ratemaking.[62] In failing to consider whether the SSR rates allowed Wisconsin Electric to double-recover Presque Isle SSR costs, the Mines contend that the Commission abdicated its statutory authority to assure that federally-regulated electric rates are just and reasonable.[63]

28. The Mines cite to *FPC v. Conway Corp.*[64] for the proposition that the Commission must consider all factors relevant to the justness and reasonableness of rates.[65] The Mines state that in that case, the Supreme Court required the Commission to consider the relation between retail and wholesale rates in setting just and reasonable wholesale rates, and to generally examine the entire context on which the wholesale rate will function.[66]

C. Requests for Rehearing: Refunds

29. The Michigan Commission and Integrys state that the Commission erred by imposing retroactive refunds associated with a new cost allocation method, as its decision was inconsistent with the Commission's policy to avoid retroactive implementation of rate design changes.[67] The Michigan Commission argues that the Commission has traditionally declined to order refunds where the company has collected the

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[62] The Mines Request for Rehearing at 8-9.

[63] *Id.* at 10-11.

[64] 426 U.S. 271 (1976).

[65] The Mines Request for Rehearing at 11.

[66] *Id.* at 11-12 (citing *FPC v. Conway Corp.*, 426 U.S. 271, 277-278, 280 (1976)).

[67] *Id.*; Request for Rehearing of Integrys Energy Services, Inc., Docket No. ER14-1242-000, *et al.*, at 11-13 (filed Mar. 23, 2015) (Integrys Request for Rehearing).

proper level of revenues, but it is later determined that these revenues should have been allocated differently.[68] The Michigan Commission argues that the filed rate doctrine protects ratepayers from paying retroactive surcharges, and that section 206 of the FPA authorizes only retroactive refunds and not retroactive surcharges.[69] The Michigan Commission states that, if the February 2015 Order is construed to require not just retroactive refunds, but retroactive surcharges, the February 2015 Order constitutes an unlawful surcharge on Michigan ratepayers.[70]

30. The Michigan Commission and Integrys state that there was no basis for the Commission's finding that retroactive refunds of Presque Isle SSR costs back to April 3, 2014 are warranted because the revised cost allocation methodology is not a new methodology, but rather conforms the allocation of SSR costs in the ATC footprint to the existing methodology applied throughout the rest of MISO.[71] They state that the February 2015 Order unambiguously directed a revised study method that did not exist, and ordered it to apply retroactively. In addition, the Michigan Commission states that there was no basis for the Commission's finding that parties had reasonable notice that MISO's allocation of Presque Isle SSR costs might be changed, because the parties only had notice

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[68] Michigan Commission Request for Rehearing at 16-17.

[69] *Id.* at 17-18 (citing *Occidental Chemical Corp. v. PJM Interconnection, L.L.C. and Delmarva Power & Light Co.*, 110 FERC ¶ 61,378, at P 10 (2013); *City of Anaheim, California v. FERC*, 558 F.3d 521 (D.C. Cir. 2009) (*City of Anaheim*)).

[70] *Id.* at 18.

[71] *Id.* at 19 (citing February 2015 Order, 150 FERC ¶ 61,104 at P 90); Integrys Request for Rehearing at 13.

that MISO's existing SSR cost allocation methodology might be applied to the ATC footprint.[72]

31. Integrys asserts that there was no basis for the Commission's conclusion that refunds are justified because the SSR costs to be refunded are limited to a single SSR Unit and allocated among a defined set of customers for a limited period of time.[73] Integrys notes that the retroactive application of the new rate design methodology affects three SSR Units, and even though there is a defined set of customers affected, the impact of the challenges in effectuating the revised cost allocation is significant. Integrys further notes that, at the time of its request for rehearing, MISO had not yet submitted its compliance filing proposing a new study methodology, and the initial four-month refund period is likely to be over 18 months.[74] The Michigan Commission states that the Commission should reverse its retroactive allocation of SSR costs for the Presque Isle, Escanaba, and White Pine SSR Units and require allocation under MISO's new methodology to become effective the date of issuance of an order approving the new methodology.[75]

32. Integrys argues that retroactive application of the new rate design is unjust and unreasonable because it creates market uncertainty, such that when market rules change after the transactions are entered, sellers' expectations in such transactions can be detrimentally impacted.[76] Integrys states that

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[72] Michigan Commission Request for Rehearing at 19-20.

[73] Integrys Request for Rehearing at 14 (citing February 2015 Order, 150 FERC ¶ 61,104 at P 91).

[74] *Id.* at 17.

[75] Michigan Commission Request for Rehearing at 20.

[76] Integrys Request for Rehearing at 16.

Commission policy is clear – it will not order refunds when doing so would change the economic and commercial expectations of market participants with respect to their transactions which they cannot undo.[77] Integrys notes that retroactive re-billing and reassessment of rates is particularly difficult for LSEs like Integrys that provide competitive retail services, because these entities must be able to reasonably rely on the effectiveness of tariffs and business practice manuals.[78]

IV. Discussion

A. Procedural Matters

33. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2016), the Commission will grant the City of Escanaba's late-filed motion to intervene in Docket Nos. ER14-1724 and ER14-1725. 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 granting such late intervention.[79] We find that the City of Escanaba has met this higher burden of justifying late intervention.

34. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 358.213(a)(2)

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[77] *Id.* (citing *New York Indep. Sys. Operator, Inc.*, 92 FERC ¶ 61,073, at 61,307 (2000) (*NYISO*), *reh'g denied,* 97 FERC ¶ 61,154, at 61,673 (2001); *Ameren Services Co.*, 127 FERC ¶ 61,121, at P 155 (2009) (*Ameren*)).

[78] *Id.* at 17.

[79] *See, e.g., Midwest Indep. Transmission Sys. Operator, Inc.*, 102 FERC ¶ 61,250, at P 7 (2003).

(2016), prohibits an answer to a protest or an answer unless otherwise ordered by the decisional authority. We accept the answers because they have assisted us with our decision-making process.

B. Substantive Matters

1. Requests for Clarification and Requests for Rehearing of the SSR Cost Allocation Methodology

35. We grant the City of Escanaba's request for clarification that the Commission did not intend to categorically reject all use of an optimal load-shed methodology or the use of LBA boundaries in identifying the LSEs that require the SSR Units for reliability within MISO. The Commission found in the February 2015 Order that, for the SSR Units at issue in MISO's ATC footprint, the optimization-LBA cost allocation methodology was not shown to produce SSR cost allocation results that were just and reasonable and not unduly discriminatory.[80] The Commission further stated that, if any party proposes in the future to use an optimal load-shed methodology or LBA boundaries in allocating SSR costs, the party must show that such a method allocates costs directly to those LSEs that benefit from operation of the SSR Units, as required by MISO's Tariff.[81]

36. We dismiss as moot the Michigan Commission's requests for clarification and rehearing related to (1) whether the February 2015 Order prejudged the justness and reasonableness of MISO's proposed study methodology and (2) whether the Michigan Commission was precluded from addressing its concerns with

[80] February 2015 Order, 150 FERC ¶ 61,104 at P 86.

[81] *Id.* n.210.

MISO's proposed study methodology and proposing an alternative methodology or requesting a hearing on issues related to the proposed study methodology. The Commission has evaluated the justness and reasonableness of MISO's proposed study methodology and accepted the methodology with some modifications.[82] The Michigan Commission had the opportunity to provide its concerns for the Commission's consideration.[83] With respect to the Michigan Commission's request for clarification of whether the refund effective dates set in the February 2015 Order constituted new findings, we note that the April 3, 2014 refund effective date for Presque Isle was set in the prior Wisconsin Commission Complaint Order and the refund effective dates for the Escanaba and White Pine SSR Units aligned with the effective dates of the SSR agreements and rate schedules that had been previously accepted (subject to condition) by the Commission in Docket Nos. ER14-2180-000 and ER14-1725-000, respectively.

2. Requests for Rehearing: Compensation for SSR Service

37. We deny requests for rehearing of the Commission's finding that retail rate treatment is not

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[82] *See* September 2015 Order, 152 FERC ¶ 61,216; May 2016 Order, 155 FERC ¶ 61,134.

[83] *See* Motion of the Michigan Public Service Commission for Access to Information and Answer in Support of Motion of Verso Corporation for Access to Information, Docket No. ER14-2952-003 (filed June 1, 2015); Protest of the Michigan Public Service Commission, Docket No. ER14-2952-003 (filed June 10, 2015); Protest of the Michigan Public Service Commission, Docket No. ER14-2952-004, *et al.* (filed Oct. 29, 2015); Michigan Commission Request for Rehearing of the September 2015 Order, Docket No. ER14-2952-006, *et al.* (filed Oct. 19, 2015).

relevant to setting the just and reasonable level of compensation for Commission-jurisdictional service provided by an SSR Unit under the MISO Tariff.[84] The establishment of retail rates properly rests with state public utility commissions, not the Commission.[85] We are not persuaded by allegations that the Wisconsin Commission lacks authority to protect ratepayers against double recovery of SSR costs included in retail rates set by that commission, and therefore that the Commission must adjust wholesale SSR compensation to prevent double recovery. Indeed, we note that it was the Wisconsin Commission that challenged the previous *pro rata* SSR cost allocation methodology to ensure that costs associated with the Presque Isle facility are properly allocated to the entities that benefit from its continued operation. We continue to find that it is the Commission's responsibility to set appropriate SSR compensation and cost allocation at the wholesale level, and we decline to intrude on the prerogatives of the Wisconsin Commission to oversee retail rates subject to its jurisdiction.[86] Furthermore,

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[84] February 2015 Order, 150 FERC ¶ 61,104 at P 75.

[85] *See Southwest Power Pool, Inc.*, 119 FERC ¶ 61,199, at P 37 (2007).

[86] 16 U.S.C. §§ 824, 824d, 824e (2012) (vesting wholesale rate authority in the Commission); *see, e.g.*, *Western Massachusetts Elec. Co.*, 23 FERC ¶ 61,025, at 61,063-64, *reh'g denied*, 23 FERC ¶ 61,345 (1983) (state commission cannot establish Commission-jurisdictional rates); *Houlton Water Co. v. Maine Pub. Service Co*., 60 FERC ¶ 61,141, at 61,514 (1992) (federal and state ratemaking bodies are not bound to use same ratemaking principles); *Central Power and Light Co*., 98 FERC ¶ 61,069, at 61,184 n.24 (2002) (Commission is not bound by actions of state commission); *Barton Village Inc*., 100 FERC ¶ 61,244, at P 12 (2002) ("Under the Federal Power Act . . . the Commission has exclusive jurisdiction over [Commission-jurisdictional] rates . . . . Thus, we have no legal obligation to review, much less rely on, the findings by the

as the Commission noted in the February 2015 Order, the fact that the retail rate allocator for Wisconsin Electric's generation allocates the majority of that company's embedded generation costs to Wisconsin customers does not necessarily correlate to the same load that requires the designation of an SSR Unit for the purposes of establishing a just and reasonable allocation of SSR costs under the MISO Tariff.[87]

38. The Mines cite to *FPC v. Conway Corp.* for the proposition that the Commission must consider the relation between retail and wholesale rates in setting just and reasonable wholesale rates.[88] However, we find that *FPC v. Conway Corp.* does not require the Commission to adjust the level of SSR compensation for the Presque Isle SSR Units to offset the alleged double-recovery of these costs in Wisconsin Electric's retail rates. In that case, a power company that sold electricity at both wholesale and retail sought to raise its wholesale rates.[89] The company's wholesale customers stated that they were in competition with the company for industrial retail accounts and argued that the increase was discriminatory because it was an attempt to squeeze the company's customers out of competition, such that it would be impossible for the customers to sell power to an industrial load at a competitive price with the company.[90] The Supreme

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[state commission]."), *aff'd sub nom. on other grounds*, *Barton Village Inc., v. FERC*, No 02-4693 (2d Cir. June 17, 2004) (unpublished).

[87] February 2015 Order, 150 FERC ¶ 61,104 at P 75.

[88] The Mines Request for Rehearing at 11-12 (citing *FPC v. Conway Corp.*, 426 U.S. at 277-278, 280).

[89] *FPC v. Conway Corp.*, 426 U.S. at 272-273.

[90] *Id.* at 274.

Court found that section 205 of the FPA forbids maintenance of any unreasonable difference in rates with respect to any sale subject to the jurisdiction of the Federal Power Commission (FPC), and that if undue preference or discrimination is traceable to the jurisdictional wholesale rate, then the FPC could adjust the jurisdictional rate to compensate for such discrimination.[91] In this case, there have been no allegations that Wisconsin Electric has attempted to adjust the level of compensation for continued operation of the Presque Isle SSR Units in a discriminatory manner; rather, Wisconsin Electric properly filed an Attachment Y notice with MISO when it decided to retire the Presque Isle SSR Units, and MISO determined that the units were needed for reliability. According to MISO's Tariff, Wisconsin Electric is entitled to compensation for the continued operation of the Presque Isle SSR Units, and the costs to operate the units are properly recoverable from the LSEs that benefit from such continued operation.

3. Requests for Rehearing: Refunds

39. We deny requests for rehearing of the Commission's findings that: (1) MISO must issue refunds of Presque Isle SSR costs that have been allocated to LSEs that are higher than the costs to be allocated to those LSEs according to the forthcoming study, with such refunds to begin as of the refund effective date of April 3, 2014; (2) MISO must refund any White Pine SSR costs that have been allocated to LSEs that are

[91] *Id.* at 277. Furthermore, in *FPC v. Conway Corp.*, the Supreme Court found that the FPC should put the company's rates within the lower range of the zone of reasonableness in view of the utility's decision to curb the retail competition of its wholesale customers. *Id.* at 279. Here, there is no such range in the zone of reasonableness.

higher than the costs to be allocated to those LSEs according to the forthcoming study for the White Pine SSR Unit, with such refunds to begin April 16, 2014; and (3) MISO must refund any Escanaba SSR costs that have been allocated to LSEs that are higher than the costs to be allocated to those LSEs according to the forthcoming study for the Escanaba SSR Units, with such refunds to begin June 15, 2014.[92] As further discussed below, we find that refunds are warranted due to the equitable considerations in these specific circumstances.

a. The Commission's Refund Policy

40. Section 206(b) of the FPA states that:

> the Commission may order refunds of any amounts paid, for the period subsequent to the refund effective date through a date [15] months after such refund effective date, in excess of those which would have been paid under the just and reasonable rate, charge, classification, rule, regulation, practice, or contract which the Commission orders to be thereafter observed and in force.

In two recent cases, the Commission restated its general refund policy when addressing refund requests in cases where a cost allocation or rate design has been found to be unjust and unreasonable.[93] *Black Oak* was initiated after a complaint was filed challenging the marginal line loss method and the related allocation methodology for recovering transmission

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[92] February 2015 Order, 150 FERC ¶ 61,104 at P 91.

[93] *La. Pub. Serv. Comm'n v. Entergy Corp.*, 155 FERC ¶ 61,120 (2016) (*Entergy*); *Black Oak Energy L.L.C. v. PJM Interconnection, L.L.C.*, 155 FERC ¶ 61,013 (2016) (*Black Oak*).

line losses in the PJM Interconnection L.L.C. (PJM) tariff. The Commission found that PJM had incorrectly excluded virtual marketers that paid certain transmission charges from the allocation of marginal line loss over-collections.[94] After initially requiring PJM to pay refunds to virtual marketers, the Commission reversed its decision. The Commission stated that it has established a policy of not ordering refunds in rate design and cost allocation cases to account for the utility's inability to retroactively charge customers in order to cover refund payments, referencing the United States Court of Appeals for the District of Columbia Circuit's (D.C. Circuit) holding in *City of Anaheim* for the proposition that section 206(b) of the FPA does not authorize the Commission to impose a surcharge to one group of customers to pay for the refunds to the other customers.[95]

41. In *Entergy*, the Commission noted that, in a case where the company collected the proper level of revenues, but it is later determined that those revenues should have been allocated differently, the Commission traditionally has declined to order refunds.[96] The Commission explained that, if the utility collected no more than it was entitled to, refunds would potentially result in under-recovery; this would be unfair because it would result in a loss of revenue from the reallocation when the utility would not have the opportunity to file a new rate case to recover those revenues.[97] In addition, the Commission explained that in cost allocation and rate design cases, a

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[94] *Black Oak*, 155 FERC ¶ 61,013 at P 2.

[95] *Id.* PP 12, 15, 17.

[96] *Entergy*, 155 FERC ¶ 61,120 at P 25.

[97] *Id.* P 28.

different cost allocation or rate design could have led to different decisions by consumers or a utility, but it is now too late to alter the decisions that were in fact made. The Commission in *Entergy* stated that it was mindful of the D.C. Circuit's statement that invoking a Commission policy on refunds does not eliminate the need to consider the fact that an unjust and unreasonable cost allocation caused some consumers to pay too much and other consumers to pay too little.[98] However, the Commission stated that refunds in cost allocation cases where over-recovery has not occurred must be implemented through surcharges, which create a zero sum game in which customers, not regulated public utilities, are the source of refunds made to other customers. While the Commission conceded that it may be inequitable that some customers paid too much under the filed rate, it also explained that it must consider the equities involved in assessing additional charges on other customers who were not responsible for the misallocation but who would be required to make additional payments for past purchases they reasonably concluded were final and cannot revisit.

42. The Commission's "no-refund" policy, as reiterated in *Black Oak* and *Entergy*, is not a strict requirement in every cost allocation case. Rather, as stated in *Entergy*, "the Commission has never enunciated a single, general policy on refunds … [t]he Commission's approach to refunds has instead been shaped by the way certain equitable considerations are typically associated with certain specific fact

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[98] *Id.* P 36 (citing *La. Pub. Serv. Comm'n v. FERC*, 772 F.3d 1297, at 1305 (D.C. Cir. 2014)).

patterns."[99] The Commission's refund authority is "discretionary, and refund decisions are to be guided by equitable principles… [i]n short, the basic consideration in ruling on refunds is one of fairness."[100] The question becomes whether the facts presented support following the Commission's policy of not awarding refunds in cost allocation cases. We find that, under the specific circumstances present in these proceedings, the equitable considerations require a narrow exception to the general "no refund" policy for cost allocation cases, as discussed below.[101]

43. The Commission has cited two primary grounds for its general "no refund" policy in cost allocation cases: (1) the unfairness that results from retroactive implementation of a new rate for both utilities and customers who cannot alter their past actions in light of that new rate, and (2) the potential for under-recovery.[102] We find that neither of these grounds applies here, and thus fairness considerations do not

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[99] *Id.* P 20.

[100] *Id.* PP 26, 27.

[101] *Black Oak* and *Entergy* reiterate and clarify the Commission's general policy against granting refunds in cost allocation cases due to fairness considerations. However, even if these cases were considered to adopt a strict "no refund" policy in every cost allocation case going forward, no matter the equitable considerations, we would find it reasonable to apply the Commission's pre-existing policy due to the unique factual circumstances of the present case, as described herein. *See Consolidated Edison Co. of New York, Inc. v. FERC*, 315 F.3d 316 (D.C. Cir. 2003) ("An agency may decide to apply a pre-existing policy to resolve a pending case, so long as that policy is not otherwise arbitrary and the agency provides a reasoned explanation for its decision").

[102] *Entergy*, 155 FERC ¶ 61,120 at P 30.

require automatic application of the Commission's general "no refund" policy.

44. First, we note that Integrys, which sought rehearing on the first ground cited above, has not identified any particular decisions made in reliance on the previous SSR cost allocation methodology. In *Entergy*, for instance, the Commission found that the Entergy System Agreement provision challenged by the complaint created a disincentive to make curtailable sales.[103] The Commission found that refunds would serve to impose potentially unrecoverable costs on Entergy Operating Companies that, based on the incentives that the System Agreement created, chose to engage in firm sales that cannot now be undone instead of curtailable sales that the System Agreement discouraged from their perspective. In *Black Oak*, the Commission noted that, assuming that PJM was permitted to surcharge customers to provide a refund to others that should have been allocated transmission line loss overcollections, exporters within PJM relied on the existing PJM tariff when they engaged in export transactions into MISO with the expectation that they would receive a *pro rata* share of the surplus revenues PJM allocated for transmission loss charges.[104]

45. Here, Integrys only stated generally that retroactive application of the new rate design is unjust and unreasonable because it creates market uncertainty, such that when market rules change after the transac-

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[103] *Id.* P 35.

[104] *Black Oak L.L.C. v. PJM Interconnection L.L.C.*, 139 FERC ¶ 61,111, at P 43 n.57 (2012).

tions are entered, sellers' expectations in such transactions can be detrimentally impacted.[105] Integrys notes that retroactive re-billing and reassessment of rates is difficult for LSEs that provide competitive retail services, because these entities must be able to reasonably rely on the effectiveness of tariffs and business practice manuals, but does not cite to any particular instances where this reliance had a detrimental impact on its retail services.[106] Integrys merely states that MISO market customers are faced with retroactive adjustments and had no means by which to adjust their operations, or plan for or anticipate these costs. Integrys cites to precedent that is not applicable in the circumstances present here, because those cases denied refunds where the Commission found that energy market prices, or the allocation of payments related to the real-time energy market, were unjust and unreasonable, such that refunds would have (1) been difficult to calculate, (2) undermined confidence in those markets, and (3) prevented parties from making retroactive adjustments to their market conduct to account for refunds.[107] By contrast, in this case, as discussed further below, SSR Unit designation and subsequent SSR cost allocation is an out-of-market process. Because there are no markets involved, there is no undermining of those markets, nor is there

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[105] Integrys Request for Rehearing at 16.

[106] *Id.* at 17.

[107] *Id.* at 16 (citing *NYISO*, 92 FERC ¶ 61,073 at 61,306-307 (denying refunds when considering remedies for energy market flaws); *Ameren*, 127 FERC ¶ 61,121 at PP 155-157 (reversing decision to grant refunds to market participants that made virtual offers in the real-time energy market and that had been over-allocated Revenue Sufficiency Guarantee costs)).

previous market conduct that would have been adjusted to account for eventual refunds.

46. Second, there is not a potential for under-recovery here because MISO has a record of the SSR costs paid by each LSE under the previous SSR cost allocation methodology, and MISO can calculate the exact amount of SSR costs that should be assessed to each LSE that underpaid in order to refund LSEs that overpaid, according to the revised just and reasonable methodology that was accepted in the May 2016 Order. This was not the case in *Entergy*, where there was a significant possibility that Entergy could not recover the necessary surcharges to provide refunds to wholesale customers after an unjust and unreasonable calculation of peak load responsibility, because some of the peak load during the refund period was made up of wholesale customers who were no longer Entergy customers.[108]

47. We recognize that, in *Black Oak*, the Commission referenced *City of Anaheim* for the proposition that section 206(b) of the FPA does not authorize retroactive rate increases, such as those that MISO would have to assess on any LSEs that paid too little for Presque Isle, Escanaba, and White Pine SSR costs in order to cover the refunds to other LSEs that paid too much. However, we find that *City of Anaheim* does not bar the relief here. In that case, California wholesale electricity generators filed a section 206 complaint alleging that they were under-compensated as a result of the Commission-approved rate they were required to charge to local cities and other electricity

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[108] *Entergy*, 155 FERC ¶ 61,120 at P 31. In addition, the Arkansas Commission had rejected Entergy's request to recover surcharges from its retail customers. *Id.* P 32.

purchasers.[109] The Commission agreed and used its refund authority under section 206(b) as justification for ordering a retroactive rate increase requiring the cities to pay more for electricity purchased from those generators. The court reversed, explaining that section 206(b) "applies in cases where the complainant is a *purchaser* alleging that the rates it paid were too high.… By contrast, this case involves a complainant *seller* alleging that the rates it received were too low."[110] Accordingly, unlike the instant case where the Commission has not changed the SSR rates established under the Tariff, *City of Anaheim* involved the Commission's direct imposition of retroactive surcharges to effectuate a rate increase that the parties could not have foreseen. In these proceedings, the filing of the complaint under section 206 put the parties on notice that refunds, and therefore also surcharges, may be awarded.[111]

48. Moreover, under *Xcel Energy Services, Inc. v. FERC* (*Xcel*),[112] *City of Anaheim* does not bar refunds in these proceedings. In *Xcel*, the Commission had allowed Southwest Power Pool, Inc.'s (SPP) formula rates for a non-jurisdictional participating transmission owner to go into effect without suspension or a voluntary refund commitment from the owner to refund the difference between the as-filed rate and the

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[109] *City of Anaheim*, 558 F.3d at 522.

[110] *Id.* at 524.

[111] *See Canadian Ass'n of Petroleum Producers v. FERC*, 254 F.3d 289, 299 (D.C. Cir. 2001) (stating that "[s]o long as the parties had adequate notice that surcharges

might be imposed in the future, imposition of surcharges does not violate the filed rate doctrine").

[112] 815 F.3d 947 (D.C. Cir. 2016).

rate ultimately found to be just and reasonable by the Commission, which was in violation of section 205 of the FPA.[113] Although the Commission later admitted its legal error, the Commission concluded that, according to *City of Anaheim*, it was powerless to do more than order SPP to fix the just and reasonable rate prospectively pursuant to section 206 of the FPA.[114] Xcel Energy petitioned for review of the Commission's orders denying a refund of the unlawful rates it paid. The D.C. Circuit remanded, emphasizing that the "primary aim [of the FPA] is the protection of consumers from excessive rates and charges."[115] The court stated that "[t]he Commission appears…to have misapprehended its remedial powers and thus arbitrarily declined to weigh the equities underlying [Xcel Energy's] request for retroactive relief."[116] The court further stated that "no precedent is cited, and we are aware of none, for the proposition that the Commission's equitable authority does not encompass refunds as well as surcharges."[117]

49. Because the two general justifications for the Commission's "no refund" policy in cost allocation cases are not present here, as noted above, pursuant to the court's directives in *Xcel*, we must meet our obligation under section 206(a) of the FPA to weigh the equities underlying the provision of refunds that will restore the just and reasonable rate. After balancing the equitable considerations in these proceedings, as

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[113] *Id.* at 949.

[114] *Id.* at 953.

[115] *Id.* at 952.

[116] *Id.* at 953.

[117] *Id.* at 955.

further discussed below, we find that the circumstances here require a narrow exception to the Commission's general policy of not providing refunds in a cost allocation case.

b. Equitable Considerations Warrant Refunds

50. We find that, under the factual circumstances presented in these proceedings, when considered as a whole, the equitable considerations warrant refunds of Presque Isle, Escanaba, and White Pine SSR costs to those LSEs that paid too much of those costs under the previous unjust and unreasonable SSR cost allocation methodology, even though those refunds will be implemented through surcharges to LSEs that paid too little under the previous methodology. First, this case is unlike *Black Oak*, where the Commission noted that the surcharges may have to be imposed generally on all members of PJM, including those who may have had no connection with the line loss issues in this proceeding.[118] In this case, there is no concern that refunds would be charged to persons without any connection to these proceedings – instead, SSR costs will be recovered directly from LSEs that paid too little for SSR service and refunds given directly to LSEs that paid too much for the same service. Furthermore, MISO would not be surcharging a different set of parties who did not have a timely opportunity to challenge the new cost allocation method – the parties have been on notice that the SSR cost allocation methodology might change since the Wisconsin Commission Complaint was filed on April 3, 2014, and the revised SSR cost allocation methodology has been

[118] *Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.*, 139 FERC ¶ 61,111 at P 29.

challenged by many parties on rehearing of the Commission orders in these proceedings.

51. We find that the equitable considerations inherent in the MISO SSR process are distinguishable from *Black Oak* and *Entergy* and warrant refunds. SSR agreements in MISO are unilateral agreements of finite duration that must go into effect prior to the date an SSR Unit would otherwise go out of service in order to ensure reliability. After the owner of the generating unit submits the Attachment Y Notice informing MISO of the impending suspension or retirement, the SSR agreement immediately follows the 26-week study period if MISO cannot identify an SSR alternative that can be implemented prior to the retirement or suspension effective date. The agreement must go into effect quickly to ensure that the resource continues to operate, because it is needed for reliability. Although the agreement must be filed with the Commission, the Commission has granted waiver of the Commission's prior notice requirement to allow the SSR agreement to go into effect the day after the filing, because the SSR Unit is operating uneconomically and would otherwise have provided SSR service on an uncompensated basis while the required Tariff process took its course.[119]

52. As a result, there is limited recourse for parties that are allocated SSR costs arising under an SSR

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[119] If need be, the Commission will set the fixed cost component of the SSR compensation for hearing and settlement judge procedures, but the SSR agreement remains in effect during this process. *See, e.g.,* Wisconsin Commission Complaint Order, 148 FERC ¶ 61,071, at PP 89, 114 (2014); *Midcontinent Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,147, at PP 36, 39 (2015); *Midcontinent Indep. Sys. Operator, Inc.,* 148 FERC ¶ 61,057, at PP 155, 160 (2014).

agreement if those parties dispute the amount they are allocated under a cost allocation provision in MISO's Tariff. Such affected entities must file a complaint under section 206 of the FPA to dispute the SSR cost allocation, because the Tariff itself dictates how SSR costs are to be allocated. MISO SSR agreements have limited terms (one year with the option for renewal if necessary);[120] customers who are subjected to an unjust and unreasonable allocation of mandatory SSR costs may have more difficulty obtaining relief by filing a complaint under section 206 because of the short-term nature of the contract. As such, if relief is granted only on a prospective basis, the customers that had been allocated unjust and unreasonable costs would likely receive no compensation. The compulsory nature of the SSR agreement, whose purpose is to ensure reliability, further justifies the Commission crafting an exception to its general "no refund" policy in these circumstances.[121]

53. The SSR compensation in these proceedings was also out-of-market; pursuant to SSR agreements in MISO's Tariff, SSR costs are uplifted to applicable LSEs on a monthly basis, and such uplifts are assessed independently from the LSEs' purchases of energy and

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[120] *See* MISO FERC Electric Tariff, Attachment Y-1 (Standard Form Support Supply Resource (SSR) Agreement), § 3(A)(2) (0.0.0).

[121] We note that MISO and the California Independent System Operator Corporation are the only regions that can compel generators to operate for reliability purposes, even when the generator would otherwise retire. *See* MISO FERC Electric Tariff, Module C, § 38.2.7, "Generation Suspension, Generation Retirement, and System Support Resources" (44.0.0); CAISO Tariff, § 41.2 "Designation of Generating Unit as Reliability Must-Run Unit" (0.0.0) and Appendix G, Pro Forma Reliability Must-Run Contract, Art. 2.1 (5.0.0).

ancillary services through MISO's markets. Thus, prior market participant decisions were not predicated on the size or allocation of SSR costs. Granting refunds of Presque Isle, Escanaba, and White Pine SSR does not require any markets to be re-run, as there is no need to recreate prices or economic behavior to determine which parties are responsible for SSR costs; instead, MISO must merely identify the discrepancy in cost allocation amounts to LSEs between its previous cost allocation methodology and its final just and reasonable methodology. Thus, subsequent changes to the allocation of such costs will not undermine confidence in the settlements produced by any markets. Furthermore, SSR agreements in MISO are involuntary because they are a last resort measure to maintain reliability. So, in the MISO SSR context, a customer's inability to adjust past actions to anticipate for SSR costs is not a relevant consideration, because there is no choice involved. These facts, when considered in conjunction with the other distinguishing aspects of these proceedings described above, provide further justification for refunds.

54. As the D.C. Circuit has emphasized, the primary aim of the FPA is the protection of consumers from excessive rates and charges.[122] The circumstances in these proceedings are that, as a result of an unjust and unreasonable cost allocation, MISO LSEs paid Presque Isle, Escanaba, and White Pine SSR costs that were not commensurate with the amount they benefitted from operation of those SSR Units. Invoking a Commission policy on refunds does not eliminate the need to consider the fact that an unjust

[122] *Xcel*, 815 F.3d at 952.

and unreasonable cost allocation caused some consumers to pay too much and other consumers to pay too little; instead, our refund authority is discretionary, and refund decisions are to be guided by equitable principles.[123]

55. In sum, we affirm the finding that refunds are warranted for the Presque Isle, Escanaba, and White Pine SSR Units back to the dates previously indicated, given: (1) that the two primary grounds for the Commission's general denial of refunds in cost allocation cases are not present here; (2) that SSR costs can be recovered directly from LSEs that paid too little for SSR service and refunds given directly to LSEs that paid too much for the same service without requiring the re-running of any markets; (3) that the parties have been on notice that the SSR cost allocation methodology might change and that refunds (and surcharges) might be applied; and (4) the nature of the obligatory,[124] short-term, out-of-market MISO SSR Agreement.

c. Specific Rehearing Arguments

56. Although many of the specific arguments on rehearing are addressed in some form in the discussion above, we address each of these arguments separately. We agree with the requests for rehearing that certain justifications for granting refunds given in the February 2015 Order no longer apply, and find that: (1) the final SSR cost allocation methodology cannot be said to be an existing methodology, because the Commission directed MISO to create a new

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[123] *Id.*; *Entergy*, 155 FERC ¶ 61,120 at P 26 ("the Commission's refund authority…is discretionary, and refund decisions are to be guided by equitable principles.").

[124] *See supra* n.121.

methodology for allocating costs in the ATC footprint that is different from the generally-applicable SSR cost allocation methodology applicable to the rest of the MISO region; and (2) the SSR costs to be refunded are no longer limited to one SSR Unit, to be allocated among a defined set of customers within a limited geographic area, for a period of four months. However, we find that, regardless of these arguments, the equitable considerations in these specific circumstances warrant refunds, as described above.

57. We reject arguments that the Commission is barred from ordering refunds where such refunds would be accomplished by MISO imposing surcharges to LSEs that paid too little under the old SSR cost allocation methodology. As discussed above, the refunds in these proceedings are not barred under the FPA or Commission or court precedent.

58. We reject arguments that the Commission erred in holding that refunds are appropriate because they will not require broader adjustments to MISO's markets, as, it is argued, the ease of implementation is not a legitimate basis for ordering refunds. We have not relied upon the ease of implementation as a basis for granting refunds in this case. Rather, we have found that the out-of-market nature of mandatory SSR costs means that market participant decisions were not predicated on the size or allocation of SSR costs; therefore, subsequent changes to the allocation of such costs will not amount to a re-running of the markets or undermine confidence in the settlements produced by such markets. Similarly, we reject arguments that retroactive application of the new rate design is unjust and unreasonable because it creates market uncertainty. The parties have not identified any particular decisions made in reliance on the previous

SSR cost allocation methodology that detrimentally impacted their business, or how they would have adjusted their operation to plan for revised SSR costs.

59. We reject the Michigan Commission's and Integrys' arguments that there was no basis for the Commission's finding that parties had reasonable notice that MISO's allocation of Presque Isle SSR costs might be held unjust or unreasonable as of the filing on April 3, 2014 of the Wisconsin Commission Complaint. In cases where the Commission institutes an investigation on complaint under section 206 of the FPA, section 206(b) requires the Commission to establish a refund effective date that is no earlier than the date a complaint was filed, but no later than five months after the filing. In the Wisconsin Commission Complaint Order, the Commission decided to set the earliest possible refund effective date of April 3, 2014; therefore, the parties were aware that refunds could be issued as of that date.

60. The Michigan Commission also asserts that the parties only had notice that MISO's existing optimization-LBA cost allocation methodology as outlined in its BPM might be applied to the ATC footprint; they had no notice that the Commission would order MISO to create an entirely new method of allocating SSR costs in the ATC footprint and apply it retroactively to Presque Isle, Escanaba, and White Pine SSR Units.[125] However, all parties were on notice upon filing of the Wisconsin Commission Complaint that SSR costs might be governed by section 38.2.7.k of the Tariff, extending to the ATC footprint the general SSR cost allocation Tariff language, which requires MISO to allocate SSR costs to "the LSE(s)

[125] Michigan Commission Request for Rehearing at 19-20.

which require(s) the operation of the SSR Unit for reliability purposes," regardless of the methodology used in reaching that result. Moreover, in determining whether a Tariff is just and reasonable, or whether a Tariff is being implemented in a just and reasonable manner, the Commission has broad remedial authority to require just and reasonable compliance filings.[126] The Commission's authority to order remedies is not constrained by the parties' expectations of what those remedies might or might not entail. In addition, once the Wisconsin Commission Complaint was filed, parties were on notice that the rates they paid for SSR costs under the then-existing Tariff might not be the rates that they would ultimately pay under a revised just and reasonable Tariff.

4. Refund Reports and Protective Agreement Filing

a. Protests

i. Refund Reports

61. Marquette argues that MISO has not demonstrated the justness and reasonableness of the charges in the Refund Report resulting from application of the SSR allocation formula; rather, Marquette avers that the Refund Report shows that the SSR cost allocation methodology is flawed because (1) it imposes costs on captive customers who bear significant SSR costs that are attributable to customers that were not involved in the decisions that led to the significant cost impact from Presque Isle retirement and SSR designation, and (2) MISO has over-assumed Marquette's load

[126] *See Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967) (the Commission's breadth of discretion is "at its zenith" when fashioning remedies).

levels and reliance on SSR Units.[127] Specifically, Marquette states that the Attachment Y Study that led to the designation of the Presque Isle SSR Units assumed a minimum load of 15 MW for Marquette, but that Marquette was denied firm service during the SSR period and was limited to non-firm transmission service, and its historical average hourly purchase from MISO is actually below four MW.[128] Marquette states that its purchase and generation dispatch decisions in MISO require a reasonable knowledge of cost differences between available supply options, because Marquette only purchases energy from the MISO Day Ahead Market when such purchases are more economical than Marquette's own generation.[129] Marquette states that the allocation of significant after-the-fact SSR costs creates an unjust and unreasonable impediment to its ability to economically operate its system, and states that it could have made different decisions had it received appropriate advanced price signals.[130]

62. Cloverland states that the refund schedule in the Refund Report is unreasonable in that it starts too soon and collects over too short a period, and that it will be difficult to acquire the funds to pay for surcharges on this timeline.[131] Cloverland explains that its rates are subject to a Power Supply Cost

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[127] Protest of the Marquette Board of Light and Power, Docket No. ER14-2952-005, at 5 (filed July 1, 2016).

[128] *Id.* at 6.

[129] *Id.* at 7.

[130] *Id.* at 8-9.

[131] Protest of Cloverland Electric Cooperative, Docket No. ER14-2952-005, *et al.*, at 4-5 (filed July 5, 2016) (Cloverland Protest).

Recovery Mechanism approved by the Michigan Commission, and that it will take 60-75 days to collect funds for surcharges, which are due to MISO within seven days of receiving the invoice.[132] Cloverland states that it would have to borrow money on a short-term basis at a high rate of interest in order to pay the invoice. Cloverland asks the Commission to delay invoices until October and, given the rate shock from the large amounts of surcharges to Cloverland, asks that the surcharges be spread over 24 months instead of the 14 proposed by MISO.[133]

63. Several parties argue that the Refund Report should be rejected because it lacks detail as to what SSR cost allocation methodologies have been used by MISO, what related SSR charges have been previously collected from/refunded to customers since April 3, 2014, and how the dollar amounts of refunds were derived.[134] The Michigan Aligned Parties argue that the Commission should order MISO to provide detailed explanations of its billing practices, the allocation formulas applied by MISO during relevant periods, the allocation formula being applied on a retroactive basis, the amounts of previous SSR cost refunds and surcharges implemented by MISO, and

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[132] *Id.* at 5.

[133] *Id.* at 5-6.

[134] Protest of the Michigan Aligned Parties, Docket No. ER14-2952-000, *et al.*, at 8, 34 (filed July 5, 2016); Cloverland Protest at 2-3; Joint Protest of the Michigan Public Service Commission, the Michigan Agency for Energy, and the Michigan Attorney General Bill Schuette, Docket No. ER14-2952-000, at 7-8 (filed July 5, 2016) (Protest of the Joint Michigan Parties); Protest of the Michigan Public Service Commission, Docket No. ER14-1243-000, *et al.*, at 6-7 (filed July 5, 2016) (Michigan Commission Protest).

an explanation of how those previous billing adjustments have been reflected in the Refund Report.[135] The City of Escanaba states that the Refund Report unlawfully includes interest on the retroactive surcharges, as the Commission's regulations only permit interest on refunds.[136] Some parties argue that the new SSR cost allocation methodology must be implemented prospectively from either (1) May 3, 2016[137] or (2) the date of the Commission's order on the refund report,[138] as the rate was not fixed under section 206 of the FPA until those dates. Finally, some parties state that the Refund Report imposes retroactive surcharges in a cost allocation case in violation of the FPA, court precedent, and Commission policy, and ask the Commission to hold the refund/surcharge process in abeyance until the D.C. Circuit reviews the Commission orders and a Commission order is issued determining the just and reasonable amounts of SSR costs.[139]

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[135] Protest of the Michigan Aligned Parties at 9, 34.

[136] Protest of the City of Escanaba, Michigan, Docket No. ER14-2952-000, *et al.*, at 8 (filed July 1, 2016) (City of Escanaba Protest).

[137] Cloverland Protest at 2; Protest of the Joint Michigan Parties at 15-19; Protest of the Michigan Aligned Parties at 30-33; Michigan Commission Protest at 15-18.

[138] Protest of Refund Report of Constellation Energy, Docket No. ER14-1242, *et al.*, at 4-7 (filed July 5, 2016).

[139] City of Escanaba Protest at 1, 4-9; Cloverland Protest at 2-3; Protest of the Joint Michigan Parties at 8-15; Protest of Upper Peninsula Power Company, Docket No. ER14-2952-005, *et al.*, at 2 (filed July 5, 2016); Protest of the Michigan Aligned Parties at 11-30, 35-37; Michigan Commission Protest at 8-14.

ii. Protective Agreement

64. The Wisconsin Parties state that the Protective Agreement purports to protect confidential information contained in the Refund Report, but that this protection is eviscerated because MISO considers itself to be under no obligation to either (1) notify the owners of the confidential information when requests to release the information are made or (2) object to the disclosure of the information.[140] The Wisconsin Parties state that the data in the Refund Report reflects load patterns and usage, and is of the type generally exempt from mandatory public disclosure requirements of the Freedom of Information Act, 5 U.S.C. 552 (FOIA).[141] The Wisconsin Parties state that the data should not be disclosed as confidential business information under FOIA Exemption 4, which would prevent disclosure of documents that would reveal trade secrets and commercial or financial information if such disclosure is found to cause substantial harm to the competitive position of the person from whom it was obtained.

65. The Wisconsin Parties note that MISO intends to release the confidential information on the fifth day following a request if no objection has been filed, and they point out that MISO could provide such information before the comment due date of July 6, 2016.[142] They ask the Commission to clarify that MISO is prohibited from disclosing any confidential

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[140] Protest and Objection of Wisconsin Electric Power Company and Wisconsin Public Service Corporation to Disclosure of Confidential Information, Docket No. ER14-2952-000, *et al.*, at 2 (filed June 21, 2016).

[141] *Id.* at 3.

[142] *Id.* at 4.

information before the close of the comment period. In addition, they argue that MISO should be required to comply with Attachment Z and section 38.9 of its Tariff, which govern the treatment of confidential information provided to MISO. Finally, the Wisconsin Parties request that the Commission clarify that sections 388.112(d) and (e) of the Commission's Rules and Regulations apply. They state that section 388.112(d) requires the Commission to give notice to the owner of privileged or Critical Energy Infrastructure Information (CEII) that is requested by a FOIA or CEII requester, and provide an opportunity of at least five calendar days in which to comment on the request.[143] The Wisconsin Parties state that MISO did not interpret this provision as applicable to it because it pertains to FOIA requests made to the Commission; however, they note that under MISO's interpretation, notice of requests for disclosure would never go to the owner of the information. They further state that section 388.112(e) provides that the Commission will give at least five calendar days' notice to the owner of the privileged or CEII information before it discloses such information.

66. The Michigan Aligned Parties have no objection to the Protective Agreement Filing, provided that information required to evaluate the Refund Report is fully disclosed, and they ask the Commission to extend the comment period on the Refund Report until the parties have been granted access to the redacted information contained in MISO's filing.[144] They state that the Wisconsin Parties have not met their burden

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[143] *Id.* at 5-6.

[144] Michigan Aligned Parties Answer to MISO Application for Protective Order, Docket No. ER14-2952-000, *et al.*, at 2 (filed July 1, 2016).

to show that a protective order will not adequately safeguard their interest, and that this concern outweighs the need for the material to develop the record.[145]

b. Answers

i. Refund Reports

67. The Wisconsin Commission submits an answer to correct the protesters' assertions that the Commission is prohibited from directing MISO to issue refunds to remedy the misallocation of SSR costs to Wisconsin customers.[146] The Wisconsin Commission argues that the Commission correctly exercised its discretion to order refunds, and that refunds are consistent with the Commission's authority under the FPA, Commission precedent, court precedent, and the equities in this case.[147]

MISO argues that all protests of the cost allocation methodology used in the Refund Report and Errata Refund Report constitute impermissible collateral attacks on prior Commission orders.[148] WPPI Energy states that, to the extent the protests challenge the established refund effective dates, they are impermissible collateral attacks on Commission addressing tariff filings made under section 205 of the FPA setting forth the just and reasonable rate for the SSR Units, and

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[145] *Id.* at 3.

[146] Answer to Protests of the Public Service Commission of Wisconsin, Docket No. ER14-2952-000, *et al.*, at 2 (filed July 20, 2016).

[147] *Id.* at 11-32.

[148] MISO Answer to Protests, Docket No. ER14-2952-005, *et al.*, at 4 (filed July 20, 2016) (MISO Answer).

that they are also untimely requests for rehearing of those orders.[149]

68. MISO rejects Marquette's protest of the Attachment Y Study on the grounds that it led to an over-allocation of SSR costs, as MISO states that the planning study is only used to determine the issues for which the SSR is needed. MISO explains that the constraints identified in the planning study are used to identify the elemental pricing nodes that are responsible for costs, but that the shares of SSR costs are determined by the monthly peak hour of actual energy withdrawals for the LSEs whose elemental pricing nodes were identified.[150]

69. MISO disagrees with the various requests to delay action.[151] MISO states that the 24 month period for repayments suggested by Cloverland is well beyond any period over which SSR costs would ever have been collected, and that the Commission's orders do not contain any requirements relating to delaying an order until litigation over the Presque Isle SSR agreements is finalized. MISO states that, "[h]owever, the final Commission-ordered SSR costs could be used in the scheduled adjustments whereby such amounts will begin in November 2016."[152]

70. MISO refutes arguments that the Refund Report and Errata Refund Report do not provide enough detail.[153] MISO states that the usual refund report

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[149] WPPI Energy Answer to Protests, Docket Nos. ER14-2952-005 and ER15-767-002, at 4-5 (filed July 20, 2016).

[150] MISO Answer at 5-6.

[151] *Id.*

[152] *Id.* at 6.

[153] *Id.* at 6-7.

would only show principal and interest amounts for affected entities, but that it included additional information such as a separate accounting for interest accruals, monthly calculations by affected LSE and SSR agreement, a monthly table of refunds/charges with interest calculations, and the resettlement schedule that presents resettlement amounts by month for each SSR agreement.

71. In their answer to the Wisconsin Commission's answer, the Michigan Commission and the Michigan Aligned Parties clarify that they do not argue that the Commission does not have authority to direct refunds under section 206 of the FPA, only that the Commission lacks authority to impose surcharges to pay for those refunds.[154] They state that the Commission is acting here under section 206 of the FPA, and that the Commission cannot modify MISO rates filed under section 205 of the FPA. They state that the Wisconsin Commission mischaracterizes Commission precedent and inappropriately relies on inapplicable case law, and that even if the Commission were authorized to impose surcharges to accomplish refunds, the equities in this case do not require refunds.[155] In their answer to the Michigan Commission and the Michigan Aligned Parties answer, the Citizens Utility Board of Wisconsin and the Wisconsin Industrial Energy Group refute the claim that the Commission may not order refunds and surcharges under section 205 of the FPA.[156] They argue that the Commission is clearly

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[154] Michigan Commission and the Michigan Aligned Parties Answer to Wisconsin Commission Answer, Docket No. ER14-2952, *et al*., at 2-5 (filed Aug. 4, 2016).

[155] *Id.* at 5-12.

[156] Motion for Leave to Answer and Answer of the Citizens Utility Board of Wisconsin, and the Wisconsin Industrial Energy

acting under both sections 205 and 206 of the FPA in the proceedings, and in any case, the Commission may act under section 205 to direct MISO to make a compliance filing to modify its proposed rates so long as MISO consents to the modification. The Michigan Commission and the Michigan Aligned Parties answer that the utility's consent cannot create Commission jurisdiction under section 206 of the FPA to impose surcharges that does not otherwise exist.[157]

ii. Protective Agreement

72. The Wisconsin Parties argue that a protective agreement alone is insufficient protection of confidential information, as it does not take into account MISO's position regarding requests for the release of confidential load data.[158] They state that MISO attached confidential information belonging to the Wisconsin Parties without any notice, as required under the Tariff.[159] They argue that section 388.112 of the Commission's regulations does not provide any notice or process akin to those of the Tariff, as it only sets forth general rules on privileged and CEII treatment for documents filed with the Commission, while in this case, the confidential information at issue was not filed with the Commission but submitted to

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Group, Docket No. ER15-2952-000, *et al.*, at 3-10 (filed Aug. 15, 2016).

[157] Joint Answer of the Michigan Public Service Commission and the Michigan Aligned Parties in Opposition to the Motion for Leave to Answer and Answer of the Citizens Utility Board of Wisconsin and the Wisconsin Industrial Energy Group, Docket No. ER14-2952-005, *et al.*, at 4 (Aug. 26, 2016).

[158] Motion for Leave to Answer and Answer of Wisconsin Electric Power Company and Wisconsin Public Service Corporation, Docket No. ER14-2952, *et al.*, at 7 (filed Aug. 1, 2016).

[159] *Id.* at 5-6.

and/or gathered by MISO directly by the Wisconsin Parties. The Wisconsin Parties request that the Commission incorporate the notice and process provisions of MISO's Tariff pertaining to the release of information into the proposed Protective Agreement or otherwise require MISO to comply with the confidentiality provisions of its Tariff.[160]

73. MISO states that the monthly information was redacted from the public report, that it filed the Protective Agreement pursuant to 18 C.F.R. § 388.112(b)(2)(i) (2016), and that it received the information required by 18 C.F.R. § 388.112(b)(2)(iii) (2016) from various parties.[161] MISO further states that, consistent with 18 C.F.R. § 388.112(b)(2)(iv) (2016), MISO will not release the non-public information until ordered by the Commission or a decisional authority.

c. Discussion

i. Refund Reports

74. We reject the arguments that the Commission has no authority to order refunds in a cost allocation case and that MISO improperly imposes retroactive surcharges to effectuate such refunds. As explained above, that issue has been decided here on rehearing of the February 2015 Order, and today's order is final with respect to the refund issue. As discussed above, the Commission is not barred from granting refunds, and the equitable considerations warrant refunds of Presque Isle, Escanaba, and White Pine SSR costs to those LSEs that paid too much of those costs under the previous unjust and unreasonable SSR cost allocation methodology. We also reject protests of the SSR cost

[160] *Id.* at 8.

[161] MISO Answer at 8.

allocation methodology, as the Commission specifically approved the use of this methodology for the Presque Isle, Escanaba, and White Pine SSR Units in the May 2016 Order.[162]

75. We find that the Refund Report and the Errata Refund Report meet the Commission's directive in the May 2016 Order to describe how MISO intends to effectuate the payment of refunds to those LSEs that were overcharged under the previous SSR cost allocation methodology for the Presque Isle, Escanaba, and White Pine SSR Units.[163] The reports include monthly amounts previously billed to each affected LSE by month and SSR agreement, a monthly table of refunds and charges to be assessed under the new SSR cost allocation methodology per affected LSE and SSR agreement, with interest calculations, and the proposed resettlement schedule that shows resettlement amounts by month for each SSR agreement. We reject requests to order MISO to submit additional details of how its calculations were derived, such as specific data inputs or detailed summaries of its previous billing amounts and the equations used to derive the numbers in the report. As the administrator of its system, MISO manages the data that goes into the SSR cost allocation formula, and maintains the record of amounts previously charged – MISO is in the best position to apply the allocation formula and calculate refunds. If the parties feel that the calculations in the formula are incorrect, the parties are free to

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[162] May 2016 Order, 155 FERC ¶ 61,134 at P 53.

[163] *Id.*

dispute the calculation with MISO directly or submit a complaint with the Commission.[164]

76. We reject Marquette's argument that charges resulting from the implementation of MISO's SSR cost allocation formula are unreasonable because they impose costs on captive customers who bear significant SSR costs that are attributable to customers that were not involved in the decisions that led to the Presque Isle retirement and SSR designation. We note that all interested parties were afforded an opportunity to participate in both the Attachment Y process under the MISO Tariff leading up to Presque Isle's SSR designation, as well as in the relevant subsequent Commission proceedings. Regardless of whether customers chose to directly participate in decisions leading to retirement and subsequent SSR cost allocation, the relevant consideration is that these LSEs' loads necessitated, and correspondingly benefited from, the operation of the SSR Units. We also reject Marquette's contention that errors in the Attachment Y Study over-ascribed load to Marquette. This argument is also immaterial because, under the new SSR cost allocation methodology approved by the Commission in the May 2016 Order, the Attachment Y Study is not used to determine the amount of minimum load associated with each LSE; rather, it is used only to identify thermal and voltage constraints. We further disagree with Marquette's contention that the allocation of significant after-the-fact SSR costs impedes the economic operation of the system and is unreasonable because Marquette argues that it could

[164] We note that any such dispute should not challenge the SSR cost allocation methodology used by MISO to calculate refunds or the ability of the Commission to allow refunds in this case, as those issues have already been decided.

have made different decisions had it received appropriate advanced price signals. As described above, we find that retroactive application of the just and reasonable cost allocation and the associated refunds and surcharges are acceptable under these narrow circumstances. Furthermore, the SSR Units were needed for reliability; the degree of such costs was not foreseeable and reallocation of such costs is not tantamount to re-running a market.

77. We disagree with the City of Escanaba's contention that interest on surcharges is unlawful. The Commission's regulations and precedent do not expressly prohibit interest on surcharges. Moreover, in order to provide interest on refunds, as required by the Commission's regulations, MISO must logically charge mathematically corresponding interest on surcharges; MISO, as a non-profit entity,[165] must fund the refunds entirely through surcharges. Additionally, to the extent that some LSEs initially paid fewer SSR costs than were just and reasonable, they had access to that capital during the interim period, which offsets the interest on surcharges that they are now assessed.

78. We reject Cloverland's objection to MISO's proposed refund schedule. We find that Cloverland had adequate notice of the amounts of SSR surcharges it might pay, as the Commission first found that refunds of Presque Isle SSR costs were warranted in the Wisconsin Commission Complaint Order, and upheld refunds of the Presque Isle, Escanaba, and White Pine SSR Units in the February 2015 Order. We also find

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[165] *See City of Holland, Michigan v. Midwest Indep. Transmission Sys. Operator, Inc.*, 154 FERC ¶ 61,204, at P 25 (2016); *Midcontinent Indep. Sys. Operator, Inc.*, 151 FERC ¶ 61,143, at PP 9-10 (2015).

that MISO's proposed resettlement schedule of 14 months is just and reasonable, as this time frame reflects the approximate period over which the payment of SSR costs for the Presque Isle, Escanaba, and White Pine SSR Units would have been paid (April 3, 2014 to June 14, 2015).

79. We note that the SSR costs associated with the Presque Isle SSR Units are not final. The Commission established hearing and settlement judge procedures regarding all cost-related issues under the original and replacement Presque Isle SSR Agreements,[166] and an Initial Decision concerning those costs was issued in Docket No. ER14-1242-006, *et al*., on July 25, 2016. The Commission is not prejudging any issues raised on exceptions, but believes it is appropriate to delay refunds until it determines the final costs to be allocated under the Presque Isle SSR Agreements. We therefore direct MISO to suspend refunds of Presque Isle SSR costs until the Commission has issued an order on the Initial Decision finalizing the amount of Presque Isle SSR costs that will be allocated among benefiting LSEs. We further direct MISO, within 45 days of the Commission order on the Initial Decision in Docket No. ER14-1242-006, *et al*., to file a detailed refund report describing how MISO intends to effectuate the payment of refunds to those LSEs that were overcharged under the optimization LBA-approach formerly used for the Presque Isle SSR Units and adjusting to account for resettlements of Presque Isle SSR costs that have already been made according to

[166] *See Midcontinent Indep. Sys. Operator, Inc.*, 148 FERC ¶ 61,071, at P 89 (2014); *Midcontinent Indep. Sys. Operator, Inc.*, 149 FERC ¶ 61,114, at P 24 (2014).

the Refund Report and Errata Refund Report filed in this proceeding.

ii. Protective Agreement

80. We find that MISO correctly followed the Commission's regulations applicable to the privileged and confidential information contained in the Refund Report and Errata Refund Report. Section 388.112 of the Commission's regulations permits any person filing a document with the Commission to request privileged treatment for some or all of the information contained in the document that the filer claims is exempt from the mandatory public disclosure requirements of the FOIA. To obtain privileged treatment, the filer must (1) include a justification for requesting privileged treatment, (2) designate the document as privileged, and (3) submit a public version of the document with the information that is claimed to be privileged material redacted, to a practicable extent.[167] However, when such material is filed in a proceeding to which a right to intervene exists (as is the case here), the filer is required to include a proposed form of protective agreement with the filing and provide the public version of the document and its proposed form of protective agreement to each entity that is required to be serviced with the filing.[168] We find that MISO correctly followed these procedures. We reject the Wisconsin Parties' request that the Commission clarify that the notice provisions of sections 388.112 (d) and (e) of the Commission's regulations apply in this case, as we find that these sections are not applicable.

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[167] 18 C.F.R. § 388.112(b)(1) (2016).

[168] 18 C.F.R. § 388.112(b)(2)(i) (2016).

81. We direct MISO, five days after the issuance of this order, to provide a complete, un-redacted copy of the Refund Report and Errata Refund Report to participants in these proceedings that have submitted a signed a non-disclosure certificate, pursuant to the terms of the Protective Agreement.[169] We also direct MISO to provide a complete, un-redacted copy of the refund reports to any parties that sign a non-disclosure certificate in the future, within five days of the receipt of the certificate. Although we recognize that the non-public information submitted by MISO in the Refund Report and Errata Refund Report may provide insight into monthly load patterns, which the Wisconsin Parties argue is sensitive business information that should not be disclosed, it is appropriate for parties to a proceeding to use a protective agreement to gain access to confidential and proprietary information submitted on a non-public basis while at the same time ensuring such information is neither publicly disclosed nor used by parties for purposes unrelated to their participation in the proceeding.[170] The Commission has previously found that the use of such agreements appropriately balances the interests

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[169] *See* 18 C.F.R. § 388.112(b)(2)(iii) (2016) ("Any person who is a participant in the proceeding or has filed a motion to intervene or notice of intervention in the proceeding may make a written request to the filer for a copy of the complete, non-public version of the document."). To date, the following parties have submitted signed non-disclosure certificates: Verso, the Tribe, the Mines, the City of Mackinac Island, and the Bay Hills Indian Community. Bay Hills Indian Community has not filed a motion to intervene in these proceedings.

[170] *See, e.g.*, *Arlington Storage Co., LLC*, 145 FERC ¶ 61,025, at P 9 (2013); *West Deptford Energy, LLC*, 134 FERC ¶ 61,189, at P 29 (2011); *Southern Co. Energy Marketing, Inc.*, 111 FERC ¶ 61,011 (2005).

of filers in protecting sensitive information against inappropriate disclosure and the right of intervenors to access information necessary to their full and meaningful participation in a contested proceeding.[171] The Wisconsin Parties have failed to demonstrate why the non-public information contained in the Refund Report and Errata Refund Report cannot be protected by means of the Protective Agreement filed by MISO.[172]

82. In response to the Wisconsin Parties' request that the Commission require MISO to provide notice before disclosing the non-public information in the Refund Report and Errata Refund Report, we find that this order provides notice to the affected parties that the non-public information in the reports will be released, pursuant to the Protective Agreement, to the parties that have submitted a signed non-disclosure certificate. We agree with the Wisconsin Parties that MISO should comply with Attachment Z and Section 38.9 of its Tariff in regard to the treatment of confidential information provided to MISO by MISO participants, but the Wisconsin Parties do not explain what specific section of the Tariff they believe MISO did not comply with in this case.

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[171] *See, e.g.*, *Essential Power, LLC*, 155 FERC ¶ 61,095, at PP 15-16 (2016).

[172] We also find that the Wisconsin Parties' concerns about MISO disclosing confidential information before the close of the comment period is moot, as MISO stated that it would not disclose any information until ordered to do so by the Commission pursuant to 18 C.F.R. § 388.112(b)(2)(iv) (2016). *See* MISO Answer at 8.

The Commission orders:

(A) The requests for clarification of the February 2015 Order are granted in part and dismissed as moot in part, as discussed in the body of this order.

(B) The requests for rehearing of the February 2015 Order are denied, as discussed in the body of this order.

(C) MISO's Refund Report and Errata Refund Report meet the Commission's directives in the May 2016 Order, as discussed in the body of this order.

(D) MISO is hereby directed to provide a complete, un-redacted copy of the Refund Report and the Errata Refund Report to the parties that have submitted a signed non-disclosure certificate, pursuant to the terms of the Protective Agreement, as required by section 388.112(b)(2) of the Commission's regulations, within five days of the issuance of this order, as discussed in the body of this order. MISO is similarly directed to provide a complete, un-redacted copy of the Refund Report and the Errata Refund Report to any parties that sign a non-disclosure certificate in the future, within five days of the receipt of the certificate.

(E) MISO is hereby directed to suspend refunds of Presque Isle SSR costs until the Commission issues an order on the Initial Decision in Docket No. ER14-1242-006, *et al.*, as discussed in the body of this order. MISO is further directed to file a detailed refund report within 45 days of the date of the Commission order on the Initial Decision in Docket No. ER14-1242-006, *et al.*, as discussed in the body of this order.

By the Commission. Commissioner Honorable is not participating.

(SEAL)

Nathaniel J. Davis, Sr.,
Deputy Secretary.