

121 FERC ¶ 61,131
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Midwest Independent Transmission System
Operator, Inc.

Docket Nos. ER04-691-084
ER04-691-086

ORDER ON REHEARING

(Issued November 5, 2007)

1. The Midwest Independent Transmission System Operator, Inc.'s (Midwest ISO) Open Access Transmission and Energy Markets Tariff (TEMT) charges market participants withdrawing energy in the real-time energy market a real-time revenue sufficiency guarantee (RSG) charge based on their virtual supply offers and real-time load, injection, export and import deviations. The purpose of the RSG charge is to ensure that any generator scheduled or dispatched by the Midwest ISO after the close of the day-ahead energy market – either through the Reliability Assessment Commitment (RAC) or the real-time energy market – will receive no less than its offer price for start-up, no-load and incremental energy. RSG credits are paid to units scheduled in the RAC or in the real-time market that do not earn sufficient real-time energy revenues to cover start-up and no-load costs.

2. On April 25, 2006, the Commission issued an order rejecting the Midwest ISO's proposal to, among other things, remove references to virtual supply from the TEMT provisions related to calculating RSG charges.¹ The Commission further found that because the Midwest ISO had not been including virtual supply offers in its RSG

¹ *Midwest Independent Transmission System Operator, Inc.*, 115 FERC ¶ 61,108, at P 48-49 (RSG Order), *order on reh'g*, 117 FERC ¶ 61,113 (2006) (RSG First Rehearing Order), *order on reh'g*, 118 FERC ¶ 61,212 (2007) (RSG Second Rehearing Order).

calculations, it had violated its tariff and must make appropriate refunds.² However, the requests for rehearing of the RSG Order persuaded the Commission to change course and exercise its equitable discretion not to require refunds for the Midwest ISO's failure to include virtual supply offers in its calculation of RSG charges.³

3. On March 15, 2007, the Commission issued two orders in this proceeding: the RSG Second Rehearing Order⁴ and the RSG Compliance Order.⁵ In the RSG Second Rehearing Order, the Commission reiterated that "the Midwest ISO's tariff requires allocation of RSG costs to virtual supply offers, and . . . the Midwest ISO violated its tariff by failing to do so. There no longer seems to be any dispute that this is how the tariff should properly be read."⁶ The Commission then revisited the issue of whether to exercise its discretion to require refunds, but based on a balancing of equities, reaffirmed its prior decision not to impose refunds.⁷ In the RSG Compliance Order, the Commission rejected the Midwest ISO's proposal to allocate costs based on net virtual offers, *i.e.*, virtual offers minus virtual bids, and clarified that the currently-effective tariff, which allocates RSG costs to virtual supply offers, remains in effect.⁸

4. Requests for rehearing of both the RSG Second Rehearing Order and the RSG Compliance Order were filed by: Strategic Energy, LLC (Strategic Energy); Otter Tail Power Company (Otter Tail); and Integrys Energy Services, Inc., Wisconsin Public

² RSG Order, 115 FERC ¶ 61,108 at P 26.

³ RSG First Rehearing Order, 117 FERC ¶ 61,113 at P 92-96.

⁴ RSG Second Rehearing Order, 118 FERC ¶ 61,212 (2007).

⁵ *Midwest Independent Transmission System Operator, Inc.*, 118 FERC ¶ 61,213 (2007) (RSG Compliance Order.)

⁶ RSG Second Rehearing Order, 118 FERC ¶ 61,212 at P 88 (internal citation omitted).

⁷ *Id.* P 88-98.

⁸ RSG Compliance Order, 118 FERC ¶ 61,213 at P 92-93 ("[T]he currently-effective tariff provisions relating to the real-time RSG charge in section 40.3.3 remain in effect.").

Service Corporation and Upper Peninsula Power Company (collectively, Integrys).⁹ Hoosier Energy Rural Electric Cooperative, Inc. (Hoosier) filed a request for rehearing of the RSG Second Rehearing Order.

Discussion

A. Procedural Matters

5. In the RSG First Rehearing Order¹⁰ and the RSG Second Rehearing Order,¹¹ the Commission denied Strategic Energy's motion to intervene out of time in this proceeding. Upon further review of this docket, however, we find that Strategic Energy was, in fact, already a party to this proceeding at the time it filed its motion to intervene out of time and its request for rehearing of the RSG Order.¹² When an entity is already a party in a particular docket, it need not file a separate motion to intervene in individual sub-dockets to maintain its party status. Because Strategic Energy was already a party to these proceedings, the Commission erred in refusing to address the merits of Strategic Energy's requests for rehearing of the RSG Order and RSG First Rehearing Order. That said, the substantive issues raised by Strategic Energy in those pleadings were discussed in other parties' requests for rehearing and addressed on the merits,¹³ so Strategic Energy's interests have been adequately represented throughout these proceedings, and the error is harmless.

⁹ When WPS Resources Corporation and Peoples Energy Company merged to create Integrys Energy Group, Inc., WPS Energy Services, Inc. was renamed Integrys Energy Services, Inc.

¹⁰ RSG First Rehearing Order, 117 FERC ¶ 61,113 at P 7.

¹¹ RSG Second Rehearing Order, 118 FERC ¶ 61,212 at P 10-13.

¹² See *Midwest Independent Transmission System Operator, Inc.*, 107 FERC ¶ 61,191, at P 12-13 and App. A (2004) (accepting Strategic Energy's motion to intervene).

¹³ See RSG First Rehearing Order, 117 FERC ¶ 61,113 at P 17, 91, 98, 101, 107 and n.77; RSG Second Rehearing Order, 118 FERC ¶ 61,212 at P 13.

B. Effective Date for Refunds**1. Background**

6. In the RSG Second Rehearing Order, the Commission clarified that for those market participants withdrawing energy, the RSG Order served as notice to market participants that virtual offers were liable for RSG charges, per the terms of the currently-effective tariff. Therefore, the RSG First Rehearing Order's waiver of refunds applied to the period before that order (*i.e.*, from market start-up in April 2005 until April 24, 2006). The Commission clarified that, after April 24, 2006, virtual supply offers were liable for RSG costs. To the extent virtual supply offers were not assessed RSG costs, refunds were due for the period starting April 25, 2006.¹⁴

2. Notice Regarding the Refund Effective Date and Ambiguity in Earlier Orders**a. Requests for Rehearing**

7. Hoosier, Integrys, Otter Tail and Strategic Energy each take issue with the Commission's finding in the RSG Second Rehearing Order that the RSG Order provided notice that virtual transactions taking place after April 25, 2006 would be liable for RSG charges.

8. Hoosier asks that the Commission establish that RSG costs will not be allocated to virtual supply offers prior to March 15, 2007 or, in the alternative, no earlier than October 26, 2006. Hoosier argues that while the RSG Order provided notice that virtual offers would be liable for RSG charges at some point, it did not make clear that this point was April 25, 2006. Hoosier contends that the RSG Order stated that refunds would be required back to April 1, 2005 and does not indicate that virtual transactions taking place on April 25, 2006 would be treated differently from virtual transactions that took place before that date. Moreover, Hoosier notes that the RSG First Rehearing Order stated that the Commission would "*prospectively* allocate RSG charges to virtual transactions consistent with the TEMT, as described elsewhere in this order, to prevent *future* inequity."¹⁵ According to Hoosier, the references to prospective allocation and future inequity mean that the date on which virtual transactions assume RSG liability would not

¹⁴ RSG Second Rehearing Order, 118 FERC ¶ 61,212 at P 102.

¹⁵ Hoosier Request for Rehearing at 4 (quoting RSG First Rehearing Order, 117 FERC ¶ 61,113 at P 95 (emphasis added)).

be earlier than the date of the RSG First Rehearing Order. Hoosier notes that the RSG First Rehearing Order further required the Midwest ISO to propose a charge to assess RSG charges to virtual supply offers based on the RSG charges that such offers cause. Hoosier concludes that the most reasonable interpretation of the RSG First Rehearing Order is that the allocation of RSG charges to virtual supply offers would not begin until the Midwest ISO proposed, and the Commission accepted, a charge. Hoosier argues that the RSG Second Rehearing Order and RSG Compliance Order stated for the first time that RSG costs would be allocated to virtual transactions back to April 25, 2006, the date of the RSG Order. This, Hoosier says, is not reasoned decision-making because the Commission has not justified its change of mind as a “considered departure” from its prior decision.

9. Similarly, Integrys and Strategic Energy argue that the Commission erred in imposing a refund effective date of April 26, 2006 because market participants were not on notice that virtual supply offers would be subject to RSG charges as of April 26, 2006. They argue that, in the RSG First Rehearing Order, the Commission declined to order assessment of RSG on virtual supply offers retroactive to April 1, 2005, clarifying “that those provisions [governing rates for RSG on virtual supply offers] will not go into effect until we accept an appropriate allocation of costs to virtual supply offers.”¹⁶ Integrys and Strategic Energy state that market participants therefore “reasonably relied on the Commission’s order that RSG charges would only be applicable to virtual supply offers prospectively, once a rate that reflected the cost of virtual supply offers on the system was determined.”¹⁷ Integrys notes that, accordingly, market participants engaged in virtual activity “with the reasonable expectation that virtual transactions would not be allocated RSG charges.”¹⁸ Integrys also argues that the Commission’s “abrupt reversal” in the RSG Compliance Order, finding that RSG charges should be applicable to virtual supply offers as of April 26, 2006, is arbitrary and capricious and not the result of reasoned decision-making. Integrys and Strategic Energy further argue that imposition of the RSG charges back to April 26, 2006 causes significant harm, especially in light of

¹⁶ Integrys Request for Rehearing of RSG Second Rehearing Order at 7 (quoting RSG First Rehearing Order, 117 FERC ¶ 61,113 at P 122); *see also* Strategic Energy Request for Rehearing at 9 (quoting RSG First Rehearing Order, 117 FERC ¶ 61,113 at P 122).

¹⁷ Integrys Request for Rehearing of RSG Second Rehearing Order at 7; *see also* Strategic Energy Request for Rehearing at 9.

¹⁸ Integrys Request for Rehearing of RSG Compliance Order at 7 (quoting RSG First Rehearing Order, 117 FERC ¶ 61,113 at P 94).

unusually high RSG charges over the last few months, and creates additional burdens on the Midwest ISO, which has to re-calculate and re-bill these charges.

10. Otter Tail also argues that the Commission erred in requiring the Midwest ISO to assess charges against virtual supply offers that were made after April 24, 2006, maintaining that the Midwest ISO should assess RSG charges only to virtual supply offers transacted after March 15, 2007.

11. Otter Tail maintains that the RSG Order and RSG First Rehearing Order were ambiguous as to when the Midwest ISO was obligated to begin applying RSG charges to virtual transactions. Otter Tail states that Commission orders, particularly those imposing obligations, must be unambiguous and specific enough that utilities are aware of their responsibilities.¹⁹ It notes, in particular, precedent in which a reviewing court found that the Commission could not rely on earlier orders to provide adequate notice of a new requirement because the terms at issue in those orders were subject to multiple interpretations.²⁰

12. Otter Tail states that the RSG Order and the RSG First Rehearing Order are ambiguous because they did not clearly specify when the Midwest ISO should begin to apply RSG charges to virtual supply transactions. Otter Tail maintains that the Commission's summary of the comments and protests in the RSG Second Rehearing Order makes clear that several parties had trouble discerning from the RSG First Rehearing Order when RSG charges would be assessed to virtual supply offers. Otter Tail asserts that the RSG Order did not specify a date by which the Midwest ISO should begin assessing RSG charges to virtual supply transactions. It also argues that the RSG First Rehearing Order could be interpreted to mean that RSG charges would not be applied until after the Commission accepted the Midwest ISO's compliance filing. In support, Otter Tail points to the Commission's statement that it would prospectively allocate RSG charges to virtual transactions, consistent with the TEMT,²¹ and to the subsequent section of the same order, which was titled "Prospective Treatment of Virtual

¹⁹ Otter Tail Request for Rehearing at 8-10 (citing, *inter alia*, *Southern Company Services, Inc. v. FERC*, 416 F.3d 39 (D.C. Cir. 2005) (*Southern Company Services*); *Dominion Resources, Inc. v. FERC*, 286 F.3d 586 (D.C. Cir. 2002); *Kansas Cities v. FERC*, 723 F.2d 82 (D.C. Cir. 1983); *United Gas Pipe Line Co. v. FERC*, 597 F.2d 581 (5th Cir. 1979)).

²⁰ *Id.* at 9-10 (citing *Southern Company Services*, 416 F.3d at 44-45).

²¹ *Id.* at 11 (citing RSG First Rehearing Order, 117 FERC ¶ 61,113 at P 95).

Supply Offers” and included directives for the Midwest ISO to conduct a cost causation analysis.²² Otter Tail contends that it is therefore reasonable for the Midwest ISO to conclude that RSG charges were not required to be assessed to virtual supply transactions until after the Midwest ISO filed, and the Commission accepted, an RSG charge. Otter Tail avers that it was not clear until the Commission issued the RSG Second Rehearing Order that it intended the Midwest ISO to begin imposing RSG charges on virtual transactions on the date that the RSG Order was issued.

13. Finally, Otter Tail faults the Commission for not specifying compliance obligations in the body or the ordering paragraphs of the RSG Order and the RSG First Rehearing Order. It argues that the proper way to prevent ambiguity would have been to order the Midwest ISO to revise its Business Practices Manuals to be consistent with the tariff,²³ or to state a date certain after which the Midwest ISO must apply RSG charges to virtual supply transactions. Otter Tail concludes that the absence of compliance obligations, coupled with the language of the RSG Order and RSG First Rehearing Order, strongly suggested that RSG charges would not be assessed on virtual transactions until a future time.

b. Discussion

14. The Commission approved the tariff provisions allocating RSG costs to virtual supply prior to the start of the Midwest ISO energy markets, and those provisions have remained in effect without interruption for over two years.²⁴ The Commission has never indicated that those provisions were no longer in effect, or that it was acceptable for the Midwest ISO not to follow them. As Otter Tail admits, the RSG Order “clarified that the currently-effective tariff applied to Virtual Supply Offers.”²⁵ In fact, in every order dealing with RSG costs, the Commission indicated that virtual supply offers were liable

²² *Id.* at 11-12 (citing RSG First Rehearing Order, 117 FERC ¶ 61,113 at P 117, 119).

²³ *Id.* at 12-13 (citing *PPL EnergyPlus, LLC v. New York Independent System Operator, Inc.*, 115 FERC ¶ 61,383, at P 31 (2006) (*PPL*)).

²⁴ *Midwest Independent Transmission System Operator, Inc.*, 108 FERC ¶ 61,163 (TEMT II Order), *order on reh’g* 109 FERC ¶ 61,157 (2004), *order on reh’g*, 111 FERC ¶ 61,043, *order on reh’g*, 112 FERC ¶ 61,086 (2005), *aff’d sub nom. Wisconsin Public Power Inc. v. FERC*, 2007 U.S. App. LEXIS 17257 (D.C. Cir. July 20, 2007).

²⁵ Otter Tail Request for Rehearing at 11.

for RSG costs, *per the terms of the currently-effective tariff*.²⁶ Considering these repeated and consistent statements by the Commission in previous orders, we find no basis for concluding that the Commission's orders were ambiguous or, as further detailed below, that RSG charges would not apply until the Midwest ISO proposed, and the Commission accepted, a revised RSG charge. We therefore disagree with the allegations that the RSG Second Rehearing Order stated for the first time that RSG costs would be allocated to virtual transactions back to the date of the RSG Order.

15. Nor were Commission orders ambiguous on the effective date for refunds. The RSG Order stated that refunds were required back to market start-up, consistent with the terms of the currently-effective tariff. The Commission made clear in the RSG Order²⁷ that virtual supply was liable for RSG costs and affirmed that finding in the RSG First Rehearing Order.²⁸ There is no basis to conclude that issues of interpretation remained after the date of the RSG Order. Following the Commission's waiver of the refund requirement in the RSG First Rehearing Order, the Commission in the RSG Second Rehearing Order clarified that refunds would be waived for the period before the RSG First Rehearing Order.²⁹ In this context, the waiver of refunds was a one-time exercise of the Commission's discretion to require (or not to require) refunds for violations of a tariff provision that continuously remained in effect. We are not persuaded that the Commission's prior rulings were unreasonable.

16. As to the effective date for a proposed allocation, we repeat the Commission's ruling in the RSG Compliance Order: "Inasmuch as the Commission made clear that the currently effective tariff provision allocates RSG costs to virtual offers in both the RSG Order and RSG [First] Rehearing Order, there is no basis to conclude that RSG costs

²⁶ See RSG Order, 115 FERC ¶ 61,108 at P 26, 29 ("Accordingly, to the extent the Midwest ISO did not charge virtual supply offers for RSG costs, it violated the terms of its tariff. . . . Allocation of RSG costs to virtual transactions is required by the tariff."); RSG First Rehearing Order, 117 FERC ¶ 61,113 at P 45 ("Inasmuch as the language of section 40.3.3.a.ii specifically lists virtual supply as a component of the RSG settlement charge, we affirm our decision in the RSG Order to require virtual supply to be assessed RSG costs."); RSG Second Rehearing Order, 118 FERC ¶ 61,212 at P 88.

²⁷ See RSG Order, 115 FERC ¶ 61,108 at P 26.

²⁸ See RSG First Rehearing Order, 117 FERC ¶ 61,113 at P 45.

²⁹ RSG Second Rehearing Order, 118 FERC ¶ 61,212 at P 102.

should not be allocated to virtual supply offers at any time since market start”³⁰ – including future periods.

17. We disagree that the RSG Second Rehearing Order provided the first notice that the Midwest ISO should impose RSG charges on virtual supply transactions. Although the RSG Order used the word “prospective” in the discussion of the currently-effective tariff as well as in the analysis of the Midwest ISO’s proposal to change the tariff, the Commission stated many times that the tariff was never changed in this proceeding and that the tariff provision that assigned RSG costs to virtual supply remained effective. The Commission’s discussion of prospective treatment of virtual supply offers, starting with the RSG Order,³¹ therefore applied only to an evaluation of the testimony and analysis supporting the Midwest ISO’s proposal to delete from its tariff the language allocating RSG costs to virtual supply.³² Furthermore, the RSG First Rehearing Order separated its discussion of the Midwest ISO’s proposal not to assess RSG charges to virtual supply offers³³ from the earlier discussion of the currently-effective tariff. As further discussed below, we find that it was not reasonable for the Midwest ISO to interpret the RSG Order and the RSG First Rehearing Order to mean that RSG charges would not be assessed to virtual supply offers until after the Midwest ISO filed an RSG charge that the Commission would accept.

³⁰ RSG Compliance Order, 118 FERC ¶ 61,213 at P 27. We further note that, contrary to Otter Tail’s assertion, the Midwest ISO did not conclude that the Commission’s discussion of prospective treatment meant that RSG charges could not be assessed to virtual supply transactions until after it filed, and the Commission accepted, an RSG charge. In the Midwest ISO’s own words, it requested that the Commission amend the TEMT prospectively, and that the Midwest ISO not be required to resettle charges under the TEMT with respect to the allocation of RSG charges to virtual transactions. *See* Midwest ISO Answer, Docket No. ER04-691-065, at 4 (Dec. 2, 2005).

³¹ RSG Order, 115 FERC ¶ 61,108 at P 31, 48-49.

³² *See* RSG Second Rehearing Order, 118 FERC ¶ 61,212 at P 106 (“The Commission instructed the Midwest ISO to refile a proposal and to undertake an analysis to determine the impact of virtual supply offers on RSG costs. The Commission ruling provided no specific direction to eliminate the energy withdrawal condition that is in the currently-effective tariff.”).

³³ *See* RSG First Rehearing Order, 117 FERC ¶ 61,113 at P 97-122.

18. We further disagree that the Commission erred by not ordering the Midwest ISO to amend its Business Practices Manuals to be consistent with the tariff or stating a date certain after which the Midwest ISO must commence applying RSG charges to virtual supply transactions. Business Practices Manuals are not kept on file with the Commission; the Midwest ISO supplies them so that its market participants know how the procedures described in the tariff will be carried out.³⁴ The Midwest ISO is responsible for making sure that the contents of the Business Practices Manuals are consistent with the TEMT.³⁵ Because the Midwest ISO (and its market participants) have known throughout this proceeding that the Business Practices Manuals are not consistent with the TEMT, the Commission did not need to remind the Midwest ISO to update its Business Practices Manuals to include correct information. Nor did the Commission find it necessary to name a date certain for the assessment of RSG costs to virtual supply, since the tariff remained effective and the Commission waived partial refunds only for a defined time period.

3. **Reliance by Market Participants on the Midwest ISO's Business Practices Manuals**

a. **Requests for Rehearing**

19. Otter Tail states that the Commission has encouraged market participants to rely on an RTO's instructions and guidance because of its role as "the gatekeeper for the integrity of the markets [it] administer[s]."³⁶ Otter Tail maintains that in certain circumstances, the Commission has concluded that reliance on an RTO's directives would justify a presumption that a market participant has not violated a Commission

³⁴ "Under our existing 'rule of reason' policy, we see no reason to require that the Midwest ISO file the Business Practices Manuals . . . [W]hile implicating our jurisdiction, they mostly involve general operating procedures." TEMT II Order, 108 FERC ¶ 61,163 at P 656, 658.

³⁵ PPL, 115 FERC ¶ 61,383 at P 29. See also TEMT, Module C, section 38.1.5, Second Revised Sheet No. 357 ("The [Midwest ISO] shall prepare, maintain, promulgate, and update the Business Practices Manuals as they relate to the operation of the Energy Markets. The Business Practices Manuals shall conform and comply with [the TEMT], and the NERC operating policies, guidelines, and standards.").

³⁶ Otter Tail Request for Rehearing at 13-14 (quoting *Policy Statement on Credit-Related Issues for Electric OATT Transmission Providers, Independent System Operators and Regional Transmission Organizations*, 109 FERC ¶ 61,186, at P 18 (2004)).

requirement. It also notes the RTO's statement may even be relied upon as an affirmative defense where a market participant engaged in a transaction or action that was not approved by the Commission. In support of this contention, Otter Tail points to the Commission's statement that "[i]f a market participant undertakes an action or transaction at the direction of an ISO or RTO that is not approved by the Commission, the market participant can assert this as a defense for the action taken."³⁷

20. Otter Tail states that one of the ways in which an RTO provides guidance is through its non-filed manuals. Otter Tail states that the Commission has recognized that the principal purpose of the Midwest ISO's Business Practices Manuals is to explain in detail how the Midwest ISO interprets and implements its tariff provisions. Otter Tail points to Commission statements that Business Practices Manuals "supplement the rates, terms and conditions specified in the TEMT," and provide "background information, guidelines, business rules and processes established for the operation and administration of the different Midwest ISO markets."³⁸ It notes that market participants rely heavily on the Business Practices Manuals to understand and comply with the TEMT.

21. Pointing to *New York Independent System Operator, Inc. v. Astoria Energy, LLC*,³⁹ Otter Tail maintains that the Commission has found that, in addition to manuals, market participants can rely on an ISO representative's informal interpretations of tariff provisions. In *Astoria*, the Commission denied a complaint filed by the New York Independent System Operator, Inc. (NYISO) against Astoria Energy LLC, one of its customers, for failing to comply with certain tariff provisions. The Commission concluded that since the tariff provisions in question were ambiguous and susceptible to different interpretations, the customer acted reasonably in relying to its detriment on the NYISO representatives' interpretation of the tariff language.⁴⁰ Citing *PPL*, Otter Tail

³⁷ *Id.* at 14 (quoting *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorization*, 114 FERC ¶ 61,165, at P 27, *reh'g denied*, 115 FERC ¶ 61,053 (2006)).

³⁸ *Id.* at 21 (quoting TEMT II Order, 108 FERC ¶ 61,163 at P 650).

³⁹ *Id.* at 15-16 (citing *New York Independent System Operator, Inc. v. Astoria Energy LLC*, 118 FERC ¶ 61,216 (2007) (*Astoria*)).

⁴⁰ *Id.* (citing *Astoria*, 118 FERC ¶ 61,216 at P 30, 32, 34-36).

claims that it would be unfair to require market participants to assume that statements RTOs make about their own manuals and procedures are not credible.⁴¹

22. Otter Tail notes that the Commission has expressly found that the Midwest ISO's Business Practices Manuals need not be filed.⁴² It argues that by concluding that some guidance documents need not be reviewed by the Commission to determine whether they are just and reasonable, the Commission implicitly recognizes that sometimes the RTO will make a mistake by providing guidance in an un-filed document that is later determined to be inconsistent with the controlling tariff. Otter Tail argues that the Commission should not impose charges or penalties against the market participants that reasonably relied on such procedures.

23. Otter Tail asserts that market participants' reliance on Midwest ISO procedures and interpretations is justified because the Midwest ISO has "the last say" in all tariff filings and its Business Practices Manuals; therefore, market participants must be able to rely on common interpretations provided by the Midwest ISO.⁴³

b. Discussion

24. We do not agree with Otter Tail that the Midwest ISO's statements and Business Practices Manuals determine when tariff provisions are effective and when they are not. As the Commission has stated several times, the TEMT takes precedence over the Business Practices Manuals, not the other way around.⁴⁴ The Midwest ISO's own statements recognize that virtual supply offers are liable for RSG costs,⁴⁵ and, as

⁴¹ *Id.* at 16 (citing *PPL*, 115 FERC ¶ 61,383 at P 29).

⁴² *Id.* at 17 (citing TEMT II Order, 108 FERC ¶ 61,163 at P 656-58).

⁴³ Otter Tail cites to Commission statements that the Midwest ISO interpretations in its own publications should be regarded as coming from a credible source. *See* Otter Tail Request for Rehearing at 18.

⁴⁴ RSG Order, 115 FERC ¶ 61,108 at P 30; RSG First Rehearing Order, 117 FERC ¶ 61,113 at P 94. The Commission has affirmed the precedence of tariff provisions since the start of the Midwest ISO energy markets. *See* TEMT II Order, 108 FERC ¶ 61,163 at P 657 ("We share WEPCO's concern that the Business Practice[s] Manuals should not take precedence over the TEMT.").

⁴⁵ *See* RSG Order, 115 FERC ¶ 61,108 at P 26 (citing Midwest ISO Filing, Docket No. ER04-691-065, at 6 (Oct. 27, 2005)).

discussed above, its October 27, 2005 filing and subsequent compliance filings indicate that it fully understood that the currently-effective tariff remained in effect while the Commission evaluated its proposed amendment. More to the point, parties to this proceeding have ample evidence that the currently-effective tariffs have remained in effect since market start and therefore did not need continued verifications from the Midwest ISO as to the status of virtual supply liability for RSG costs.⁴⁶

25. Unlike the circumstance in *Astoria*, the Commission in this proceeding has never found that the tariff language was ambiguous, and it did not base its waiver of refunds on this argument. Rather, the Commission clearly stated RSG charges apply to virtual supply offers per the terms of the tariff.⁴⁷ The Midwest ISO simply chose not to assess RSG costs to virtual supply, contrary to the clear language of the tariff, as it has admitted.

26. While the Commission waived the refund between market start and April 25, 2006 in the RSG First Rehearing Order, and cited *PPL* as a basis for that decision, we do not consider *PPL* to be a basis to waive refunds for later time periods. As *PPL* points out, “[w]hen publishing informational documents for its market participants, NYISO has a responsibility to ensure that these documents are consistent with the Services Tariff and procedures.”⁴⁸ As discussed in the preceding paragraphs, the tariff provision assigning RSG charges to virtual supply is clear and has remained in effect since market start-up. Furthermore, Commission orders consistently stated that virtual supply offers are liable for RSG, and that the content of the Midwest ISO’s Business Practices Manuals was inconsistent with the tariff and therefore inaccurate. Under these circumstances, we do not consider market participants’ continued reliance on Business Practices Manuals to be reasonable. On the contrary, we find that it was unreasonable for parties to continue to rely on Midwest ISO staff statements that contradicted the currently-effective tariff and Commission orders after issuance of the RSG Order. We further find it unreasonable to do so after fifteen months of Commission orders affirming and reaffirming that the tariff remains in effect and virtual supply is liable for RSG costs. Accordingly, we disagree

⁴⁶ Inasmuch as this proceeding is restricted to the effectiveness of a cost allocation for an energy market, we do not consider Otter Tail’s example of a market participant undertaking an action at the direction of the ISO that is not approved by the Commission, as occurred in the *Astoria* proceeding, to be pertinent to this proceeding. The Midwest ISO did not, to our knowledge, direct Otter Tail to carry out specific actions.

⁴⁷ RSG Order, 115 FERC ¶ 61,108 at P 26; RSG First Rehearing Order, 117 FERC ¶ 61,113 at P 45.

⁴⁸ *PPL*, 115 FERC ¶ 61,383 at P 29.

with Otter Tail's assertion that Midwest ISO guidance that the Midwest ISO and market participants knew was contrary to the tariff and specific Commission orders represents information from a credible source. *PPL* simply does not stretch that far.

4. Market Participants' Reliance on the Midwest ISO's Guidance

a. Requests for Rehearing

27. Otter Tail states that the Midwest ISO specifically communicated to market participants, during several committee meetings in 2006, its understanding that RSG charges would not be applied to virtual transactions until the Commission accepted an appropriate methodology for assessing such charges.⁴⁹ For example, Otter Tail states, Midwest ISO representatives explained to market participants that no charges would be assessed to cleared virtual supply transactions prior to the effective date of the new TEMT provisions contained in the Midwest ISO's compliance filing.

28. Otter Tail also states that market participants also relied on the Midwest ISO's December 26, 2006 compliance filing in this proceeding, which further reinforced the Midwest ISO's prior guidance that RSG charges would not be applied other than prospectively to virtual transactions, effective April 1, 2007. Otter Tail states that while it realizes that the Commission may reject portions of a compliance filing, the December 26, 2006 compliance filing is further evidence of the Midwest ISO's interpretation of the Commission's requirements and a further basis for market participant reliance on the Midwest ISO's guidance.

29. Further, Otter Tail states that market participants reasonably relied on the Midwest ISO's decision not to begin applying RSG charges to virtual supply transactions after the issuance of either the RSG Order or the RSG First Rehearing Order as proof that RSG charges would not apply to those transactions until after the Commission accepted the Midwest ISO's compliance filing. Otter Tail states that a market participant should be able to rely on bills and settlement statements received from the Midwest ISO for transactions conducted in the Midwest ISO markets.

30. Otter Tail further notes that the Midwest ISO did not revise its Business Practices Manuals after the issuance of the RSG Order and the RSG First Rehearing Order, and argues this sent a "strong, consistent signal" to market participants that RSG charges

⁴⁹ Otter Tail refers to a November 8, 2006 Market Subcommittee meeting and a November 15, 2006 Advisory Committee meeting and states that there were other meetings as well. Otter Tail Request for Rehearing at 19-20, App. A.

would not be assessed to virtual supply offers until after the Midwest ISO's compliance filing was approved and implemented.⁵⁰ Otter Tail claims that there continued to be robust virtual transaction activity following the issuances of those orders, making it apparent that a majority of market participants relied on the Midwest ISO's understanding.

31. Moreover, Otter Tail notes that the Commission specifically concluded in the RSG First Rehearing Order that it was reasonable for market participants to rely on the Midwest ISO's interpretation of its tariff.⁵¹ Although the Commission may not agree with the Midwest ISO's interpretation, Otter Tail says, market participants nonetheless reasonably relied on that interpretation and guidance. Consequently, market participants that relied on that guidance to enter into virtual transactions should not be charged after the fact. Otter Tail contends that the retroactive imposition of RSG charges that result in significant net losses is an inappropriate penalty.

32. Otter Tail claims that it would send the wrong message to impose RSG charges on virtual transactions after market participants relied on the Midwest ISO's specific interpretations and guidance that such charges would not apply after the issuance of the RSG Order and RSG First Rehearing Order. Otter Tail claims that doing so would send a message to market participants that they should second-guess the Midwest ISO's interpretations of its own tariff and the validity of its Business Practices Manuals. It notes that the Commission has found that refunds are not appropriate where they would create substantial uncertainty, or undermine confidence, in the markets.⁵²

33. Otter Tail claims that the Commission mistakenly concluded in the RSG First Rehearing Order that the assessment of RSG charges to virtual supply offers did not adversely affect the Midwest ISO virtual transaction markets. Otter Tail claims that the market remained robust because the Midwest ISO had not begun to apply RSG charges to

⁵⁰ *Id.* at 21.

⁵¹ *Id.* at 22 (quoting RSG First Rehearing Order, 117 FERC ¶ 61,113 at P 94 (“While [the Commission] recognize[s] that the Midwest ISO's Business Practice[s] Manuals do not take precedence over the TEMT, we also believe that it is unfair to market participants to assume that the interpretations made by the Midwest ISO ‘in its own publications . . . cannot be regarded as coming from a credible source.’ . . . Midwest ISO market participants engaged in virtual transactions with the reasonable expectation that virtual transactions would not be allocated RSG charges.”)).

⁵² *Id.* at 24 (citing RSG First Rehearing Order, 117 FERC ¶ 61,113 at P 95).

virtual transactions, not because the RSG charges applied to virtual transactions were insignificant. Otter Tail states that it appears that the Commission did not realize at that time that the RSG charges were not being imposed.

34. Otter Tail posits that imposing RSG charges on virtual supply transactions entered into after the RSG Order will likely undermine Midwest ISO markets and adversely affect those who engaged in virtual supply transactions in reliance on the Midwest ISO's guidance. It alleges that imposing RSG charges after the fact will have the very consequence the Commission sought to avoid in the RSG First Rehearing Order by waiving RSG refunds and retroactive assessments – that is, that many of the virtual transactions that resulted in positive revenues may, after the fact, become losses.

35. Otter Tail also submits the affidavit of Mr. Bruce Glorvigen, Otter Tail's Manager of Power Services, to describe its virtual trading activities following issuance of the various RSG orders. Otter Tail states that following issuance of the RSG Order, it was unsure whether RSG charges would apply to its virtual supply transactions, and that it significantly curtailed its virtual trading activity. It states that this reduction occurred because in the vast majority of cases, the magnitude of estimated RSG charges, plus the risk that the charges would be imposed, eliminated the profit that could be derived from participating in virtual supply transactions.

36. Otter Tail claims it increased its virtual supply activity following issuance of the RSG First Rehearing Order, in reliance on the Midwest ISO's guidance that it would not assess RSG charges to current virtual transactions. If the Commission now imposes RSG charges on virtual supply offers that predate the issuance of the RSG Second Rehearing Order, Otter Tail states that it may have to refund all of the net revenue it received from the Midwest ISO's settlement of those transactions and pay significant additional charges. It states that “converting a modest profit to a significant net loss goes a long way towards undermining faith in the Midwest ISO's markets and in the Midwest ISO's ability to interpret and comply with its regulatory obligations.”⁵³

b. Discussion

37. As described above, Otter Tail's arguments regarding its reliance on the Midwest ISO's various representations far exceed what *Astoria* and *PPL* indicate is reasonable. *Astoria* concerned a generator's use of informal communications with an ISO to make a

⁵³ *Id.* at 28.

first-time interpretation of an ambiguous tariff provision.⁵⁴ In *PPL*, the Commission agreed with a NYISO market participant that it was reasonable to rely on NYISO's unfiled manuals and publications in order to determine the meaning of a tariff requirement.⁵⁵

38. Both *Astoria* and *PPL* involve the Commission's initial interpretation of a tariff provision – in the case of *Astoria*, an ambiguous tariff provision. In this proceeding, however, the Commission has repeatedly found that section 40.3.3.a.ii of the TEMT assigns RSG charges to virtual supply transactions, and it has never found that the section is ambiguous. As such, neither *Astoria* nor *PPL* can be read to support Otter Tail's suggestion that market participants may continue to rely on Midwest ISO publications and presentations, which it knows conflict with the Commission's published orders. If they could be read this way, then they would effectively permit the Midwest ISO to overrule the Commission.

39. We do not consider the expected impacts on the market to be a basis for granting rehearing in the face of tariff provisions in effect without interruption for over two years, numerous Commission statements affirming that the currently-effective tariff remains in effect, and statements by the Midwest ISO recognizing the RSG liability of virtual supply. Given the extensive record and consistent Commission findings, we will not grant rehearing on this basis. In this context, we do not agree with the contention that imposition of RSG charges on virtual supply would create uncertainty and undermine confidence in the Midwest ISO markets. The Commission has provided certainty in its rulings on the effectiveness of these provisions and its consistency on this point serves to bolster confidence that the market will be subject to predictable regulatory rules. Parties increasing their virtual transactions during the course of this proceeding did so knowing that they must assume a certain amount of risk, and should have factored that risk into the

⁵⁴ *Astoria*, 118 FERC ¶ 61,216 at P 36 (“[H]ad the Services Tariff been clear and unambiguous about the ICAP requirements at issue in this proceeding, informal communications (whether written or oral) by NYISO's representatives would be immaterial to resolving the issues.”).

⁵⁵ *PPL*, 115 FERC ¶ 61,383 at P 29 (“[T]he *NYISO Insider* interpreted the ICAP Manual in a manner consistent with the filed rate and . . . it is reasonable for PPL to rely on NYISO's own statements, submitted in a newsletter that it publishes, as to the NYISO's own interpretation of how section 4.9.2 operates.”).

economics of their transactions.⁵⁶ By contrast, we would consider a regulatory regime that suspended the effectiveness of Commission-approved tariffs every time an ISO made a statement in conflict with the effective tariff to be an uncertain market environment that would undermine market participants' confidence in the rules applicable to their transactions.

C. Cost Support Analysis

1. Background

40. In the RSG Compliance Order, the Commission rejected the Midwest ISO's proposal to allocate RSG costs to net virtual offers, *i.e.*, virtual offers minus virtual bids, and to allocate RSG costs for every hour in which there are positive net virtual offers. The Commission noted that the Midwest ISO had not provided any analysis or data on the relationship between virtual offers and RSG cost incurrence, and therefore had not considered cost causation in the design of the proposed rate.⁵⁷

2. Requests for Rehearing

41. Otter Tail argues that the Commission should set the currently-effective RSG charges that are assessed to virtual supply offers for hearing procedures under section 206 of the Federal Power Act.⁵⁸ Otter Tail claims that the Midwest ISO's initial filing to change the TEMT (the October 27, 2005 filing) and the Commission's reasoning in its RSG Order, RSG First Rehearing Order, RSG Second Rehearing Order and RSG Compliance Order lead to the "irrefutable result" that the Midwest ISO's currently-effective RSG charge for virtual supply transactions is not based on cost causation and is in all likelihood unjust and unreasonable.⁵⁹

⁵⁶ We recognize that since the Midwest ISO has yet to allocate any RSG costs to virtual supply, the Commission's conclusion in the RSG Second Rehearing Order that the market remained robust even though costs were being allocated to virtual supply was in error. However, that inaccuracy does not change our analysis and conclusion.

⁵⁷ RSG Compliance Order, 118 FERC ¶ 61,213 at P 88.

⁵⁸ 16 U.S.C. § 824e (2000).

⁵⁹ Otter Tail Request for Rehearing at 30.

42. Otter Tail argues that the underlying premise for this proceeding is that the current RSG charge provisions that existed since the start of the Midwest ISO Day 2 markets were not consistent with cost causation principles notwithstanding the Commission's earlier order accepting those provisions. Otter Tail states that in the October 27, 2005 filing, the Midwest ISO proposed to revise the current RSG provisions to ensure that RSG charges were developed and assessed consistent with the Commission's cost causation principles and eliminate the application of RSG charges to virtual supply offers because virtual transactions do not involve actual energy deliveries.

43. Otter Tail states that in the RSG Order, the Commission concluded that the current tariff language requires the application of RSG charges to virtual supply offers made by market participants that withdraw energy in real time,⁶⁰ that "virtual supply can affect RSG costs,"⁶¹ and that its acceptance of the Midwest ISO's proposed tariff language was conditioned "upon the filing by the Midwest ISO of a new tariff proposal, per the requirement of this order."⁶² Otter Tail states that the Commission recognized that certain allocation provisions as filed were imprecise.⁶³

44. Otter Tail states that in the RSG First Rehearing Order, the Commission directed the Midwest ISO to "propose a charge that assesses RSG costs to virtual supply offers based on the RSG costs they cause."⁶⁴ Otter Tail maintains that to ensure that the charge was based on cost-causation principles, the Commission ordered the Midwest ISO to "identify those costs caused by virtual supply offers, as determined by an analysis of the energy market with virtual supply offers compared to the energy market without virtual supply offers."⁶⁵ Otter Tail claims that this indicates that the Commission was concerned that the Midwest ISO's proposed RSG charge was not designed consistent with cost causation principles.

⁶⁰ *Id.* at 31 (citing RSG Order, 115 FERC ¶ 61,108 at P 26).

⁶¹ *Id.* (quoting RSG Order, 115 FERC ¶ 61,108 at P 84).

⁶² *Id.* (quoting RSG Order, 115 FERC ¶ 61,108 at P 84).

⁶³ *Id.* (citing RSG Order, 115 FERC ¶ 61,108 at P 80, 84-85).

⁶⁴ *Id.* (quoting RSG First Rehearing Order, 117 FERC ¶ 61,113 at P 117).

⁶⁵ *Id.* at 31-32 (quoting RSG First Rehearing Order, 117 FERC ¶ 61,113 at P 117).

45. Otter Tail states that in the RSG Compliance Order, the Commission confirmed that the Midwest ISO's RSG charge was not consistent with the Commission's cost causation principles and therefore may be unjust and unreasonable. The Commission explained that it had instructed the Midwest ISO to analyze "the impact of virtual supply offers on the incurrence of RSG costs, and thereby formulate a basis to allocate RSG costs . . . according to the principle that cost responsibility should follow cost incurrence"⁶⁶ and rejected the Midwest ISO's compliance proposal because the Midwest ISO failed to provide the required cost support analysis. Otter Tail contends that, in essence, the Commission concluded that the Midwest ISO had never provided cost support for allocating RSG costs to virtual supply offers.⁶⁷

46. Otter Tail argues that the Commission's decision to reject the Midwest ISO's compliance filing does not change the fact that the currently-effective RSG charge has not been shown to be based upon cost causation and may therefore be unjust and unreasonable. Otter Tail claims that, by rejecting the Midwest ISO's compliance proposal as not based on cost causation, the Commission recognized that the currently-effective RSG charge provisions likely are not based on cost causation.

47. Integrys and Strategic Energy argue that the Commission erred in the RSG Compliance Order in rejecting the Midwest ISO's compliance filing without requiring the Midwest ISO to make a subsequent filing to justify the costs of virtual supply offers in developing an RSG rate. They argue that "RSG rates that are generally applicable under the [TEMT] have been increasing and are now at unprecedented and unexpected levels. Assessment of RSG on virtual supply offers solely made by entities withdrawing energy will increase the costs of engaging in virtual activity and, if the rate is not cost based, will result in subsidization of other services by only those engaging in virtual supply offers."⁶⁸ Accordingly, Integrys and Strategic Energy argue that the Commission should

⁶⁶ *Id.* at 32 (quoting RSG Compliance Order, 118 FERC ¶ 61,213 at P 84).

⁶⁷ *Id.* (quoting RSG Compliance Order, 118 FERC ¶ 61,213 at P 88 ("Without any analysis or data on the relationship between virtual offers and RSG cost incurrence, we find ourselves in the same position the Commission found itself with respect to the Midwest ISO's initial RSG filing. In both circumstances, the Midwest ISO proposed a tariff revision that would either not allocate costs to virtual supply offers or that would allocate costs to virtual supply offers without considering cost causation in the design of the rate.")).

⁶⁸ Integrys Request for Rehearing of RSG Compliance Order at 6; *see also* Strategic Energy Request for Rehearing at 7.

require the Midwest ISO to develop a rate that reflects the cost of virtual supply offers on the need for additional generation.

48. Integrys also argues that RSG Second Rehearing Order requires the Midwest ISO to retroactively assess the RSG rate in effect during April 26, 2006 to the present time period “even though it acknowledges that such rate is not based on the costs in additional generation of virtual supply offers.”⁶⁹ Integrys states that “[a]pplication of the RSG rate, including all of the re-calculations, readjustments and re-allocations that are necessary, to virtual supply offers back to April 26, 2006 will not reflect the costs of virtual supply offers because [the Midwest ISO] has yet to show that there are *any* costs to the system resulting from virtual supply offers.”⁷⁰ Integrys asks the Commission to require the Midwest ISO to develop a rate for virtual supply offers that is cost justified, and once that rate is designed, apply it to virtual supply offers.

3. Discussion

49. Contrary to parties’ claims, the currently-effective rate is based on cost causation, since it appropriately allocates RSG costs to virtual supply in recognition of the fact that virtual supply can cause the incurrence of RSG costs.⁷¹ That cost allocation was approved without protest and has been in effect since market start-up. There is no single just and reasonable rate; what the Commission can accept as just and reasonable is represented by an area, not a pinpoint.⁷² We reaffirm that the RSG charge falls within this area and is therefore just and reasonable. With respect to Otter Tail’s request for further investigation in a hearing, the same issue is pending in recently-filed cases that

⁶⁹ Integrys Request for Rehearing of RSG Second Rehearing Order at 9.

⁷⁰ *Id.* (emphasis in original).

⁷¹ The record in this proceeding includes evidence that virtual supply causes the incurrence of RSG costs, as the Commission has affirmed in previous orders. *See* RSG Order, 115 FERC ¶ 61,108 at P 48 (“As the example provided by Ameren shows, virtual supply offers can cause RAC costs to increase and therefore they impact real-time revenue sufficiency.”); *see also* RSG First Rehearing Order, 117 FERC ¶ 61,113 at P 98-112 (discussing testimony filed on rehearing as to whether or not virtual offers can cause RSG costs).

⁷² *See, e.g., FPC v. Conway Corp.*, 426 U.S. 271, 278 (1976); *ExxonMobil Gas Mktg. Co. v. FERC*, 297 F.3d 1071, 1084 (D.C. Cir. 2002).

seek revisions to the RSG rate under section 206 of the FPA. We will address the need for hearings in response to those complaints.

D. Physical Withdrawals of Energy

1. Background

50. Section 40.3.3.a.ii of the TEMT describes the components of the RSG charge, providing that, “[o]n any Day when a Market Participant actually withdraws Energy, the Market Participant shall be charged a Real-Time Revenue Sufficiency Guarantee Charge.”⁷³

51. The Midwest ISO stated in the October 27, 2005 filing that since its energy markets opened in 2005, notwithstanding the above-quoted language, it had not considered virtual supply offers in the RSG charge calculation. It explained that virtual supply offers do not include actual energy deliveries; thus, they were not considered to be a generation resource that could be physically committed for reliability purposes in the RAC process. In the RSG Order, the Commission disagreed, finding that under the above-quoted section 40.3.3.a.ii, the RSG charge applied to virtual supply offers.

52. In the RSG Order and RSG First Rehearing Order, the Commission responded to parties’ requests for clarification as to whether any market participant that made virtual transactions must pay RSG costs, or whether section 40.3.3.a.ii applies only to those market participants that made actual withdrawals of energy. The Commission found that the tariff assesses RSG costs to virtual supply offers only on those days that the market participant makes a physical withdrawal of energy at a commercial pricing node.⁷⁴

2. Request for Rehearing

53. Integrys contends the Commission erred in broadly construing what constitutes a “physical withdrawal” for purposes of the applicability of RSG on virtual supply offers. Integrys asserts the Commission must narrowly define withdrawal of energy to withdrawal at a particular commercial pricing node associated with a physical delivery. Integrys maintains that to do otherwise would result in discrimination against entities such as Integrys that use virtual activities as part of their strategy to serve load but also engage in virtual activity not associated with a load service obligation. Integrys claims

⁷³ TEMT, Module C, section 40.3.3.a.ii, Second Revised Sheet No. 577.

⁷⁴ See RSG First Rehearing Order, 117 FERC ¶ 61,113 at P 45-47.

there is no reason there should be any difference between Integrys' activity and a financial merchant's activity to justify disparate treatment and that such undue discrimination would have anti-competitive effects.

3. Discussion

54. Integrys raises the same request to modify the tariff language it raised on rehearing of the RSG First Rehearing Order. Integrys has not raised any new arguments that would warrant a different finding. The language of the tariff assigning RSG costs to entities that withdraw energy was accepted by the Commission in the TEMT II Order, which established the initial terms and conditions of service for the new Midwest ISO energy market nearly three years ago. As the Commission stated in the RSG Second Rehearing Order, changes such as those Integrys proposes cannot be made to a Commission-approved and effective tariff in the instant 205 proceeding; they are beyond the scope of this proceeding. Integrys had the opportunity to challenge the justness and reasonableness of these provisions when the Midwest ISO filed them as part of its TEMT, but it chose not to do so.

The Commission orders:

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

(B) The requests for rehearing of the RSG Compliance Order are hereby denied, as discussed in the body of this order.

By the Commission. Commissioner Moeller not participating.

(S E A L)

Kimberly D. Bose,
Secretary.