

121 FERC ¶ 61,205  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Ameren Services Company  
Northern Indiana Public Service Company

Docket No. EL07-86-000

v.

Midwest Independent Transmission System Operator,  
Inc.

Great Lakes Utilities  
Indiana Municipal Power Agency  
Missouri Joint Municipal Electric Utility Commission  
Missouri River Energy Services  
Prairie Power, Inc.  
Southern Minnesota Municipal Power Agency  
Wisconsin Public Power Inc.

Docket No. EL07-88-000

v.

Midwest Independent Transmission System Operator,  
Inc.

Wabash Valley Power Association, Inc.

Docket No. EL07-92-000

v.

Midwest Independent Transmission System Operator,  
Inc.

E.ON U.S. LLC

Docket No. EL07-100-000

v.

Midwest Independent Transmission System Operator,  
Inc.

ORDER ON COMPLAINTS, INSTITUTING INVESTIGATION, ESTABLISHING  
PAPER HEARING, ESTABLISHING REFUND EFFECTIVE DATE, AND  
CONSOLIDATING DOCKETS

(Issued November 28, 2007)

1. On August 10, 2007, Ameren Services Company, on behalf of certain of its affiliates,<sup>1</sup> and Northern Indiana Public Service Company (collectively, Ameren/NIPSCO) filed a complaint (Ameren/NIPSCO Complaint), pursuant to section 206 of the Federal Power Act (FPA)<sup>2</sup> and Rule 206 of the Commission's Rules of Practice and Procedure,<sup>3</sup> against the Midwest Independent Transmission System Operator, Inc. (Midwest ISO) regarding the allocation of Revenue Sufficiency Guarantee (RSG) charges to market participants under the Midwest ISO's Open Access Transmission and Energy Markets Tariff (TEMT).
2. On August 17, 2007, Great Lakes Utilities, Indiana Municipal Power Agency, Missouri Joint Municipal Electric Utility Commission, Missouri River Energy Services, Prairie Power, Inc., Southern Minnesota Municipal Power Agency, and Wisconsin Public Power Inc. (collectively, the Midwest TDUs) filed a conditional complaint and motion to consolidate their complaint with the Ameren/NIPSCO Complaint (Midwest TDUs Conditional Complaint).<sup>4</sup>

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<sup>1</sup> For the purposes of the complaint, these affiliates include: Ameren Energy Marketing Company, Union Electric Company d/b/a AmerenUE, Central Illinois Public Service Company d/b/a AmerenCIPS, Central Illinois Light Company d/b/a AmerenCILCO, and Illinois Power Company d/b/a AmerenIP. Ameren Services Company and these affiliates are collectively referred to as Ameren.

<sup>2</sup> 16 U.S.C. § 824e (2000).

<sup>3</sup> 18 C.F.R. § 385.206 (2007).

<sup>4</sup> On August 29, 2007, the Midwest TDUs sought permission to add the Midwest Municipal Transmission Group as an additional complainant. We will accept the Midwest TDUs' request to add the Midwest Municipal Transmission Group as a complainant.

3. On August 24, 2007, Wabash Valley Power Association, Inc. (Wabash) filed a second conditional complaint and motion to consolidate their complaint with the Ameren/NIPSCO Complaint and the Midwest TDUs Conditional Complaint (Wabash Conditional Complaint).

4. For the reasons set forth below, we will grant in part and deny in part the relief requested in the Ameren/NIPSCO Complaint, the Midwest TDUs Conditional Complaint, and the Wabash Conditional Complaint (collectively, Complaints). The Commission finds that the Midwest ISO's existing RSG cost allocation methodology may not be just and reasonable. The Commission also finds that the RSG cost allocation methodologies proposed by complainants have not been shown to be just and reasonable. Therefore, this order establishes a refund effective date of August 10, 2007 and sets the Complaints for paper hearing and investigation to review evidence and to establish a just and reasonable RSG cost allocation methodology. However, we will hold this paper hearing in abeyance pending the conclusion of an ongoing stakeholder proceeding on February 1, 2008, whichever is earlier. Further, we will consolidate Docket Nos. EL07-86-000, EL07-88-000, and EL07-92-000 as requested.

#### **I. Background**

5. The Midwest ISO's TEMT charges market participants withdrawing energy in the real-time energy market a real-time RSG charge based on their virtual supply offers and real-time load, injection, export and import deviations.<sup>5</sup> The purpose of the RSG charge

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<sup>5</sup> Specifically, section 40.3.3.a.ii of the Midwest ISO TEMT provides:

On any Day when a Market Participant actually withdraws Energy, the Market Participant shall be charged a Real-Time Revenue Sufficiency Guarantee Charge. The Market Participant's Real-Time Revenue Sufficiency Guarantee Charge shall be based on all Virtual Supply Offers for the Market Participant in the Day-Ahead Energy Market and for deviations based on the sum of the absolute value for the following four elements (a) Load deviations in the Real-Time Energy Market during the Operating Day (based on the difference between real-time Metered Load and Load scheduled in the Day-Ahead Energy Market, measured at each Commercial Node), (b) Import schedule deviations (based on the difference between real-time Import scheduled quantities and Imports scheduled in the Day-Ahead Energy Market), (c) Export schedule deviations (based on the difference between real-time Export scheduled quantities and Exports scheduled in the Day-Ahead Energy Market), and (d)

(continued)

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.

6. On April 25, 2006, in Docket No. ER04-691, the Commission issued an order rejecting the Midwest ISO's proposal to, among other things, remove references to virtual supply from the TEMT provisions related to calculating RSG charges.<sup>6</sup> The Commission further found that because the Midwest ISO had not been including virtual supply offers in its RSG calculations, it had violated its tariff and must make appropriate refunds.<sup>7</sup> However, the requests for rehearing of the RSG Order persuaded the Commission to

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injections of Energy including: (1) any difference between Energy output based on the Metered quantity of Energy (MWh) versus the hourly integrated Dispatch Instruction in the Real-Time Energy Market (excluding MW designated for either Regulation Down or Regulation Up); (2) any negative difference between Energy scheduled in the Day-Ahead Energy Market and real time Economic Minimum Dispatch amounts (excluding Resources committed in any RAC processes conducted for the Operating Day); and, (3) any negative difference between real time Economic Maximum Dispatch amounts and Energy scheduled in the Day-Ahead Energy Market. The sum of the absolute value for such amounts set forth in Section 40.3.3.a.ii.(a) through (d) shall be multiplied by the per unit Real-Time Revenue Sufficiency Guarantee Charge rate to determine the Real-Time Revenue Sufficiency Guarantee Charge to be paid by the Market Participant, provided, that, no charges shall be assessed for any difference caused by lags in the State Estimator and Unit Dispatch System tracking of unit output that complies with Dispatch Instructions.

<sup>6</sup> *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 (RSG Second Rehearing Order), *order on reh'g*, 121 FERC ¶ 61,131 (2007) (RSG Third Rehearing Order).

<sup>7</sup> RSG Order, 115 FERC ¶ 61,108 at P 26.

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.<sup>8</sup>

7. On March 15, 2007, the Commission issued two orders regarding the Midwest ISO's RSG charges, the RSG Second Rehearing Order and the RSG Compliance Order.<sup>9</sup> 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."<sup>10</sup> 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.<sup>11</sup> In the RSG Compliance Order, the Commission found that the Midwest ISO failed to analyze the relationship between virtual supply offers and RSG cost incurrence as required by the RSG First Rehearing 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.<sup>12</sup> On November 5, 2007, the Commission denied rehearing of the RSG Second Rehearing Order and RSG Compliance Order and accepted the Midwest ISO's second compliance filing in this proceeding.<sup>13</sup>

8. Since November 2005, the RSG Task Force, a working group of Midwest ISO market participants organized under the Midwest ISO's Market Subcommittee (organized

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<sup>8</sup> RSG First Rehearing Order, 117 FERC ¶ 61,113 at P 92-96.

<sup>9</sup> *Midwest Independent Transmission System Operator, Inc.*, 118 FERC ¶ 61,213 (2007) (RSG Compliance Order), *order on reh'g*, RSG Third Rehearing Order, 121 FERC ¶ 61,131 (2007).

<sup>10</sup> RSG Second Rehearing Order, 118 FERC ¶ 61,212 at P 88 (internal citation omitted).

<sup>11</sup> *Id.* P 88-98.

<sup>12</sup> 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.").

<sup>13</sup> RSG Third Rehearing Order, 121 FERC ¶ 61,131 (2007); *Midwest Independent Transmission System Operator, Inc.*, 121 FERC ¶ 61,132 (2007) (RSG Second Compliance Order).

under the Midwest ISO's Advisory Committee) has been working to identify improvements that could be made to the RSG cost allocation methodology.

9. As discussed in greater detail below, the Complaints filed against the Midwest ISO challenge the existing allocation of RSG charges to market participants under the TEMT. The complainants allege that the RSG rate, which is based in part on virtual supply offers, is unjustly and unreasonably assessed on only a subset of virtual supply offers. They argue that there is no justification for differentiating among virtual supply offers with regard to RSG charge allocation, and that the Commission's prior orders have found that there is no basis to do so. They ask that the Commission set for hearing the issue of the revisions to the TEMT necessary to remedy this alleged discrimination.

## **II. Notice of Filing and Responsive Pleadings**

10. Notice of the Ameren/NIPSCO Complaint was published in the *Federal Register*, 72 Fed. Reg. 46,618 (2007), with interventions and protests due on or before September 4, 2007. Timely motions to intervene were filed by: Alliant Energy Corporate Services, Inc.; the Coalition of Midwest Transmission Customers (CMTC); Constellation Energy Commodities Group, Inc. and Constellation NewEnergy, Inc.; Consumers Energy Company (Consumers); The Detroit Edison Company; and DTE Energy Trading, Inc. Timely motions to intervene, comments and answers were filed by the Midwest ISO<sup>14</sup> and the Midwest TDUs. The Public Service Commission of Wisconsin (Wisconsin Commission) filed a timely notice of intervention and comments. Wabash filed a timely motion to intervene. An untimely motion to intervene was filed by Exelon Corporation (Exelon).

11. Notice of the Midwest TDUs Conditional Complaint was published in the *Federal Register*, 72 Fed. Reg. 49,277 (2007), with interventions and protests due on or before September 7, 2007. Timely motions to intervene were filed by: CMTC; Consumers; and Wabash. An untimely motion to intervene was filed by Ameren.

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<sup>14</sup> On September 18, 2007, the Midwest ISO filed a motion to clarify and/or for leave to admit answer in order to clarify that its answer to the Ameren/NIPSCO Complaint, filed on September 4, 2007, was intended to serve as the Midwest ISO's answers to the Midwest TDUs Conditional Complaint and Wabash Conditional Complaint as well.

12. Notice of the Wabash Conditional Complaint was published in the *Federal Register*, 72 Fed. Reg. 51,222 (2007), with interventions and protests due on or before September 13, 2007. Ameren filed a timely motion to intervene.

13. Timely motions to intervene in all three proceedings were filed by: Black Oak Energy, LLC; Hoosier Energy Rural Electric Cooperative, Inc.; Michigan South Central Power Agency; Michigan Public Power Agency; Otter Tail Power Company; Wisconsin Public Service Corporation and Upper Peninsula Power Company; and Wolverine Power Supply Cooperative, Inc. Timely motions to intervene, comments and/or answers in all three proceedings were filed by: American Municipal Power – Ohio, Inc. (AMP-Ohio); CAM Energy Trading, LLC, EPIC Merchant Energy, LP and SESCO Enterprises, LLC (collectively, the Financial Marketers); DC Energy Midwest, LLC, Lehman Brothers Commodity Services, Inc., Morgan Stanley Capital Group Inc. and Credit Suisse Energy LLC (collectively, the Financial Participants);<sup>15</sup> Duke Energy Shared Services, Inc. (Duke); Edison Mission Energy, Edison Mission Marketing & Trading, Inc. and Midwest Generation EME, LLC (collectively, EME); E.ON U.S. LLC (E.ON); FirstEnergy Service Company (FirstEnergy); Indianapolis Power & Light Company (IPL); Integrys Energy Services, Inc. (Integrays); Strategic Energy, LLC (Strategic); Wabash; and Wisconsin Electric Power Company (Wisconsin Electric); and Xcel Energy Services Inc. (Xcel).

14. On August 31, 2007, as amended on September 4, 2007, the Financial Participants filed a motion for summary dismissal with their motion to intervene. Answers to the Financial Participants' motion for summary dismissal were filed by: Ameren; the Midwest TDUs and IPL (jointly); and Wabash on September 19, 2007. On October 4, 2007, the Financial Participants filed an answer to these answers.

15. Ameren, E.ON and the Midwest TDUs and IPL (jointly) also filed answers to those pleadings opposing the Complaints.

### **III. Discussion**

#### **A. Procedural Matters**

16. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2007), the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to these proceedings.

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<sup>15</sup> As discussed below, the Financial Participants filed a motion to intervene, for summary dismissal and for shortened answer period. In a notice issued on September 5, 2007, the Commission denied the Financial Participants' request for a shortened answer period.

17. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2007), the Commission will grant Ameren and Exelon's late-filed motions to intervene in Docket Nos. EL07-88-000 and EL07-86-000, respectively, given their interest in the proceedings, the early stage of the proceedings, and the absence of undue prejudice or delay.

18. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2007), prohibits an answer to a protest and/or answer unless otherwise ordered by the decisional authority. We will accept the answers of Ameren, E.ON, the Midwest TDUs and IPL (jointly), and the Financial Participants because they have provided information that assisted us in our decision-making process.

**1. Motions to Consolidate**

**a. Complaints**

19. In the Midwest TDUs Conditional Complaint and Wabash Conditional Complaint, complainants ask the Commission to consolidate the three related Complaints.

20. On September 17, 2007, in Docket No. EL07-100-000, E.ON filed a fourth complaint related to RSG issues (E.ON Complaint). E.ON argues that the Midwest ISO is erroneously calculating resettlements associated with RSG charges, in violation of the Commission's directives in prior RSG-related orders. E.ON seeks to consolidate that proceeding with the Complaints.

**b. Responsive Pleadings**

21. In its answer, the Midwest ISO states that it has no objections to consolidation to the extent the Complaints involve essentially the same RSG issues. Several entities, including AMP-Ohio, E.ON, EME and IPL, do not oppose or support the motions to consolidate.

**c. Commission Determination**

22. Because there are common issues of law and fact raised in the three Complaints, we will consolidate Docket Nos. EL07-86-000, EL07-88-000 and EL07-92-000.

23. We deny E.ON's request to consolidate the E.ON Complaint proceeding with the others because the focus of the E.ON Complaint differs from the Complaints at issue herein. The E.ON Complaint will be addressed in a separate Commission order.

**B. Sufficiency of the Complaints****1. Responsive Pleadings**

24. Several entities, including EME, the Financial Marketers, the Financial Participants and Integrys, argue that the Complaints are procedurally deficient and, therefore, must be rejected. First, these entities argue that section 206 requires complainants to prove that the existing rate is unjust and unreasonable, but complainants have not done so.<sup>16</sup> These opponents disagree with complainants' statements that prior Commission orders "invited" such section 206 complaints on these issues, noting that if the Commission had concluded the current allocation rule was unjust and unreasonable, it could have initiated its own section 206 proceeding to replace it. EME argues that it is not sufficient for complainants to simply identify imperfections in the rate.

25. Second, these entities argue that complainants have not proposed an alternative just and reasonable rate, as required by section 206. For example, EME argues that Ameren/NIPSCO's reliance on the Midwest ISO stakeholder process to produce an alternative rate is in error because the requirements of section 205 would be applied to that future filing, including the requirement for 60 days' notice of the proposed change in rates.

26. Further, opponents to the Complaints argue that the complainants' arguments are no more than untimely requests for rehearing of the Commission's prior RSG-related orders. The Financial Marketers assert that, in its prior RSG orders in Docket No. ER04-691, the Commission was clear that it would not allocate RSG costs to purely virtual offers unless the rate accurately reflected the actual costs caused by virtual supply. EME also argues that because the Commission already analyzed whether the current allocation rule is just and reasonable and decided this issue adversely to the complainants, they are barred by collateral estoppel principles from relitigating it.

27. Finally, the Midwest ISO states that it is unclear on what basis the "conditional" complaints could be separately filed.

**2. Answers**

28. In response, the complainants assert that their section 206 complaints are adequately supported. First, they argue that they have provided sufficient evidence regarding the unjust and unreasonable nature of the existing cost allocation methodology to meet the "threshold requirement" for a hearing.<sup>17</sup> Complainants reiterate the

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<sup>16</sup> *See infra* section III.C.

<sup>17</sup> Ameren Answer at 12 (citing *Wisconsin Electric Power Co.*, 62 FERC ¶ 61,142, (continued))

arguments made in the Complaints as evidence that the existing cost allocation is discriminatory.

29. Second, the complainants argue that they have met the requirement under section 206 to propose a just and reasonable alternative. Ameren argues that it “would replace the currently-effective discriminatory allocation of RSG costs with one that allocates RSG costs to all market participants that cause RSG costs to be incurred, including market participants submitting virtual supply offers and generators deviating from their day-ahead schedule that do not also serve load.”<sup>18</sup> The Midwest TDUs and IPL note that they suggested “closing the loophole for entities who do not ‘actually withdraw[] [e]nergy’ and leaving the rest of the cost allocation regimen unchanged.”<sup>19</sup> Ameren further asserts that Commission precedent does not require complainants to provide such an alternative at this stage, but rather, complainants are required only to make a *prima facie* case that the existing tariff provisions are not just and reasonable.<sup>20</sup>

30. Ameren also argues that its complaint is not a collateral attack on the Commission’s orders in ER04-691, because new facts have become evident since the Commission’s March 15, 2007 decisions in that proceeding:

At that time, the Commission acknowledged the cost causation problem and the fact that the mismatch would have to be addressed with an uplift charge, but appears to have believed that the uplift charge would not amount to much and would be spread across the market on a non-discriminatory basis. Clearly this is not the case.<sup>[21]</sup>

Moreover, Ameren argues that “[i]f the Commission had known at the time it issued the March 15, 2007 orders that the uplift it accepted would amount to 57 percent of total RSG costs, it likely would have realized the magnitude of the problem and initiated its own [s]ection 206 investigation.”<sup>22</sup>

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at 62,009 (1993)).

<sup>18</sup> *Id.* at 15.

<sup>19</sup> Midwest TDUs and IPL Answer at 11.

<sup>20</sup> Ameren Answer at 12-13.

<sup>21</sup> *Id.* at 12.

<sup>22</sup> *Id.* at 16.

31. In the response to answers to their motion for summary dismissal, the Financial Participants maintain that the Complaints, even supplemented by complainants' answers, fail to propose how rates will be developed. The Financial Participants note that, while the complainants do propose the allocation of RSG costs to virtual supply offers on the same basis that they are currently allocated to load and exports by removing the actual withdrawal requirement, the Commission already rejected this approach as unsupported by cost causation analysis.<sup>23</sup>

### 3. Commission Determination

32. In a section 206 matter, the party seeking to change the rate, charge or classification has a dual burden – it must first provide substantial evidence that the existing rate is unjust, unreasonable or unduly discriminatory, and then demonstrate through substantial evidence that the new rate is just, reasonable and not unduly discriminatory.<sup>24</sup>

33. As discussed in section III.D, *infra*, complainants have established a *prima facie* case under section 206 that the existing RSG cost allocation methodology may be unjust, unreasonable, unduly discriminatory and/or preferential.<sup>25</sup> The mere fact that a tariff provision implementing a particular rate was at one time found to be just and reasonable

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<sup>23</sup> Financial Participants Answer at 2-3 (citing RSG Compliance Order, 118 FERC ¶ 61,213 at P 84-93). The Financial Participants state that “[i]f the [Midwest ISO had filed under FPA section 205 to effect the same tariff changes [c]omplainants seek in these proceedings with the same lack of cost support for the tariff changes, we know from the two orders issued in March 2007 in the RSG Proceeding that such a filing would be patently deficient and rejected by the Commission.” *Id.* at 10-11.

<sup>24</sup> See *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956); *Michigan Electric Transmission Co., LLC*, 116 FERC ¶ 61,164, at P 12 (2006).

<sup>25</sup> See *Sithe/Independent Power Partners, L.P. v. FERC*, 165 F.3d 944, 951 (D.C. Cir. 1999) (“It is also noteworthy that the Commission itself has, in the past, interpreted the § 206 burden scheme to require a customer seeking an investigation into existing rates to ‘provide some basis to question the reasonableness of the overall rate level, taking into account changes in all cost components and not just [the challenged component].’”) (citing *Houlton Water Co.*, 55 FERC ¶ 61,037, at 61,110 (1991); *City of Hamilton, Ohio and Am. Mun. Power-Ohio, Inc. v. Kentucky Power Co. and Ohio Power Co.*, 72 FERC ¶ 61,158, at 61,785-86 (1995) (dismissing, without prejudice to re-filing, a customer’s section 206 complaint because it failed to satisfy the threshold of providing a basis to question the overall reasonableness of the utility’s rates)).

does not preclude the Commission from later reviewing the tariff provision to determine whether it continues to be just and reasonable.

34. For the reasons discussed below, we find that complainants have raised sufficient grounds to warrant an investigation.<sup>26</sup> We agree that complainants met their burden to propose an alternative methodology; specifically, complainants propose allocating RSG costs to virtual supply offers on the same basis that they are currently allocated to load and exports, but removing the actual withdrawal requirement.<sup>27</sup> However, as the Financial Participants note, the Commission has found this approach unsupported by the limited cost causation analysis available in the record of Docket No. ER04-691. Because we cannot resolve these issues summarily, we will set the Complaints for paper hearing procedures and investigation.

35. Moreover, we do not consider the Complaints to be untimely rehearing requests or collateral attacks on the Commission's prior RSG orders. Complainants request an investigation into the reasonableness of the rate. While certain parties to the RSG proceedings in Docket No. ER04-691 had asked the Commission to institute a section 206 proceeding, *sua sponte*, as to the Midwest ISO's RSG cost allocation methodology, the Commission declined to do so.<sup>28</sup> Here, complainants provide evidence to establish their *prima facie* burden under section 206. Accordingly, we will not reject the Complaints on these procedural grounds and we reject the motion for summary dismissal.

36. Further, despite the Midwest ISO's concern as to the basis for the conditional nature of the Midwest TDUs and Wabash filings, we will accept the conditional nature of the Midwest TDUs Conditional Complaint and the Wabash Conditional Complaint. While the Commission has consistently rejected efforts to combine complaints with other

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<sup>26</sup> Complainants seeking a hearing have the burden to show that a hearing is warranted. *See, e.g., UNITIL Power Corp. v. Public Service Co. of New Hampshire and Northeast Utilities*, 62 FERC ¶ 61,055 (1993); *The Algoma Group v. Wisconsin Public Service Corp.*, 61 FERC ¶ 61,265, at 61,959 (1992), *order on reh'g*, 62 FERC ¶ 61,040 (1993); *accord Pennsylvania Public Utility Commission v. FERC*, 881 F.2d 1123, 1126 (D.C. Cir. 1989);).

<sup>27</sup> *See, e.g.,* Ameren Answer at 15; Midwest TDUs and IPL Answer at 11.

<sup>28</sup> RSG Second Rehearing Order, 118 FERC ¶ 61,212 at P 56.

types of filings,<sup>29</sup> the Commission will permit the use of conditional complaints here to protect the Midwest TDUs' and Wabash's early refund effective date in the event Ameren/NIPSCO withdraw their complaint.<sup>30</sup>

**C. Whether the Midwest ISO's Existing RSG Cost Allocation Methodology is Just and Reasonable**

**1. Cost Causation Basis for Allocating Costs to Virtual Supply Offers**

**a. Background**

37. Under section 40.3.3.a.ii of the currently-effective TEMT, RSG costs are assessed on market participants on any day when the participant actually withdraws energy. Therefore, the virtual supply offers subject to RSG costs are only those offers made by market participants who actually withdraw energy; market participants that make virtual offers but do not withdraw energy are not allocated RSG costs. This provision was approved as part of the Commission's August 6, 2004 order approving the Midwest ISO's TEMT.<sup>31</sup>

**b. Complaints**

38. Ameren/NIPSCO<sup>32</sup> contend that there is no basis to distinguish purely financial market participants and other market participants that do not physically withdraw energy in the real-time markets from market participants that serve load. They argue that:

The Commission's finding that virtual supply offers can cause RSG costs to be incurred regardless of whether the

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<sup>29</sup> See, e.g., *Entergy Services, Inc.*, 52 FERC ¶ 61,317, at 62,270 (1990) (complaints must be filed separately from motions to intervene and protests); *Consumers Power Co.*, 58 FERC ¶ 61,323, at 62,046, *order on clarification*, 59 FERC ¶ 61,276 (1992) (petitions for declaratory order must be filed separately from motions to intervene and protests).

<sup>30</sup> See *infra* section III.E.

<sup>31</sup> Ameren/NIPSCO Complaint at 9 (citing *Midwest Independent Transmission System Operator, Inc.*, 108 FERC ¶ 61,163 (2004)).

<sup>32</sup> In their conditional complaints, the Midwest TDUs and Wabash rely on, adopt and incorporate by reference the allegations presented in the Ameren/NIPSCO Complaint.

entity submitting the offer is physically withdrawing energy . . . makes these scenarios doubly unfair: financial players and other market participants such as generators and market participants with import transactions that submit virtual supply offers, but do not physically withdraw energy in real time, escape assignment of RSG costs they cause to be incurred and the resulting uplift charges are then disproportionately allocated to load-serving entities [(LSEs)], including load-serving entities that had no deviations and thus did not cause RSG costs to be incurred. Thus, . . . there is simply no basis to distinguish purely financial market participants and other market participants that do not physically withdraw energy in the real-time market from market participants that serve load, particularly when the Commission has found that RSG costs are caused by virtual supply offers, regardless of whether such offers are submitted by a purely financial market participant or a market participant that engages in both physical and financial transactions.<sup>[33]</sup>

39. Specifically, Ameren/NIPSCO argue that, in the RSG orders in Docket No. ER04-691, the Commission consistently has stressed the need for cost allocation to follow cost causation. Ameren/NIPSCO state that after the Midwest ISO's failure to perform the required analysis regarding the relationship between virtual supply offers and RSG cost incurrence, the Commission allowed the currently-effective tariff to remain in effect. "Worse, it continues to interpret [s]ection 40.3.3.a.ii in such a way as to arbitrarily allocate RSG costs to only a limited subset of virtual supply offers, with no justification for the differing allocation."<sup>34</sup>

40. Further, Ameren/NIPSCO argue that the Commission has already found that RSG costs are caused by virtual supply regardless of whether such offers are submitted by a purely financial market participant or a market participant that engages in both physical and financial transactions. Ameren/NIPSCO argue that the Commission's orders in Docket No. ER04-691 support their argument that there is no basis to distinguish between these types of entities.

41. First, Ameren/NIPSCO argue that, in the RSG Order, the Commission rejected the Midwest ISO's proposal to retroactively modify section 40.3.3.a.ii of the TEMT such

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<sup>33</sup> Ameren/NIPSCO Complaint at 13.

<sup>34</sup> *Id.* at 10.

that market participants submitting virtual supply offers would not be allocated RSG charges.<sup>35</sup> Ameren/NIPSCO state that the Commission found that “to the extent the Midwest ISO previously had not been allocating RSG charges to virtual supply offers it had violated the terms of its tariff and ordered the Midwest ISO to re-calculate the rate and make refunds to market participants, with interest, to reflect the correct allocation of RSG charges.”<sup>36</sup>

42. Ameren/NIPSCO maintain that in the RSG First Rehearing Order, the Commission “granted rehearing as to refunds of RSG charges incorrectly allocated prior to the RSG Order” but “affirmed the Commission’s decision in the RSG Order to require RSG charges to be allocated to market participants that submit virtual supply offers.”<sup>37</sup> Ameren/NIPSCO maintain that the RSG First Rehearing Order “clarified [the Commission’s] interpretation of the currently-effective TEMT as assessing RSG charges on virtual supply offers only on those days when the market participant submitting the virtual supply offers physically withdraws energy” but, as to *prospective* allocation of RSG charges, “reaffirmed the RSG Order’s determination that virtual supply can cause RSG costs to be incurred and therefore should be assessed RSG charges.”<sup>38</sup> Ameren/NIPSCO state that because the Commission found “no basis to differentiate among virtual supply offers since any virtual supply offer could result in physical unit commitment to meet the physical needs of the real-time energy market,”<sup>39</sup> the Commission directed the Midwest ISO to analyze the Midwest ISO energy market with and without virtual supply offers to identify RSG costs caused by virtual supply offers.<sup>40</sup>

43. Ameren/NIPSCO argue that, in the RSG Compliance Order, the Commission found the Midwest ISO’s analysis insufficient to determine a cost causation relationship between virtual supply offers and RSG costs. The Commission therefore concluded that the Midwest ISO’s proposed tariff revision on RSG charge allocation “may result in unjust and unreasonable rates since [they are] not based on cost causation” and rejected

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<sup>35</sup> *Id.* at 3 (citing RSG Order, 115 FERC ¶ 61,108 at P 26, 48).

<sup>36</sup> *Id.* (citing RSG Order, 115 FERC ¶ 61,108 at P 26, 48).

<sup>37</sup> *Id.* (citing RSG First Rehearing Order, 117 FERC ¶ 61,113 at P 45, 92).

<sup>38</sup> *Id.* (citing RSG First Rehearing Order, 117 FERC ¶ 61,113 at P 108).

<sup>39</sup> *Id.* at 4 (citing RSG First Rehearing Order, 117 FERC ¶ 61,113 at P 111) (emphasis added).

<sup>40</sup> *Id.* (citing RSG First Rehearing Order, 117 FERC ¶ 61,113 at P 117-18).

the proposed revisions.<sup>41</sup> Ameren/NIPSCO note that the Commission found that, because the proposal was not based on cost causation, no other action was required as to Midwest ISO's proposal, and that "changes to the existing tariffs are beyond the scope of this proceeding, since the Commission can only consider changes to currently-effective tariffs in the context of a section 206 investigation."<sup>42</sup>

44. Ameren/NIPSCO argue that these findings, "combined with traditional ratemaking principles and the demonstrated harm to many Midwest ISO market participants, strongly suggests that [s]ection 40.3.3.a.ii of the TEMT is unjust, unreasonable and unduly discriminatory and thus the Commission should determine a new, just and reasonable RSG charge allocation methodology to replace it."<sup>43</sup> Ameren/NIPSCO ask that the Commission set for hearing the issue of the necessary revisions to section 40.3.3.a.ii of the TEMT.

### c. Responsive Pleadings

45. AMP-Ohio, Duke, IPL, the Wisconsin Commission and Wisconsin Electric filed comments in support of the Complaints, noting that section 40.3.3.a.ii fails to allocate RSG charges to all entities that cause RSG costs to be incurred. IPL states that entities submitting virtual supply offers but not withdrawing energy in real time are causing costs that others are paying, violating cost-causation principles.

46. The Midwest ISO maintains that the Commission did not require any changes to the existing RSG provisions in the RSG-related proceedings in Docket No. ER04-691 and therefore it remains appropriate for the Midwest ISO to continue implementing the currently-effective tariff until the Commission finds it to be unjust and unreasonable.

47. Other entities challenge complainants' assertion that the existing cost allocation methodology does not follow cost causation principles. For example, the Financial Marketers claim that virtual offers represent only a minor factor in causing RSG costs; therefore, the Commission should reject as discriminatory the complainants' argument that virtual offers are a primary driver of RSG costs, and instead consider all of the relevant cost allocation factors in determining an entirely new RSG rate. The Financial Marketers further argue that, to the extent the current tariff is flawed, it over-allocates RSG costs to virtual market participants. They state that the evidence produced during

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<sup>41</sup> *Id.* (citing RSG Compliance Order, 118 FERC ¶ 61,213 at P 88).

<sup>42</sup> *Id.* at 5 (citing RSG Compliance Order, 118 FERC ¶ 61,213 at P 90); *see also id.* at 5-6 (citing SG Second Rehearing Order, 118 FERC ¶ 61,212 at P 22, 35, 56, 58).

<sup>43</sup> *Id.* at 8-9.

the ER04-691 proceeding shows that the current tariff over-allocates RSG costs to market participants engaging in both virtual offers and physical withdrawal in the same day.

48. The Financial Participants also argue that the Complaints fail to consider the benefits provided by virtual transactions. They argue that virtual transactions increase convergence between the day-ahead and real-time energy markets; market liquidity, efficiency and competition. They assert that, when the cost reduction benefits of virtual transactions are considered, the only just and reasonable allocation of RSG costs to day-ahead virtual transactions is zero.

49. EME notes instances in the orders in Docket No. ER04-691 where the Commission specifically defended the existing tariff language.<sup>44</sup> EME also argues that “the reason RSG charges have been so high is that there is a flaw in [the Midwest ISO’s] pricing software that suppresses real-time prices and, as a result, increases RSG costs.”<sup>45</sup>

50. Several entities, including the Financial Participants, EME, the Financial Marketers and Integrys, argue that complainants have not filed any cost-based studies or other evidence supporting the assessment of RSG costs to purely virtual supply offers. The Financial Participants assert that complainants fail to allege any facts or offer any analysis or support for treating virtual offers that do not result in the actual withdrawal of energy as though they cause the incurrence of RSG costs to the same extent as other causes of RSG costs, such as deviations between day-ahead schedules and real-time load, and load forecasting errors. Similarly, Integrys argues that Ameren/NIPSCO “wrongly assumes that *all* virtual supply offers, whether or not accompanied by energy withdrawals, cause RSG costs. Neither of these assumptions have been tested, despite the Commission’s direction that the Midwest ISO prepare a study prior to implementation of a charge on virtual supply offers.”<sup>46</sup> Accordingly, Integrys argues that “before any change to the RSG rate can be made, a proper study demonstrating cost causation must be made.”<sup>47</sup>

51. The Financial Marketers argue that the Commission has never found that day-ahead virtual supply offers should be allocated real-time RSG costs on an equal basis

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<sup>44</sup> EME Comments on Ameren/NIPSCO Complaint at 10-11 (citing RSG First Rehearing Order, 117 FERC ¶ 61,113 at P 45, 46, 140; RSG Second Rehearing, 118 FERC ¶ 61,212 at P 22, 57)

<sup>45</sup> *Id.* at 4.

<sup>46</sup> Integrys Comments at 7 (emphasis in original).

<sup>47</sup> *Id.* at 8.

with load and physical deviations. They allege that “the Commission found only that virtual supply offers *may* increase RSG costs and that virtual supply offers should pay for any incremental increase in RSG costs that are caused by virtual supply.”<sup>48</sup>

52. Finally, opponents to the Complaints assert that changes to the existing cost allocation methodology will increase uncertainty in the market. The Financial Marketers argue that the Complaints will increase the risk premium that all purchasers of power must pay. FirstEnergy, EME and Financial Participants argue that the Complaints will chill participation in the Midwest ISO markets by suppliers of virtual supply offers and other market participants. The Financial Participants note that day-ahead energy market prices rose approximately \$2 per MWh after the Midwest ISO advised market participants that it would assess RSG charges on virtual offers and by \$1.11 per MWh for the period between the RSG Order and RSG First Rehearing Order, resulting in an impact on Ameren 14 times greater than the alleged RSG uplift to which complainants object.<sup>49</sup>

**d. Answers**

53. In their answers, complainants reiterate their interpretation of the Commission’s findings in the prior RSG orders. Ameren argues that this proceeding is not about the difference between physical and financial transactions, but about an unduly discriminatory cost allocation.<sup>50</sup> Ameren disagrees with opponents of the Complaints that the current methodology works to the benefit of virtual transactions (and therefore, confers a benefit on all market participants). Moreover, Ameren notes that it does not serve 100 percent of its load at the day-ahead market price; rather, the majority of its load is from generation it owns or has contracted for on a long-term basis. Ameren also questions opponents’ assertion of the benefits of allowing purely financial transactions to avoid RSG charges, given that all LSEs are against the existing cost allocation methodology.

54. Further, Ameren argues that EME errs in arguing that flaws in the Midwest ISO’s real-time pricing software cause RSG costs to be high. Ameren argues that its Complaint is “not about the absolute amount of RSG costs . . . it is about the disproportionate amount of RSG costs being shifted to load.”<sup>51</sup> Ameren also argues that this is actually not a software flaw, “but a locational marginal price . . . calculation issue that exists in

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<sup>48</sup> Financial Marketers Comments at 23.

<sup>49</sup> Financial Participants Comments at 10-11.

<sup>50</sup> Ameren Answer at 10.

<sup>51</sup> *Id.* at 8.

every RTO with an energy market” and that none of the other RTOs have been able to completely resolve. Ameren notes that while the Midwest ISO is attempting to solve this problem the Midwest ISO has indicated that the earliest it would be able to attempt to solve the LMP calculation problem will be later next year.

55. The Midwest TDUs and IPL argue that no cost causation analysis is necessary because the Commission has already found that both virtual and actual generators can and do cause RSG incurrence.<sup>52</sup> The Midwest TDUs and IPL argue that opponents to the Complaints concede that RSG cost causation is not limited to those market participants who actually withdraw energy and none deny that non-withdrawing generators who deviate from dispatch instructions cause RSG costs by necessitating unit commitments. The Midwest TDUs and IPL assert that opponents to the Complaints provide no evidence for the assertion that market participants who submit virtual offers may not cause RSG costs to the same per-MW extent as do market participants who submit physically backed offers and later actually withdraw energy. The Midwest TDUs and IPL assert that even if that could be proven, that is not a reason for dismissing the Complaints.

56. In response to concerns about whether acting on the Complaints would create uncertainty, complainants and their supporters assert that substantial uncertainty regarding RSG cost allocation already exists. The Midwest TDUs and IPL argue that the only alternatives to placing market participants on notice are to “(1) conclude at the outset that the Commission will leave unremedied an unjust and unreasonable loophole . . . , or (2) summarily establish a fully considered final rate, which would be nice if it could be achieved but which is not institutionally practical . . . .”<sup>53</sup> Ameren notes that PJM Interconnection, L.L.C. (PJM) has a “robust virtual market, notwithstanding the fact that PJM charges a share of its unit commitment costs to purely financial virtual transactions.”<sup>54</sup> Further, Ameren argues that even if additional uncertainty was created, that is not relevant to the issue of whether the existing RSG cost allocation methodology is just and reasonable.

57. Similarly, the Midwest TDUs and IPL maintain that opponents to the Complaints err in arguing that virtual supply offers facilitate efficient market pricing and will be discouraged by a risk premium if made subject to refund. The Midwest TDUs and IPL argue that this argument is a collateral attack on the Commission’s prior findings in the prior RSG orders. The Midwest TDUs and IPL assert that “efficient market pricing is not

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<sup>52</sup> Midwest TDUs and IPL Answer at 4 (citing RSG First Rehearing Order, 117 FERC ¶ 61,113 at P 46; RSG Second Rehearing Order, 118 FERC ¶ 61,212 at P 60).

<sup>53</sup> *Id.* at 13.

<sup>54</sup> Ameren Answer at 7.

advanced by subsidizing virtual supply offers as the [opponents to the Complaints] seek. Efficient pricing is furthered by requiring all accepted virtual supply offers (and not merely the arbitrary subset that happens to be made by market participants who also withdraw on given operating day) to internalize the cost of the unit commitments they cause.”<sup>55</sup>

58. In the response to answers to their motion for summary dismissal, the Financial Participants reiterate their earlier arguments concerning a showing of cost causation and harm to the markets from the pendency of the Complaints. They note their reduced participation in the virtual markets and that the Midwest ISO itself has observed a decrease in virtual participation in the wake of the first round of RSG orders in the first RSG proceeding.

**2. Cost Causation Basis to Allocate Costs to Generation Deviations**

**a. Background**

59. As described above, the currently-effective tariff assesses RSG charges only on market participants withdrawing energy in the real-time market. Therefore, the only market participants liable for RSG costs because of generation deviations from day-ahead schedules are those who also withdraw energy.

**b. Complaints**

60. In their conditional complaint (and answer to the Ameren/NIPSCO Complaint), the Midwest TDUs specifically focus on appropriate allocation of costs to generation. The Midwest TDUs state that the Ameren/NIPSCO Complaint focuses on only one category of market participants – those making virtual supply offers – that may avoid any allocation of RSG costs even though they cause RSG costs to be incurred. The Midwest TDUs argue that this understates the scope of the problem: Generator-only market participants similarly avoid a fair share of RSG costs because they usually do not actually withdraw energy. The Midwest TDUs argue that generators within the Midwest ISO footprint routinely cause RSG costs when their real-time performance differs from day-ahead schedules, and that this occurs even at times when they do not actually withdraw energy. The Midwest TDUs argue that the Midwest ISO and the Commission anticipated that generation would be allocated RSG costs.<sup>56</sup> The Midwest TDUs argue that the

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<sup>55</sup> Midwest TDUs and IPL Answer at 12-13.

<sup>56</sup> Midwest TDUs Comments at 6 (citing RSG Order, 115 FERC ¶ 61,108 at P 31-32).

Commission erred in the ER04-691 proceeding by assuming that the end result of the RSG charge does not result in any harm. The Midwest TDUs argue that the RSG charge does result in harm because: (1) the magnitude of the RSG is enormous (57 percent of RSG costs are not recovered) and (2) the Commission was mistaken in asserting that uplift charges apply to “all market participants” (because Revenue Neutrality Uplift charges apply only to loads, they are not born by generator-only market participants). The Midwest TDUs also state that some market participants who have both load and generators are taking steps to separate into load-only and generator-only market participants to take advantage of this loophole.

**c. Responsive Pleadings**

61. Wisconsin Electric agrees with the Midwest TDUs and adds that there is no basis to allocate costs solely to entities whose transactions result in physical withdrawals of energy. Wisconsin Electric considers this disparate treatment of otherwise similarly-situated entities to be unjust, unreasonable and unduly discriminatory.

**3. Mismatch in the RSG Rate Calculation**

**a. Background**

62. Under the TEMT, market participants are charged a real-time RSG charge on any day they withdraw energy. A market participant’s RSG charge is the product of the RSG charge times the RSG rate. The RSG charge is based on virtual supply offers and the absolute value of real-time market deviations in load, imports, exports and injections of energy. The RSG rate divides the RSG charge attributed to resources committed in any RAC processes by the sum of the amounts in the RSG charge for individual market participants, or the aggregate of the economic maximum dispatch amounts, whichever is greater. If the RSG charge is greater than the RSG charges paid by market participants, the excess is allocated (uplifted) on a load-ratio share basis across the Midwest ISO.

**b. Complaints**

63. Ameren/NIPSCO contend that the discrimination among types of virtual supply offers creates a “rate design mismatch” that renders this provision unjust, unreasonable and unduly discriminatory.<sup>57</sup> Ameren/NIPSCO note that the RSG charge applies only to market participants withdrawing energy whereas the RSG rate applies to all virtual supply offers. Ameren/NIPSCO argue that, as indicated in Ameren (and others’) protests of the Midwest ISO’s April 2007 compliance filing, “the staggering amount of uplift charges now being assessed on [LSEs] as a result of the rate design mismatch was unjust,

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<sup>57</sup> Ameren/NIPSCO Complaint at 11.

unreasonable and unduly discriminatory.”<sup>58</sup> Ameren/NIPSCO contend that much of the RSG costs will now be recovered through the load-ratio share allocation. They estimate that the increased uplift on LSEs will be more than \$440 million from April 2005 through February 2007 (57 percent of RSG costs) and that there will be a cost shift of \$125 million from generators and other asset owners to LSEs. Ameren/NIPSCO consider assigning the bulk of the RSG costs per a load-ratio share allocation to be contrary to cost causation principles that undermines the market by weakening price signals and creating perverse incentives.

64. Ameren/NIPSCO argue that, in the RSG Second Rehearing Order, the Commission noted that a section 206 investigation would be required to alter the currently-effective TEMT: “[T]he allocation of RSG costs under the currently-effective TEMT ‘arguably could be refined or improved . . . pursuant to section 206’ and . . . the currently-effective allocation procedures ‘may result in less than full recovery of RSG costs.’”<sup>59</sup> Ameren/NIPSCO note that the Commission agreed with Ameren’s concern that the Commission’s interpretation of the currently-effective TEMT would result in under-recovery of RSG costs because the rate would be assessed on only a subset of virtual supply offers. Ameren/NIPSCO maintains, however, that the Commission “reasoned that the under-recovered costs would be ‘recovered through uplift charges assessed to all market participants.’”<sup>60</sup> Ameren/NIPSCO also argue that “there is nothing the [LSEs] can do to manage the amount of uplift they are assessed as a result of the flawed methodology. . . . [because] they have no way to manage the shortfall in RSG cost recovery . . .”<sup>61</sup>

65. Ameren/NIPSCO further challenge the Commission’s conclusion that any mismatch, which may result in under-recovery of RSG charges, “[does] not result in any harm’ because the unrecovered costs are recovered through uplift charges assigned to all market participants.”<sup>62</sup> Ameren/NIPSCO argue that “[i]n effect, the Commission recognized that the existing allocation is inconsistent with its long-standing precedent requiring cost allocation to follow causation, but determined that it was procedurally prohibited under [s]ection 205 of the FPA from ordering a remedy. Instead, the

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 5 (citing RSG Second Rehearing Order, 118 FERC ¶ 61,212 at P 22, 58).

<sup>60</sup> *Id.* (citing RSG Second Rehearing Order, 118 FERC ¶ 61,212 at P 58).

<sup>61</sup> *Id.* at 14.

<sup>62</sup> *Id.* at 11 (citing RSG Second Rehearing Order, 118 FERC ¶ 61,212 at P 58).

Commission all but invited this [s]ection 206 complaint in order to correct the problem.”<sup>63</sup>

66. Midwest TDUs adopt the financial impact allegations set forth by Ameren/NIPSCO and add that one of their members, Wisconsin Public Power Inc., has incurred increased charges of about \$80,000 per month on an ongoing basis.

67. Like Ameren/NIPSCO and the Midwest TDUs, Wabash contends that the Midwest ISO has inappropriately calculated the RSG rate, and this misapplication is unjust, unreasonable and unduly discriminatory. Wabash alleges that the Midwest ISO’s calculation of the RSG rate using the resettlement results in under-collection of RSG costs by the RSG charge, noting that the RSG rate only collected 58 percent of RSG costs in a resettlement performed by the Midwest ISO on July 6, 2007. Wabash contends it is more reasonable to require the RSG rate to be calculated by dividing RSG costs by the MWhs that will be charged the RSG rate. Wabash argues that this would logically allocate RSG costs to MWhs as directed in the RSG Second Rehearing Order. Wabash asserts the Midwest ISO method inappropriately socializes RSG costs to LSEs that have managed their day-ahead schedules so as not to incur RSG costs. Wabash estimates the potential financial impact of the Midwest ISO method to be between \$3 million and \$5 million (based on an estimate of Wabash being assessed approximately one percent of the socialized over \$440 million cited by Ameren/NIPSCO).

**c. Responsive Pleadings**

68. The Midwest ISO argues that the Commission did not require any change to the Midwest ISO’s manner of implementing existing RSG provisions in its prior RSG orders. The Midwest ISO notes, specifically, that the RSG Second Rehearing Order did not find the calculation of the charge to be unreasonable, arbitrary or unduly discriminatory.<sup>64</sup> The Midwest ISO also argues that:

[D]espite Ameren’s argument that RSG costs would be under-recovered if the current RSG provisions are construed to tie cost allocation to physical withdrawal of energy, the [RSG Second Rehearing Order] did ‘not find the calculation

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<sup>63</sup> *Id.*

<sup>64</sup> Midwest ISO Answer at 6 (“[A]lthough the March 15 Compliance Order rejected *prospective* Tariff revisions based on the Midwest ISO’s cost allocation study that the Commission deemed insufficient, the Commission largely did not require any change to the Midwest ISO’s manner of implementing *existing* RSG provisions.”) (emphasis in original).

of the charge to be arbitrary or unduly discriminatory.’ Moreover, the Commission did not find anything unreasonable and discriminatory in the fact that “the unrecovered costs are recovered through uplift charges assessed to all market participants.” Both the [RSG Second Rehearing Order and RSG Compliance Order] also confirmed the “physical withdrawal” requirement applicable to the allocation of RSG costs to Virtual Supply Offers.[<sup>65</sup>]

Accordingly, the Midwest ISO contends it is reasonable for the Midwest ISO to continue implementing the currently-effective RSG provisions until or unless the Commission subsequently finds them unjust and unreasonable.

69. Several entities, including AMP-Ohio, Duke, E.ON, IPL, the Wisconsin Commission, and Wisconsin Electric, filed comments in support of complainants’ allegation of a rate mismatch. The Wisconsin Commission states that the TEMT provides for different treatment for virtual supply offers with no justification for the differing cost allocation. The Wisconsin Commission asserts that the “currently-effective TEMT calculates the rate for the RSG charge based on volumes that will not pay the RSG charge, resulting in a significant deviation from cost causation and uplift.”<sup>66</sup> AMP-Ohio asserts that the Midwest ISO’s current TEMT fails to allocate RSG costs to all parties that cause them and forces parties such as AMP-Ohio to subsidize the difference.

70. E.ON agrees with complainants that Midwest ISO’s resettlement process is causing an inappropriate cost shift to LSEs. E.ON argues that the Midwest ISO is wrong in its assertion that “the Commission has found nothing unreasonable or discriminatory in the fact that certain unrecovered RSG costs are recovered though additional uplift charges assessed to all market participants.”<sup>67</sup>

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<sup>65</sup> *Id.* (internal citations omitted). The Midwest ISO also notes that the implementation of the existing tariff provisions includes the making of certain refunds. *Id.* at 6-7.

<sup>66</sup> Wisconsin Commission Comments at 5.

<sup>67</sup> E.ON Answer at 2. E.ON cites to its pending complaint in Docket No. EL07-100-000 for further evidence that the Midwest ISO’s implementation of its resettlement process and the Midwest ISO’s uplift charges are unjust and unreasonable.

71. Wisconsin Electric also argues that the RSG charge fails to follow cost causation principles. Wisconsin Electric estimates that the uplift charges resulting from the RSG calculations in the current tariff will cost it an additional \$470,000 per month.<sup>68</sup>

72. Duke argues that if the Commission sets the case for hearing, Duke would expect to submit evidence demonstrating that it is also required to pay a substantial amount each month in uplift charges, subsidizing the virtual offer activities of market participants who are not required to shoulder the costs of their actions. Duke argues, however, that no judicial hearing is necessary because complainants have made an ample *prima facie* showing that Midwest ISO's current rate is unjust, unreasonable, and unduly discriminatory and that further costly, protracted litigation is unnecessary and unwarranted.

73. IPL contends the cost allocation is unduly discriminatory since virtual offers by non-LSEs should not be subsidized by other market participants, and that Commission precedent requires the assignment of the cost of service to those classes of industry participants that either are at fault for the dilemma or benefit from its resolution. IPL argues that entities contribute to increases in RSG costs but will avoid assessment because they are not withdrawing energy at that time and that this will result in increased uplift charges imposed on other load-serving market participants. IPL argues that this is contrary to the Commission's stated principles of cost causation. IPL also argues that the current tariff language is unduly preferential, arguing that:

If there are two similarly situated entities that both make virtual supply offers of the same amount and at the same location and one gets charged because it also serves load (even if that load was served by the entities [sic] own resources as anticipated in its day ahead schedule) and the other does not – this is a quintessential case of undue discrimination. In essence the TEMT is currently favoring marketers or generation-only entities at the expense of market participants who serve load.<sup>69</sup>

74. IPL argues that, regardless of whether the issue is viewed in terms of virtual supplies or otherwise, “[t]he Commission’s and [the Midwest ISO’s] interpretation of the meaning of withdrawal of energy, and its application in the context of RSG cost assignment, leads to undue discrimination between suppliers.”<sup>70</sup> It argues that “[w]hether

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<sup>68</sup> Wisconsin Electric Comments on Ameren/NIPSCO Complaint at 4.

<sup>69</sup> IPL Comments on Ameren/NIPSCO Complaint at 10.

<sup>70</sup> *Id.*

a generator also happens to serve load makes no difference as far as why that generator caused RSG costs to be incurred.”<sup>71</sup> IPL also maintains that the unjust allocation is harming IPL and its customers, estimating the cost shift of RSG charges to uplift charges approaches half a billion dollars on a market-wide basis.

75. In its answer to the Wabash Conditional Complaint, IPL argues that Midwest ISO’s methodology is “simply mathematically wrong in terms of how rates are calculated and costs are allocated. IPL maintains that “through a fundamental ratemaking mistake, [the Midwest ISO] has guaranteed a significant uplift that the [LSEs] within the footprint have had to bear.”<sup>72</sup> IPL also argues that no hearing is necessary, maintaining that simply removing the first sentence of section 40.3.3.a.ii will fix the tariff language.

76. By contrast, several entities filed comments rejecting the mismatch concern cited in the Complaints. For example, Financial Marketers argue that Ameren/NIPSCO’s claim that fast action is needed to prevent costs from being uplifted to physical load ignores the fact that the allocation of the majority of RSG costs to physical load is a just and reasonable outcome. The Financial Marketers argue that “[t]he record evidence in the RSG proceeding shows that physical Market Participants are the primary beneficiaries of supply and cause most, if not all, RSG costs to be incurred. Thus, the allocation of RSG costs to load largely follows cost causation principles.”<sup>73</sup>

77. The Financial Marketers disagree that RSG costs to the market are increasing. They argue that the uplift of RSG costs to load that Ameren/NIPSCO complains of is exacerbated by the Midwest ISO’s inclusion of daily virtual supply offers in its RSG calculation, instead of hourly virtual supply offers as required by the TEMT. This same flawed interpretation, Financial Marketers argue, leads to an increase in RSG costs allocated to participants engaging in both virtual and physical transactions within the same day.<sup>74</sup>

78. The Financial Marketers further argue that the current tariff over-collects RSG costs since the Midwest ISO is allocating RSG charges to all of a market participant’s cleared virtual offers in the day-ahead market even if the market participant only withdrew energy during a single hour of the operating day. The Financial Marketers

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<sup>71</sup> *Id.* at 11.

<sup>72</sup> IPL Comments on Midwest TDUs Complaint and Wabash Complaint at 7.

<sup>73</sup> Financial Marketers Comments at 2.

<sup>74</sup> *Id.* at 3 (emphasis in original).

consider this allocation to be contrary to the tariff that directs the calculation of RSG costs on an hourly basis.

79. Similarly, EME argues that “the Commission specifically found that any under-recovery of RSG costs under the current TEMT provisions should be recovered through uplift charges, so this component of the current allocation methodology cannot be unjust and unreasonable.”<sup>75</sup>

#### **4. Commission Determination**

80. We find that the complainants have established a *prima facie* case under FPA section 206 that the existing RSG cost allocation methodology may be unjust, unreasonable, unduly discriminatory and/or preferential.

81. We agree with complainants that the record in Docket No. ER04-691 supports the conclusion that RSG costs should be allocated to virtual offers, irrespective of whether the market participant withdraws energy.<sup>76</sup> After reviewing Ameren’s and the Midwest ISO’s separate analyses of how virtual supply offers impact RSG costs, the Commission concluded that virtual supply offers can cause RSG costs to increase.<sup>77</sup> Further, after reviewing a number of rehearing requests, some of which included testimony of electric market experts, the Commission concluded that virtual supply offers can cause the commitment of resources in the RAC process – and in turn, cause RSG costs – whether the virtual supply offers are made by financial trader market participants (that do not withdraw energy) or other participants with physical load and generation (that do withdraw energy).<sup>78</sup> We disagree with opponents to the Complaints that the evidence developed during the RSG proceeding does not support the position that purely virtual participants cause RSG costs. In the several compliance and rehearing orders after the RSG First Rehearing Order, no party challenged this Commission finding.<sup>79</sup> As parties assert, a revised cost allocation needs to be supported by sufficient facts and analysis for

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<sup>75</sup> EME Comments on Ameren/NIPSCO Complaint at 2.

<sup>76</sup> We agree with Ameren/NIPSCO that the Commission can rely on evidence produced in connection with another proceeding to support a section 206 complaint. *Maine Public Service Commission v. Central Maine Power Co.*, 111 FERC ¶ 61,283 (2005).

<sup>77</sup> See RSG Order, 115 FERC ¶ 61,108 at P 48; RSG First Rehearing Order, 117 FERC ¶ 61,113 at P 108.

<sup>78</sup> See RSG First Rehearing Order, 117 FERC ¶ 61,113 at P 111.

<sup>79</sup> Some entities did contend that the RSG rate should be modified or refined.

the Commission to determine that the resulting rate is just and reasonable. While the Commission requested a cost causation analysis as a basis for a revised cost allocation in the RSG proceedings, the Midwest ISO did not perform the requested analysis. Accordingly, the Commission determined it did not have an adequate basis to revise the RSG rate.<sup>80</sup> Complainants offer alternative RSG cost allocation methodologies, but we are unable to find that these mechanisms are just and reasonable in the absence of additional facts and analysis.

82. Therefore, we will institute an investigation, under section 206 of the FPA, to develop the cost causation analysis needed to develop and support a revised cost allocation. Because this investigation will involve issues of material fact that we expect can be thoroughly presented and resolved in writing, we will set the matter for a paper hearing, rather than a trial-type hearing.<sup>81</sup> We believe that a paper hearing will allow us to determine a just and reasonable cost allocation methodology. We will hold the paper hearing in abeyance, as further detailed below, until February 1, 2008 or such earlier date as the Midwest ISO files a revised cost allocation methodology pursuant to the conclusion of the work of the RSG Task Force.

83. Parties misconstrue the purpose of the cost analysis previously ordered by the Commission. The Commission had already found and affirmed that virtual offers cause RSG costs before it required the analysis. The analysis therefore was not aimed at testing the conclusion that virtual offers cause RSG costs, but rather was intended to develop a more refined allocation of RSG costs to virtual offers based on the principle of cost

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<sup>80</sup> See RSG Compliance Order, 118 FERC ¶ 61,213 at P 84.

<sup>81</sup> The use of a paper hearing rather than a trial-type evidentiary hearing has been addressed in previous cases. See, e.g., *Public Service Co. of Indiana*, 49 FERC ¶ 61,346 (1989), *order on reh'g*, 50 FERC ¶ 61,186, *opinion issued*, Opinion 349, 51 FERC ¶ 61,367, *order on reh'g*, Opinion 349-A, 52 FERC ¶ 61,260, *clarified*, 53 FERC ¶ 61,131 (1990), *dismissed*, *Northern Indiana Public Service Co. v. FERC*, 954 F.2d 736 (D.C. Cir. 1992). As the Commission noted in Opinion No. 349, 51 FERC at 62,218-19 & n.67, while the FPA and the case law require that the Commission provide the parties with a meaningful opportunity for a hearing, the Commission is required to reach decisions on the basis of an oral, trial-type evidentiary record only if the material facts in dispute cannot be resolved on the basis of the written record, *i.e.*, where the written submissions do not provide an adequate basis for resolving disputes about material facts. The courts have upheld the Commission's discretion in this regard. See *Central Maine Power Co. v. FERC*, 252 F.3d 34, 46-47 (1st Cir. 2001); *Lomak Petroleum, Inc. v. FERC*, 206 F.2d 1193, 1199 (D.C. Cir. 2000) (citing *Conoco Inc. v. FERC*, 90 F.3d 536, 543, n.15) (D.C. Cir. 1996) (quoting *Environmental Action v. FERC*, 996 F.2d 401, 413 (D.C. Cir. 1993)).

causation.<sup>82</sup> The fact that the Midwest ISO did not undertake that analysis does not disprove the record in the Docket No. ER04-691 that virtual offers cause RSG costs.

84. We will not further address parties' cost causation arguments at this time, but will leave those issues for further development in the paper hearing. We remind parties that they should focus their efforts on providing the facts and analysis pertaining to this issue. Finally, we note the Commission has already addressed the benefits of virtual offers on day-ahead and real-time prices in Docket No. ER04-691, and nonetheless affirmed that a cost allocation to virtual offers was appropriate per cost causation principles.<sup>83</sup> We will not allow parties to re-argue this issue in the paper hearing. Rather, the paper hearing will be limited to issues of cost allocation.

85. We also agree with the complainants that the record in Docket No. ER04-691 provides support for a cost allocation to generator deviations, irrespective of whether the market participant withdraws energy in the real-time market. In its assessment of the Midwest ISO proposal to revise its allocation of RSG charges from an allocation among market participants that withdraw energy to an allocation among market participants that have differences in their real-time load, imports, exports and injections, the Commission found the Midwest ISO proposal properly assigned costs to transactions that cause those costs to be incurred.<sup>84</sup> No party challenged this finding in the several subsequent orders, and no party indicated support for assigning RSG costs based on the withdrawal of energy.<sup>85</sup> However, for the reasons noted above, this finding alone is not sufficient for the development of a revised rate. Accordingly, we require that this issue, the cost causation basis for an RSG cost allocation for generator deviations, be further explored in the paper hearing ordered herein.

86. We will deny the relief requested in the Complaints with respect to the alleged mismatch between the RSG charge and the RSG rate. As discussed in the RSG Second Compliance Order, the Commission has found that there is no mismatch between the

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<sup>82</sup> RSG Compliance Order, 118 FERC ¶ 61,213 at P 84.

<sup>83</sup> *See* RSG First Rehearing Order, 117 FERC ¶ 61,113 at P 112-13.

<sup>84</sup> *See* RSG Order, 115 FERC ¶ 61,108 at P 83-84. The Commission acceptance of the Midwest ISO proposal was conditional because the Midwest ISO improperly excluded virtual supply offers from the RSG charge calculation.

<sup>85</sup> In fact, parties argued for the opposite conclusion throughout the proceeding, arguing that the provision is illogical. *See* RSG First Rehearing Order, 117 FERC ¶ 61,113 at P 46.

RSG charge and the RSG rate.<sup>86</sup> Given the Commission’s finding that the RSG charge and rate calculations appropriately recover the costs at issue, we will not require revisions to these tariff provisions. To the extent the Midwest ISO has been in error in its interpretation of the RSG charge and rate, we require that refunds be provided.

**D. Stakeholder Process**

**1. Complaints**

87. Complainants note that the RSG Task Force has been working to identify improvements that could be made to the RSG cost allocation methodology. They state that they have been involved in that process and acknowledge that an appropriate allocation methodology may be developed through that process. However, Complainants state they nevertheless filed their Complaints in order to establish a refund effective date in the event the stakeholder process does not result in appropriate RSG cost allocation provisions.<sup>87</sup>

**2. Responsive Pleadings**

88. IPL supports the Complaints as necessary, notwithstanding the ongoing stakeholder proceeding. IPL maintains that the Midwest ISO “has made clear, in several stakeholder settings, that it had no intention of making an FPA section 205 filing to address the targeted – and costly – issue of RSG cost allocation.”<sup>88</sup> IPL also argues that those entities who actually have to bear costs have taken the “significant step of filing a formal complaint and ought to be granted relief expeditiously” and “[w]hile IPL believes [the Midwest ISO] has been responsive and is proceeding in good faith to deal with all of the perceived problems related to RSG, the fact remains that [the Midwest ISO] faces no direct financial exposure. Thus, [the Midwest ISO’s] willingness to wait several months before making a new FPA section 205 filing must be placed in the proper context.”<sup>89</sup> Strategic notes its hope that the stakeholder process will succeed but states that the Commission should, at a minimum, encourage the Midwest ISO to complete the stakeholder process expeditiously.

89. In contrast, several entities, including the Midwest ISO, the Financial Marketers, the Financial Participants, FirstEnergy, Integrys and Xcel, argue that the stakeholder

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<sup>86</sup> RSG Second Compliance Order, 121 FERC ¶ 61,132 at P 26.

<sup>87</sup> *See infra* section III.E.

<sup>88</sup> IPL Comments at 13.

<sup>89</sup> *Id.* at 15-16.

process is the better forum for evaluating prospective RSG revisions and ask the Commission to reject the Complaints, or at least hold the proceeding in abeyance, until the stakeholder proceeding is complete. The Midwest ISO states that it expects to conclude its stakeholder consultations, and to file a comprehensive RSG allocation proposal, before the end of 2007. These entities argue that the stakeholder process has been successful in addressing market participants' concern so far, and action on the Complaints will distract market participants from the progress already made. The Financial Participants argue that the Commission has a policy against circumvention of RTO/ISO stakeholder process and generally requires exhaustion of the stakeholder process before permitting complaints under section 206 to proceed.<sup>90</sup>

### 3. Answers

90. In response, complainants argue that the ongoing stakeholder proceeding should not be seen as a barrier to action on their section 206 complaints. Ameren states that "RTO stakeholder processes cannot delay urgently-needed changes or preclude the Commission from ordering relief from clearly unjust, unreasonable and unduly discriminatory terms and conditions."<sup>91</sup> The Midwest TDUs and IPL assert that the Commission cannot defer to the stakeholder process when unjust and unreasonable rates could be perpetuated.<sup>92</sup> Wabash argues that the Commission has previously instituted proceedings under section 206 in lieu of pending stakeholder proceedings.<sup>93</sup>

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<sup>90</sup> Financial Participants Comments at 14-15 (citing *New England Power Pool*, 107 FERC ¶ 61,135, at P 24 (2004); *New Power Co. v. PJM Interconnection, L.L.C.*, 98 FERC ¶ 61,208, at 61,759 (2002); *Morgan Stanley Capital Group Inc. v. PJM Interconnection, L.L.C.*, 96 FERC ¶ 61,331, at 62,269 (2001); *Rumford Power Associates, L.P.*, 97 FERC ¶ 61,173, at 61,806 (2001)).

<sup>91</sup> Ameren Answer at 4-5 (citing *Midwest Independent Transmission System Operator, Inc.*, 114 FERC ¶ 61,278, at P 49 (2006); *Midwest Independent Transmission System Operator, Inc.*, 111 FERC ¶ 61,053, at P 177 (2005); *PJM Interconnection, L.L.C.*, 103 FERC ¶ 61,167, at P 31 (2003)).

<sup>92</sup> Midwest TDUs and IPL Answer at 11 (citing, *inter alia*, *Midwest Independent Transmission System Operator, Inc.*, 114 FERC ¶ 61,117, at P 25 (2006); *Midwest Independent Transmission System Operator, Inc.*, 112 FERC ¶ 61,169, at P 36 (2005); *Southwest Power Pool, Inc.*, 118 FERC ¶ 61,120, at P 23 (2007); *Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy*, 105 FERC ¶ 61,183, at P 64 (2003)).

<sup>93</sup> Wabash Answer at 8 (citing *Pacific Gas & Electric Co.*, 108 FERC ¶ 61,017 (2004)).

91. Complainants also reiterate their concerns about the ability of the stakeholder process to address these issues at all or in a timely fashion. Ameren, Wabash, the Midwest TDUs and IPL argue that setting a prompt refund effective date is necessary to keep pressure on all market participants and the Midwest ISO to bring the stakeholder process to a prompt conclusion.

92. In response to answers to their motion for summary dismissal, the Financial Participants reiterate that the Commission's policy generally requires market participants seeking to modify an ISO/RTO tariff to exhaust the stakeholder process before filing a complaint with the Commission.

#### **4. Commission Determination**

93. We agree that the Commission often indicates its expectation that stakeholders seek relief through the processes provided by the ISO or RTO itself before coming to the Commission.<sup>94</sup> Here, however, we will exercise our discretion as to whether and how to conduct our proceedings<sup>95</sup> and not dismiss the Complaints on these procedural grounds.

94. For the reasons stated above, the Commission finds that complainants have established a *prima facie* case under section 206 that the existing cost allocation methodology may be unjust, unreasonable, unduly discriminatory and/or preferential and sets the Complaints for paper hearing procedures and investigation to develop a record upon which to establish an alternative cost allocation methodology. However, to allow the stakeholder process an opportunity to complete negotiations, the paper hearing procedures established herein will be held in abeyance pending conclusion of the stakeholder proceeding and the Midwest ISO's submittal of a revised cost allocation methodology, or February 1, 2008, whichever is earlier. We expect that holding the paper hearing procedure in abeyance will not harm complainants because we are granting an early refund effective date, as requested.<sup>96</sup> That said, in recognition of complainants' (and the Commission's) desire for expedited action on these issues, we direct the Midwest ISO to make an informational filing notifying the Commission of the status of the stakeholder process on February 1, 2008. If no alternative cost allocation

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<sup>94</sup> See, e.g., *Morgan Stanley Capital Group, Inc. v. New York Independent System Operator, Inc.*, 93 FERC ¶ 61,058, at 61,156 (2000); *Morgan Stanley Capital Group, Inc. v. PJM Interconnection, L.L.C.*, 96 FERC ¶ 61,331, at 62,269-70 (2001).

<sup>95</sup> See *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524-25 (1978); *Michigan Public Power Agency v. FERC*, 963 F.2d 1574, 1578-79 (D.C. Cir. 1992).

<sup>96</sup> See *infra* section III.E.

methodology has been developed through the stakeholder process by that date, upon receipt of the Midwest ISO's informational filing, the Commission will establish a schedule for paper hearing procedures.

**E. Refund Effective Date**

**1. Complaints**

95. Ameren/NIPSCO argue that the Commission should establish the earliest possible refund effective date for the revisions to the RSG charge allocation provisions of the TEMT. Ameren/NIPSCO request a refund effective date for such revisions of August 10, 2007 (the date of filing their Complaint). Ameren/NIPSCO maintain that "Commission precedent and policy call for the Commission to establish the earliest possible refund effective date in the [s]ection 206 proceedings, to provide the most complete protection of customers from unjust and unreasonable rates."<sup>97</sup>

96. The Midwest TDUs and Wabash filed their respective Conditional Complaints for the sole purpose of protecting their interests in an early refund effective date in the event that the earlier-filed complaints are withdrawn. In support of an early refund effective date, they assert that the Midwest ISO has refused to take immediate action and any longer-term proposal is months away; therefore, an early refund-effective date is necessary.

**2. Responsive Pleadings**

97. Several entities, including AMP-Ohio and IPL, support complainants' request for the earliest refund effective date under section 206. IPL maintains that there is no alternative means to protect market participants and their customers. AMP-Ohio also notes that although the Midwest ISO indicates that the earliest possible implementation of new RSG rules would be in late 2007 or early 2008, these could be delayed for several reasons.

98. Other entities argue that the Commission should not establish an August 10, 2007 refund effective date. First, entities argue that implementation of a refund effective date is premature because any rate design changes proposed by the Midwest ISO should be dealt with under section 205. The Financial Participants argue that the complainants hope to get an effective date for a section 205 filing that the Midwest ISO is yet to file. EME argues that the courts and the Commission have recognized only two exceptions to

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<sup>97</sup> Ameren/NIPSCO Complaint at 15 (citing *Maine Public Utilities Comm'n v. Central Maine Power Co.*, 111 FERC ¶ 61,283, at P 19-20 (2005) (*MPUC*); *Louisiana Public Services Comm'n*, 51 FERC ¶ 61,218, at 61,615 (1990) (*LPSC*)).

the rule against retroactive ratemaking – where all parties agree to such rates and where all parties have adequate notice of such rates – and neither exception applies here. Integrys argues that a refund effective date will create additional uncertainty and instability while the Commission’s prior orders remain pending before the Commission and the Court of Appeals.

99. Second, entities argue that use of a section 206 application as a vehicle to secure an early refund effective date is an abuse of the complaint process. The Financial Marketers argue that the complaint process was never intended to be used to interfere with or change an on-going RTO/ISO stakeholder process. The Financial Participants argue that the complainants seek to exceed the actions permissible under section 206(b). They argue that section 206(b) “does not permit the Commission to require customers to refund amounts that customers (as opposed to jurisdictional service providers) have not collected for services these customers have not provided. Yet this is the only relief the Complaints actually seek. Consequently, the Complaints must be dismissed because they seek relief which is simply not available under FPA section 206(b).”<sup>98</sup>

### 3. Answers

100. In their answers, all three complainants argue that because they have made the requisite showing under section 206, they are entitled to an early refund effective date to ensure the “Commission can order refunds of any and all amounts paid for the period subsequent to the refund effective date, with interest.”<sup>99</sup> Ameren argues that the Regulatory Fairness Act amendments to section 206 were designed to allow the Commission to establish a refund effective date that would pre-date the ultimate resolution of a section 206 proceeding.<sup>100</sup>

101. Further, the Midwest TDUs and IPL maintain that Commission practice is to make a determination as to whether refunds are warranted after a case is litigated, based on factors such as “the egregiousness of the difference between the prior and adjusted rate, the impact of the approved change on relied-upon expectations, the reasonableness of those expectations, and the parties’ business and litigation conduct during the

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<sup>98</sup> Financial Participants Comments at 3. The Financial Participants also argue that Ameren/NIPSCO’s reliance on *LPSC* and *MPUC* is misplaced in that neither case involved using a refund effective date to establish a new rate applicable to other customers which were not subject to the rate under the filed tariff. *Id.* at 25-26.

<sup>99</sup> Wabash Answer at 9.

<sup>100</sup> Ameren Answer at 14 (citing S. Rep. No. 100-491, at 3 (1988)).

proceeding.”<sup>101</sup> The Midwest TDUs and IPL assert that the issue is now whether the Commission should give notice that refunds may be ordered.<sup>102</sup> The Midwest TDUs and IPL maintain that the precedent cited by opponents to the Complaints “reflect [the] distinction between applying record-informed judgment to waive or enforce refunds at the end of a [s]ection 206 proceeding and simply precluding refunds before the proceeding even gets started.”<sup>103</sup> The Midwest TDUs and IPL maintain that section 206(b) permits the Commission to make a re-allocation effective during the interim period.<sup>104</sup>

102. Moreover, Ameren asserts that the request for a refund effective date is not retroactive ratemaking. Ameren also argues that opponents fail to recognize the difference between a section 205 and a section 206 proceeding. Ameren states that, in contrast to the precedent cited by opponents, this is a section 206 proceeding and “filing of the Complaint puts market participants on notice that the RSG cost allocation methodology may be revised.”<sup>105</sup>

103. In response to answers to their motion for summary dismissal, the Financial Participants assert that complainants do not request refunds of over-payments to suppliers; “rather, they seek retroactive reallocation of costs to customers who are not subject to charges under the currently effective tariff.”<sup>106</sup> The Financial Participants argue that “if the Commission establishes a new rate or charge on [virtual supply offers]

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<sup>101</sup> Midwest TDUs and IPL Answer at 8.

<sup>102</sup> *Id.* (citing Regulatory Fairness Act, Pub. L. No. 100-473, 102 Stat. 2299 (1988), *Canal Electric Co.*, 46 FERC ¶ 61,153, *reh’g denied*, 47 FERC ¶ 61,275 (1989) (*Canal*)).

<sup>103</sup> *Id.* at 9.

<sup>104</sup> *Id.* at 14 (citing *American Electric Power Service Corp.*, 113 FERC ¶ 61,050, at P 24-25 (2005); *Independent Energy Producers Association*, 118 FERC ¶ 61,096, at P 200 (2007) (*IEP*)). The Midwest TDUs and IPL argue that, in contrast to section 206(b), section 206(c) carves out an exception that precludes interim-prior cost re-allocations under certain circumstances.

<sup>105</sup> Ameren Answer at 16 (citing, *inter alia*, *ISO New England Inc.*, 100 FERC ¶ 61,245, at P 13, 25 (2002)).

<sup>106</sup> Financial Participants Answer at 2.

as of the requested effective date, market participants will not have the opportunity to take the new rate methodology into account for past transactions.”<sup>107</sup>

104. The Financial Participants maintain that the precedent cited by complainants is not analogous to these circumstances. The Financial Participants argue that, in those cases, section 206 provided a remedy “where a public utility overcharges customers and those customers are entitled to a refund from the utility that provided and overcharged for the service.” They argue that, under these circumstances, “[t]he public utility providing the jurisdictional services was, and is, the [Midwest ISO] and the physical energy suppliers” and the Midwest ISO “assessed RSG charges to pay the physical energy suppliers, not the virtual suppliers, who received absolutely no revenues from the RSG charges.”<sup>108</sup>

105. The Financial Participants also reiterate that the precedent cited by complainants does not support the requested refund effective date. In particular, the Financial Participants argue that complainants’ reliance on *Canal* is misplaced because that case “did not involve using a refund effective date to establish a new rate applicable to customers which were exempt from charges under the applicable tariff and where the application of the rate would negatively affect the commercial decisions made by parties which would be subject to the new rate.”<sup>109</sup> The Financial Participants also argue that complainants’ reliance on *IEP* is in error because in that case, the Commission implemented an offer of settlement rates prospectively after the settlement was filed.

#### **4. Commission Determination**

106. We do not agree with protestors that the Complaints would result in retroactive ratemaking. The purpose of the rule against retroactivity, and the closely related filed rate doctrine, is to ensure predictability. The courts have found that as long as the affected parties have notice, these concerns are satisfied.<sup>110</sup> The filing of the Complaints

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<sup>107</sup> *Id.* at 8.

<sup>108</sup> *Id.* at 9.

<sup>109</sup> *Id.* at 12. The Financial Participants also challenge complainants’ interpretation of section 206(c), arguing that the plain text of section 206(b) “does not permit new charges to be applied to customers which are exempt from such charges retroactive to a refund effective date.” *Id.* at 13.

<sup>110</sup> See *NStar Elec. & Gas Corp. v. FERC*, 481 F.3d 794, 801 (D.C. Cir. 2007) (“[T]he filed rate doctrine and bar on retroactive ratemaking are satisfied, in keeping with their functions, ‘when parties have notice that a rate is tentative and may later be adjusted with retroactive effect, or where they have agreed to make a rate effective

(continued)

puts parties on notice that the RSG cost allocation methodology could change. Moreover, concerns regarding whether complainants seek to put a future section 205 filing into effect as of the date of the Complaints are premature; no such section 205 filing is before the Commission (nor even exists) at this time.

107. In cases where, as here, the Commission institutes a section 206 investigation on complaint, section 206(b), as recently amended by section 1285 of the Energy Policy Act of 2005,<sup>111</sup> requires that the Commission establish a refund effective date that is no earlier than the date of the filing of such complaint nor later than five months after the filing of such complaint. Consistent with our general policy,<sup>112</sup> we will establish the refund effective date at the earliest date allowed, the date of the filing of the Ameren/NIPSCO Complaint, August 10, 2007. However, we clarify that the refund effective date does not prejudge, but it merely establishes the outside limit of the effective date of any rates or programs that we may subsequently approve in this proceeding. The FPA grants the Commission discretion in ordering refunds.<sup>113</sup> The establishment of a refund effective date does not constitute a determination that refunds will be ordered or how such refund amounts and refund period will be determined.

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retroactively.”) (internal citations omitted); *OXY USA, Inc. v. FERC*, 64 F.3d 679, 699 (D.C. Cir. 1995) (“The goals of equity and predictability are not undermined when the Commission warns all parties involved that a change in rates is only tentative and might be disallowed.”); *Public Utils. Comm’n of the State of Cal. v. FERC*, 988 F.2d 154, 163 (D.C. Cir. 1993) (“It is not that notice relieves the Commission of the bar on retroactive ratemaking, but that it ‘changes what would be purely retroactive ratemaking into a functionally prospective process by placing the relevant audience on notice at the outset that the rates being promulgated are provisional only and subject to later revision.’”) (internal citations omitted); *Natural Gas Clearinghouse v. FERC*, 965 F.2d 1066, 1075 (D.C. Cir. 1992) (the rule does not apply in situations where there is “adequate notice that resolution of some specific issue may cause a later adjustment to the rate being collected at the time of service”).

<sup>111</sup> Energy Policy Act of 2005, Pub. L. No. 109-58, § 1285, 119 Stat. 594, 980-81 (2005).

<sup>112</sup> See, e.g., *Seminole Electric Cooperative, Inc. v. Florida Power & Light Co.*, 65 FERC ¶ 61,413, at 63,139 (1993); *Canal*, 46 FERC ¶ 61,153, at 61,539, *reh’g denied*, 47 FERC ¶ 61,275 (1989).

<sup>113</sup> Both FPA § 205(e), 16 U.S.C. § 824d(e) and FPA § 206(b), 16 U.S.C. § 824e(b), indicate the Commission “may” order refunds. See also FPA § 309, 16 U.S.C. § 825h.

The Commission orders:

(A) Docket Nos. EL07-86-000, EL07-88-000 and EL07-92-000 are hereby consolidated for purposes of consideration and decision.

(B) E.ON's request to consolidate Docket No. EL07-100-000 is hereby rejected, as discussed in the body of this order.

(C) The Commission finds pursuant to section 206 of the FPA that the Midwest ISO's existing RSG cost allocation methodology may be unjust, unreasonable, unduly discriminatory or preferential.

(D) The Commission hereby institutes paper hearing procedures in Docket Nos. EL07-86-000, EL07-88-000 and EL07-92-000 under section 206 to review evidence regarding what would be a just and reasonable RSG cost allocation methodology. This paper hearing will be held in abeyance, pending the conclusion of the ongoing stakeholder proceeding or February 1, 2008, whichever is earlier.

(E) The Midwest ISO is hereby directed to make an informational filing by February 1, 2008, as discussed in the body of this order.

(F) The Secretary shall promptly publish in the *Federal Register* a notice of the Commission's initiation of this proceeding under section 206 of the FPA in Docket Nos. EL07-86-000, EL07-88-000 and EL07-92-000.

(G) The refund effective date established pursuant to section 206(b) of the FPA is August 10, 2007, the date of filing of the Ameren/NIPSCO Complaint.

By the Commission. Commissioner Moeller not participating.

( S E A L )

Kimberly D. Bose,  
Secretary.