

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

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

Public Service Commission of Wisconsin

Docket No. EL14-34-003

v.

Midcontinent Independent System Operator, Inc.

Midcontinent Independent System Operator, Inc.

Docket Nos. ER14-1242-005
ER14-1243-007
ER14-1724-003
ER14-1725-003
ER14-2176-003
ER14-2180-003
ER14-2860-002
ER14-2862-002
ER14-2952-002
ER14-2952-005

Michigan Public Service Commission

Docket No. EL15-7-001

v.

Midcontinent Independent System Operator, Inc.

ORDER ON REHEARING AND CLARIFICATION AND
ORDER ON REFUND REPORT

(Issued September 22, 2016)

1. On March 23, 2015, several parties requested rehearing and/or clarification of the Commission's February 19, 2015 order addressing several proceedings related to the refund of previously allocated costs associated with the operation of System Support

Resource (SSR)¹ Units located in the American Transmission Company LLC (ATC) service territory under the MISO Tariff. In this order, we grant in part and dismiss as moot in part the requests for clarification, and deny the requests for rehearing. We also find that the refund reports submitted by MISO meet the Commission's requirements as stated in the May 3, 2016 order directing a refund report,² and direct MISO to provide parties that have submitted a non-disclosure certificate with a complete, un-redacted copy of the refund reports. However, we direct MISO to suspend refunds for certain SSR Units and file an updated refund report when the Commission issues an order on the Initial Decision in Docket No. ER14-1242-006, *et al.*

I. Background

2. Under MISO's Tariff, market participants that have decided to retire or suspend a generation resource or SCU must submit a notice (Attachment Y Notice), pursuant to Attachment Y (Notification of Potential Resource/SCU Change of Status) of the Tariff, at least 26 weeks prior to the resource's retirement or suspension effective date. During this 26-week notice period, MISO will conduct a study (Attachment Y Study) to determine whether all or a portion of the resource's capacity is necessary to maintain system reliability, such that SSR status is justified. If so, and if MISO cannot identify an SSR alternative that can be implemented prior to the retirement or suspension effective date, then MISO and the market participant shall enter into an agreement, as provided in Attachment Y-1 (Standard Form SSR Agreement) of the Tariff, to ensure that the resource continues to operate, as needed.³ The SSR agreement is filed with the Commission and specifies the terms and conditions of the service, including the compensation to be provided to the resource. For each SSR agreement filed with the Commission, a separate rate schedule must be filed to provide for recovery of the costs

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

² *Midcontinent Indep. Sys Operator, Inc.*, 155 FERC ¶ 61,134, at P 37 (2016) (May 2016 Order).

³ *See Midwest Indep. Transmission Sys. Operator, Inc.*, 108 FERC ¶ 61,163, *order on reh'g*, 109 FERC ¶ 61,157 (2004).

identified in the SSR agreement, in accordance with the SSR cost allocation provision in section 38.2.7.k of MISO's Tariff.

3. On July 25, 2012, in Docket No. ER12-2302-000, MISO submitted proposed Tariff revisions regarding the treatment of resources that submit Attachment Y Notices. On September 21, 2012, the Commission conditionally accepted MISO's proposed Tariff revisions effective September 24, 2012, subject to two compliance filings due within 90 and 180 days of the date of the order.⁴ On July 22, 2014, the Commission accepted MISO's compliance filing, subject to condition.⁵ On December 17, 2015, the Commission issued an order on rehearing and accepted MISO's further compliance filing, subject to condition.⁶ On June 16, 2016, the Commission issued an order accepting in part and rejecting in part MISO's further compliance filing, subject to the outcome of Docket No. ER16-521.⁷

4. On January 31, 2014, MISO filed an SSR Agreement (in Docket No. ER14-1242-000) (Presque Isle SSR Agreement) and Rate Schedule 43G (in Docket No. ER14-1243-000) for Presque Isle Units 5-9,⁸ which are located in the ATC service territory within MISO. Rate Schedule 43G allocated the costs of the Presque Isle SSR Units to all load-serving entities (LSEs) within the ATC footprint on a *pro rata* basis, consistent with language in section 38.2.7.k of MISO's Tariff as it then existed. This cost allocation methodology allocated most costs to Wisconsin ratepayers, who constitute the bulk of load in the ATC footprint. On April 1, 2014, the Commission accepted the Presque Isle SSR Agreement and Rate Schedule 43G for filing, suspended them for a nominal period, to be effective February 1, 2014, subject to refund and subject to further Commission order.⁹

⁴ *Midwest Indep. Transmission Sys. Operator, Inc.*, 140 FERC ¶ 61,237 (2012), *order on compliance*, 148 FERC ¶ 61,056 (2014) (SSR Compliance Order).

⁵ SSR Compliance Order, 148 FERC ¶ 61,056.

⁶ *Midwest Indep. Transmission Sys. Operator, Inc.*, 153 FERC ¶ 61,313 (2015).

⁷ *Midwest Indep. Transmission Sys. Operator, Inc.*, 155 FERC ¶ 61,274 (2016).

⁸ Presque Isle Units 5-9 are located in Marquette, Michigan and provide up to 344 MW of capacity. See MISO SSR Agreement Filing, Docket No. ER14-1242-000, Transmittal Letter, at 2 (filed Jan. 31, 2014).

⁹ *Midcontinent Indep. Sys. Operator, Inc.*, 147 FERC ¶ 61,004 (2014).

5. On April 3, 2014, in Docket No. EL14-34-000, the Public Service Commission of Wisconsin (Wisconsin Commission) submitted a complaint (Wisconsin Commission Complaint) pursuant to sections 206 and 306 of the Federal Power Act (FPA)¹⁰ and Rule 206 of the Commission's Rules of Practice and Procedure.¹¹ The Wisconsin Commission alleged that the ATC SSR *pro rata* cost allocation provision in section 38.2.7.k of MISO's Tariff was unjust, unreasonable, and unduly discriminatory or preferential, in itself and as applied in Rate Schedule 43G.¹² The Wisconsin Commission stated that, according to a preliminary load-shed study conducted by MISO, the majority of the costs associated with the Presque Isle SSR Units would be allocated to LSEs in Wisconsin, even though Wisconsin LSEs would not receive the majority of the reliability benefits associated with the units.¹³

6. On July 29, 2014, the Commission granted the Wisconsin Commission Complaint and found that the ATC SSR *pro rata* cost allocation provision was unjust, unreasonable, unduly discriminatory, or preferential because, as demonstrated in the application of the provision under Rate Schedule 43G, it did not follow cost causation principles.¹⁴ The Commission directed MISO to remove the ATC SSR *pro rata* cost allocation provision from section 38.2.7.k of its Tariff, thereby extending to the ATC footprint the general SSR cost allocation Tariff language, which requires MISO to allocate SSR costs to "the LSE(s) which require(s) the operation of the SSR Unit for reliability purposes."¹⁵ The Commission also required MISO to conduct a final load-shed study and submit a compliance filing to align the allocation of Presque Isle SSR Unit costs with the Commission's determination.¹⁶ Additionally, the Commission directed MISO to refund, with interest, any Presque Isle SSR Unit costs allocated to LSEs from April 3, 2014 (the date of the Wisconsin Commission Complaint) until the date of the Wisconsin

¹⁰ 16 U.S.C. §§ 824e, 825e (2012).

¹¹ 18 C.F.R. § 385.206 (2016).

¹² Wisconsin Commission Complaint, Docket No. EL14-34-000, at 4 (filed Apr. 3, 2014).

¹³ *Id.* at 14.

¹⁴ *Midcontinent Indep. Sys. Operator, Inc.*, 148 FERC ¶ 61,071, at PP 59-61 (2014) (Wisconsin Commission Complaint Order).

¹⁵ *Id.* P 66.

¹⁶ *Id.* P 118.

Commission Complaint Order that were in excess of the costs to be allocated to those LSEs under MISO's final load-shed study.¹⁷ The Commission stated that:

[t]he Commission's general policy when ordering changes to a cost allocation or rate design under section 206 of the FPA is that such changes be implemented prospectively, without refunds. However, the Commission has broad equitable discretion in determining whether and how to apply remedies in any particular case. Based on the record in this proceeding, we find it appropriate to exercise our discretion in fashioning remedies and order refunds as of the date the [Wisconsin Commission Complaint] was filed. First, we note that the revised cost allocation does not represent a new cost allocation methodology, but rather conforms the allocation of SSR costs in the ATC footprint to the existing methodology applied throughout the rest of the MISO region. Furthermore, the costs at issue in this case are limited to those associated with a single SSR Unit, to be allocated among a defined set of customers within a limited geographic area, for a limited period of less than four months. Finally, these refunds will not require broader adjustments to MISO's markets.¹⁸

7. In compliance with the Commission's directives in the Wisconsin Commission Complaint Order, MISO filed revisions to update the cost allocation methodology in Rate Schedule 43G in order to allocate SSR costs to LSEs that require the SSR Unit for reliability purposes.¹⁹ MISO's practice in implementing its general SSR cost allocation methodology at the time relied on Local Balancing Authority (LBA) boundaries. MISO explained that its Transmission Planning Business Practice Manual (BPM)²⁰ provided that it first allocate costs to LBAs using an optimal load-shed methodology to determine

¹⁷ *Id.* P 68.

¹⁸ *Id.* P 66 (citations omitted).

¹⁹ See MISO Revised Rate Schedule 43G Filing, Docket No. ER14-1242-000 (filed Aug. 11, 2014); MISO Revised Rate Schedule 43G Filing, Docket No. ER14-2862-000 (filed Sept. 12, 2014).

²⁰ MISO Transmission Planning Business Practices Manual, BPM-020-r10 (dated Apr. 10, 2014) at § 6.2.6 (System Support Resource Agreement Cost Allocation Methodology), <https://www.misoenergy.org/Library/BusinessPracticesManuals/Pages/BusinessPracticesManuals.aspx>.

the reliability benefits of the SSR Units to each MISO LBA.²¹ MISO explained that these load shed values for each North American Electric Reliability Corporation (NERC) contingency are organized by LBA and accumulated to determine the total load shed for each LBA along with the corresponding cost share ratio. The costs are then allocated to LSEs within each LBA based upon peak usage of transmission facilities in each month, as determined by each LSE's actual energy withdrawals during the monthly peak hour for each LBA (the optimization-LBA methodology). The load-shed ratios proposed by MISO under the revised Presque Isle Rate Schedule 43G allocated over 93 percent of the Presque Isle SSR costs to the Wisconsin Electric LBA.

8. During the Commission's consideration of requests for rehearing of the Wisconsin Commission Complaint Order, the NERC approved a proposal by Wisconsin Electric Power Company (Wisconsin Electric) to split the Wisconsin Electric LBA in two, one covering Wisconsin and one covering the Upper Peninsula of Michigan. In recognition of the upcoming split of the Wisconsin Electric LBA, MISO proposed, in Docket No. ER14-2952-000, to apply its general SSR cost allocation methodology to recover the costs not only for the Presque Isle SSR Unit, but also for other SSR Units located in the ATC footprint: White Pine SSR Unit No. 1 (the White Pine SSR Unit)²² and the Escanaba SSR Units.²³ Using the optimization-LBA methodology outlined in the BPM, the newly-constituted Michigan Upper Peninsula LBA would have been allocated the majority of SSR costs.

9. On February 19, 2015, the Commission granted clarification of and denied rehearing of the Wisconsin Commission Complaint Order. The Commission affirmed its finding that it is unjust, unreasonable, unduly discriminatory, or preferential for MISO to allocate SSR costs on a *pro rata* basis to all LSEs in the ATC footprint and that SSR

²¹ See MISO Revised Rate Schedule 43G Filing, Docket No. ER14-1242-000, Tab C (Presque Isle SSR Cost Allocation Analysis Results) (filed Aug. 11, 2014).

²² The White Pine SSR Unit is a generator turbine located in White Pine, Michigan within the ATC footprint with a nameplate capacity of 20 MW and is operated under an SSR agreement and Rate Schedule 43H between MISO and White Pine Electric Power, LLC. See MISO White Pine SSR Agreement Filing, Docket No. ER14-1724-000, Transmittal Letter, at 2 (filed Apr. 15, 2014).

²³ The Escanaba SSR Units are located in Escanaba, Michigan within the ATC footprint and are rated at approximately 12.5 MW each. The Escanaba SSR Units were operated under an SSR agreement and Rate Schedule 43 between MISO and the City of Escanaba, Michigan. See MISO Escanaba SSR Agreement Filing, Docket No. ER14-2176-000, Transmittal Letter, at 2 (filed June 13, 2014).

costs must instead be allocated to the LSEs that require the operation of the SSR Units for reliability purposes.²⁴ The Commission rejected arguments that there was evidence in the record to support an allocation of the majority of Presque Isle SSR Unit costs to Wisconsin customers; specifically, Integrys cited to a retail rate allocator used by Wisconsin Electric that allocated the majority of Wisconsin Electric's embedded costs of generation to its Wisconsin customers.²⁵ The Commission found that retail rate treatment is not relevant to setting the just and reasonable level of compensation for Commission-jurisdictional service provided by an SSR Unit under the MISO Tariff. The Commission also found that it need not address Integrys' argument that Wisconsin Electric is double-recovering SSR costs, because Wisconsin Electric's retail rates were not before the Commission, as such retail rates fall within the relevant state commissions' jurisdiction.

10. The Commission granted clarification of the Wisconsin Commission Complaint Order and found that MISO's optimization-LBA cost allocation methodology, when applied to the allocation of SSR costs associated with SSR Units located in the ATC footprint (the Presque Isle SSR Units, the Escanaba SSR Units, and the White Pine SSR Unit), failed to allocate SSR costs directly to the LSEs that benefit from those SSR Units.²⁶ The Commission found that the optimization-LBA methodology: (1) did not adequately identify the LSEs that require the operation of the Presque Isle, Escanaba, and White Pine SSR Units;²⁷ (2) may result in the allocation of costs to LSEs that do not benefit from SSR Units; and (3) appears to be insufficient on its own to provide an all-inclusive identification of load that can be reasonably expected to benefit from the operation of the SSR Units under every circumstance.²⁸

11. Due to the shortcomings of MISO's general SSR cost allocation practice as applied to the SSR Units in the ATC footprint, the Commission directed MISO to file a new study methodology that would allocate the costs associated with the Presque Isle, Escanaba, and White Pine SSR Units directly to benefitting LSEs, as required by MISO's

²⁴ *Midcontinent Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,104, at PP 73-79 (2015) (February 2015 Order).

²⁵ *Id.* P 75.

²⁶ *Id.* PP 83-86.

²⁷ *Id.* P 83.

²⁸ *Id.* PP 85, 86.

Tariff.²⁹ The Commission stated that MISO should submit a study methodology that identifies the LSEs that require the operation of the SSR Units for reliability purposes under conditions that are more representative of actual manual and/or automatic responses taken during reliability events, rather than the ideal conditions that are used by MISO in the optimal load-shed study, and that determines the SSR benefits of specific LSEs based on their actual energy withdrawals at elemental pricing nodes.³⁰ The Commission directed MISO to submit Tariff revisions adjusting the SSR cost allocation under the rate schedules associated with the Presque Isle, Escanaba, and White Pine SSR Units in accordance with the new study methodology, with such revisions effective as follows: on April 3, 2014 for the Presque Isle SSR Units; on June 15, 2014 for the Escanaba SSR Units; and on April 16, 2014 for the White Pine SSR Unit.³¹

12. The Commission also rejected requests for rehearing of its finding in the Wisconsin Commission Complaint Order that refunds of Presque Isle SSR costs be calculated back to the refund effective date of April 3, 2014.³² The Commission noted that several parties challenged the justifications for refunds, but the Commission affirmed its prior findings and reiterated that the parties had reasonable notice that MISO's allocation of Presque Isle SSR costs might be held unjust or unreasonable as of the filing of the Wisconsin Commission Complaint on April 3, 2014 and the setting of that filing date as the refund effective date. The Commission similarly found it appropriate to

²⁹ *Id.* PP 86, 89.

³⁰ *Id.* PP 86, 87.

³¹ *Id.* P 89. The effective dates for the White Pine and Escanaba SSR Units aligned with the effective dates of the respective SSR Agreements and rate schedules accepted subject to condition by the Commission, while the effective date for the Presque Isle SSR Units aligned with the refund effective date set in the Wisconsin Commission Complaint Order. *See* Wisconsin Commission Complaint Order, 148 FERC ¶ 61,071 at P 68; *Midcontinent Indep. Sys. Operator, Inc.*, 148 FERC ¶ 61,116, at PP 37-38 (2014) (ordering refunds of any Escanaba SSR costs allocated to LSEs under Rate Schedule 43 from June 15, 2014 until the date of the order that were higher than the costs to be allocated to those LSEs according to a forthcoming load-shed study); *Midcontinent Indep. Sys. Operator, Inc.*, 148 FERC ¶ 61,136, at PP 44-45 (2014) (ordering refunds of any White Pine SSR costs allocated to LSEs under Rate Schedule 43H from April 16, 2014 until the date of the order that were higher than the costs to be allocated to those LSEs according to a forthcoming load-shed study).

³² February 2015 Order, 150 FERC ¶ 61,104 at P 90.

continue to order refunds of SSR costs associated with the White Pine and Escanaba SSR Units because: (1) those SSR agreements took effect after the Wisconsin Commission Complaint was filed; (2) the SSR Units shared common characteristics with the Presque Isle SSR Units; and (3) the SSR Units applied the same ATC SSR *pro rata* cost allocation methodology that was found to be unjust and unreasonable in the Wisconsin Commission Complaint Order.³³ Therefore, the Commission continued to require MISO to refund any White Pine SSR costs allocated to LSEs that were higher than the costs to be allocated to those LSEs according to the forthcoming study for the White Pine SSR Unit, with such refunds to begin April 16, 2014.³⁴ The Commission also continued to require MISO to refund any Escanaba SSR costs allocated to LSEs that were higher than the costs to be allocated to those LSEs according to the forthcoming study for the Escanaba SSR Units, with such refunds to begin June 15, 2014.³⁵ The Commission stated that implementation of the refund requirements for these SSR Units would be addressed in a future order addressing MISO's new study methodology. The Commission also stated that other issues raised in the rehearing requests with respect to refunds are more appropriately addressed once the Commission has addressed MISO's new study methodology and MISO has filed a detailed refund report.³⁶

13. On September 17, 2015, the Commission accepted MISO's proposed SSR cost allocation methodology, subject to condition and subject to MISO submitting a further compliance filing, finding that the methodology generally complied with the directives of the February 2015 Order.³⁷ The Commission rejected all arguments relating to the ability of the Commission to order refunds of SSR costs as beyond the scope of compliance with the February 2015 Order. The Commission also determined that it would not address implementation of the refund requirement for the Presque Isle, Escanaba, and White Pine

³³ *Id.* P 93.

³⁴ *Id.* The Commission noted that the effective date for the required revision aligned with the effective date of the SSR agreement and rate schedule ordered by the Commission in Docket No. ER14-1725-000.

³⁵ *Id.* The Commission noted that the effective date for the required revision aligned with the effective date of the SSR agreement and rate schedule ordered by the Commission in Docket No. ER14-2180-000.

³⁶ *Id.* n.231.

³⁷ *Midcontinent Indep. Sys. Operator, Inc.*, 152 FERC ¶ 61,216 (2015).

SSR Units until MISO's SSR cost allocation methodology is approved in its entirety and MISO has filed a detailed refund report.³⁸

14. On May 3, 2016, the Commission accepted MISO's revised SSR cost allocation methodology.³⁹ The Commission directed MISO to file a detailed refund report within 45 days of the date of the order, including a description of how MISO intends to effectuate the payment of refunds to those LSEs that were overcharged under the optimization-LBA cost allocation methodology formerly used for the Presque Isle SSR Units, the Escanaba SSR Unit, and the White Pine SSR Unit. The Commission rejected all rehearing arguments related to the establishment of effective dates for the SSR cost allocation methodology and the ability of the Commission to order refunds of SSR costs back to those effective dates (i.e., April 3, 2014 for the Presque Isle SSR Units, April 16, 2014 for the Escanaba SSR Units, and June 15, 2014 for the White Pine SSR Unit) as beyond the scope of the proceeding accepting MISO's new study methodology.⁴⁰ The Commission stated that, as MISO's SSR cost allocation methodology is now approved in its entirety and MISO has been directed to file a detailed refund report, the Commission would address arguments related to the effective dates and refund obligations upon the filing of the refund report and upon addressing the requests for rehearing of the February 2015 Order.⁴¹

15. On June 14, 2016, in Docket No. ER14-2952-005, MISO submitted a detailed refund report (Refund Report) as directed by the Commission in public and non-public versions. The non-public Refund Report includes a refund table containing the amounts to be refunded to some entities and amounts to be charged to others due to the reallocation of SSR costs for the Presque Isle, Escanaba, and White Pine SSR Units; the table provides monthly calculations, by affected LSE and by SSR Agreement.⁴² These amounts include the difference between the cost allocation methodologies and an estimated interest amount. MISO notes that it will submit the final statement of such interest amounts in a filing following conclusion of the resettlement process. MISO states that the monthly table of refunds/charges and interest calculations are redacted

³⁸ *Id.* P 74.

³⁹ May 2016 Order, 155 FERC ¶ 61,134 at P 53.

⁴⁰ *Id.* P 37.

⁴¹ *Id.* P 53.

⁴² Refund Report, Docket No. ER14-2952-005, Transmittal Letter at, 2-3 (filed June 14, 2016).

from the public report because this level of detail provides insight into monthly load patterns, and therefore this information qualifies as business confidential information that is subject to the protections of section 38.9.1 of the MISO Tariff (Access by Market Participants and Others).⁴³ The effective period for refunds under the Refund Report are April 3, 2014 to January 31, 2015 for the Presque Isle SSR Units, June 15, 2014 to June 14, 2015 for the Escanaba SSR Units, and April 16, 2014 to April 15, 2015 for the White Pine SSR Unit.⁴⁴ MISO states that it will undertake the resettlement in 14 monthly statements, as the payment of SSR costs under the Presque Isle, Escanaba, and White Pine SSR Agreements would normally have been paid over a 14.5 month period (April 3, 2014 to June 14, 2015), with the first installment beginning July 8, 2016.

16. On June 15, 2016, in Docket No. ER14-2952-005, in connection with the non-public version of the Refund Report, MISO filed a proposed protective agreement pursuant to 18 C.F.R. § 388.112(b)(2)(i) (2016) (Protective Agreement).⁴⁵

17. On July 20, 2016, MISO made an errata filing to correct certain values contained in the Refund Report, continuing the treatment of the monthly refund table as business confidential information and including a proposed protective agreement (Errata Refund Report).⁴⁶

II. Notice and Responsive Pleadings

18. Notice of the Refund Report was published in the *Federal Register*, 81 Fed. Reg. 39,920 (2016), with interventions and protests due on or before July 5, 2016. Notice of the Protective Agreement Filing was published in the *Federal Register*, 81 Fed. Reg. 40,692 (2016), with interventions and protests due on or before July 6, 2016. Notice of the Errata Refund Report was published in the *Federal Register*, 81 Fed. Reg. 50,607 (2016), with interventions and protests due on or before August 10, 2016.

19. On June 20, 2016, Wisconsin Electric and the Wisconsin Public Service Corporation (together, the Wisconsin Parties) filed a protest and objection to the

⁴³ *Id.* at 3.

⁴⁴ *Id.* at 4.

⁴⁵ MISO Supplemental Protective Agreement Filing, Docket No. ER14-2952-005 (filed June 15, 2016) (Protective Agreement Filing).

⁴⁶ MISO Errata Refund Report Filing, Docket No. ER14-2952-005 (filed July 20, 2016).

disclosure of confidential information pursuant to the Protective Agreement Filing. They filed an amended protest on June 21, 2016. On July 1, the Michigan Aligned Parties⁴⁷ filed an answer in support of the Protective Agreement Filing. On August 1, 2016, the Wisconsin Parties filed an answer to the Michigan Aligned Parties' answer.

20. Timely protests of the Refund Report were filed by: the City of Escanaba, Michigan (the City of Escanaba); the Marquette Board of Light and Power (Marquette); Cloverland; Constellation Energy Services, Inc. (Constellation Energy); the Michigan Commission, the Michigan Agency for Energy, and Michigan Attorney General Bill Schuette (together, the Joint Michigan Parties); UPPCo; the Michigan Aligned Parties; and the Michigan Commission. The Wisconsin Commission filed timely comments in support of the Refund Report.

21. Motions for leave to answer and answer to the protests of the Refund Report were filed by: MISO; the Wisconsin Commission; and WPPI Energy. The Michigan Commission and the Michigan Aligned Parties filed a motion to answer the Wisconsin Commission's answer. The Citizens Utility Board of Wisconsin and the Wisconsin Industrial Energy Group filed a motion to answer the Michigan Commission and the Michigan Aligned Parties' answer. The Michigan Commission and the Michigan Aligned Parties filed an answer in opposition to the Citizens Utility Board of Wisconsin and the Wisconsin Industrial Energy Group's answer.

III. Requests for Rehearing and Clarification

22. Requests for clarification and rehearing of the February 2015 Order were filed by the Michigan Commission and the City of Escanaba. Requests for rehearing were filed by: Integrys Energy Services, Inc. (Integrys); the Mines; the City of Mackinac Island; and the Tribe.

23. The City of Escanaba filed a limited request for clarification or, in the alternative, rehearing, along with a limited motion to intervene out of time in Docket Nos. ER14-1724 and ER14-1725 (addressing White Pine SSR costs). The City of Escanaba states that good cause exists to grant the out-of-time intervention because the February 2015 Order raises issues across multiple proceedings, and the City of Escanaba is a party to all

⁴⁷ For the purposes of this order, the Michigan Aligned Parties are: The Michigan Public Service Commission (Michigan Commission); Tilden Mining Company L.C. and Empire Iron Mining Partnership (together, the Mines); Cloverland Electric Cooperative (Cloverland); Verso Corporation (Verso); the City of Mackinac Island; The Sault Ste. Marie Tribe of Chippewa Indians (the Tribe); and Upper Peninsula Power Company (UPPCo).

other captioned dockets.⁴⁸ The City of Escanaba agrees to accept the record in Docket Nos. ER14-1724 and ER14-1725 as it stands, and does not seek to delay the proceeding.

A. Requests for Clarification and Requests for Rehearing of the SSR Cost Allocation Methodology

24. The City of Escanaba asks the Commission to clarify that it did not intend to categorically reject all use of an optimal load-shed methodology or the use of LBA boundaries in identifying the LSEs that require the SSR Units for reliability, if necessary to produce just and reasonable results.⁴⁹ If such clarification is not granted, the City of Escanaba requests rehearing of the Commission's categorical rejection, as it argues that MISO should not be prevented from using tools that may lead to a just and reasonable allocation of SSR costs.⁵⁰

25. The Michigan Commission asks for clarification that the Commission did not make a finding in the February 2015 Order that the new study methodology ordered by the Commission will result in a just and reasonable and not unduly discriminatory allocation of SSR costs, as the Michigan Commission argues that an analysis of the new study is needed to make this determination.⁵¹ The Michigan Commission also expresses concern regarding the Commission's directive to include in the new study methodology conditions that are more representative of actual responses taken during reliability events and to use energy withdrawals at elemental pricing nodes. The Michigan Commission argues that such a governing standard may not account for possible extreme events.⁵² The Michigan Commission asks the Commission to clarify that parties are not prohibited from responding to MISO's proposed study methodology and proposing revisions or alternate methodologies to identify the LSEs that require the operation of the SSR Units

⁴⁸ Limited Request for Clarification or, in the Alternative, Rehearing, and Limited Motion to Intervene Out of Time of the City of Escanaba, Michigan, Docket No. EL14-34-001, *et al.*, at 5 (filed Mar. 23, 2015).

⁴⁹ *Id.* at 3.

⁵⁰ *Id.* at 4.

⁵¹ Motion for Clarification or, in the Alternative, Request for Rehearing of the Michigan Public Service Commission, Docket No. EL14-34-001, *et al.*, at 5 (filed Mar. 23, 2015) (Michigan Commission Request for Rehearing).

⁵² *Id.* at 5-6.

for reliability.⁵³ The Michigan Commission further asks the Commission to clarify that its rejection of requests for a hearing on issues related to MISO's optimal load-shed study is without prejudice to any such requests for a hearing on issues related to MISO's new study methodology.⁵⁴

26. To the extent the Commission rejects its requested clarifications with respect to the SSR cost allocation methodology, the Michigan Commission requests rehearing. The Michigan Commission states that the Commission erred by finding, prior to MISO's compliance filing, that the new study methodology ordered in the February 2015 Order will avoid the deficiencies of MISO's optimal load-shed study and produce a just, reasonable and not unduly discriminatory allocation of SSR costs.⁵⁵ The Michigan Commission argues that the Commission erred by directing MISO to submit a new study methodology for allocating SSR costs without allowing interested parties to submit alternative allocation methodologies for consideration.⁵⁶ The Michigan Commission contends that the Commission erred by finding that a hearing is unnecessary to resolve issues related to MISO's new study methodology.⁵⁷

27. The Michigan Commission seeks clarification that the Commission's denial of requests for rehearing of the refund effective dates for the Presque Isle, Escanaba, and White Pine SSR Units constitutes a final order applicable to the effective dates of refunds under the new study methodology.⁵⁸ The Michigan Commission notes that the Commission rejected requests for rehearing of the April 3, 2014 refund effective date for Presque Isle SSR costs, and also directed MISO to submit revisions adjusting SSR cost allocations for the Escanaba and White Pine SSR Units, to be effective on dates aligning with the effective dates of previous compliance filings ordered by the Commission for the Escanaba and White Pine SSR Units. The Michigan Commission requests clarification that the Commission's directive for MISO to file Tariff sheets with retroactive refund dates for the Presque Isle, Escanaba, and White Pine SSR Units does not constitute a new finding, but simply restates the previous application of the same refund effective dates in

⁵³ *Id.* at 6-8.

⁵⁴ *Id.* at 9-10.

⁵⁵ *Id.* at 13-14.

⁵⁶ *Id.* at 14-15.

⁵⁷ *Id.* at 16.

⁵⁸ *Id.* at 10.

the Wisconsin Commission Complaint Order and the related orders addressing compliance filings for the White Pine and Escanaba SSR Units.⁵⁹ Absent such clarification, the Michigan Commission seeks rehearing of such refund effective dates, as described below.

B. Requests for Rehearing: Compensation for SSR Service

28. The Mines state that the Presque Isle SSR costs included in the SSR rates are the same Presque Isle SSR costs included in Wisconsin Electric's 2014 retail rates, such that Wisconsin Electric is double-recovering the Wisconsin share of its Presque Isle SSR costs.⁶⁰ The Mines, the City of Mackinac Island, and the Sault Ste. Marie Tribe of Chippewa Indians argue that the Commission erred when it refused to consider the implications of Wisconsin Electric's double-recovery of SSR costs on the justness and reasonableness of MISO's Presque Isle SSR rates.⁶¹ The Mines argue that the Commission cannot assume that the Wisconsin Commission has the power to retroactively alter Wisconsin Electric's 2014 retail rates to avoid double-recovery; indeed, the Mines state that such a retroactive alteration of retail rates would violate the general prohibition against retroactive ratemaking.⁶² In failing to consider whether the SSR rates allowed Wisconsin Electric to double-recover Presque Isle SSR costs, the Mines contend that the Commission abdicated its statutory authority to assure that federally-regulated electric rates are just and reasonable.⁶³

29. The Mines cite to *FPC v. Conway Corp.*⁶⁴ for the proposition that the Commission must consider all factors relevant to the justness and reasonableness of rates.⁶⁵ The

⁵⁹ *Id.* at 11.

⁶⁰ Request for Rehearing of Tilden Mining Company L.C. and Empire Iron Mining Partnership, Docket No. ER14-1242-000, *et al.*, at 5-7 (filed Mar. 23, 2015) (The Mines Request for Rehearing).

⁶¹ *Id.*; The City of Mackinac Island's Request for Rehearing, Docket No. ER14-1242-002, *et al.*, at 3 (filed Mar. 23, 2015); The Sault Ste. Marie Tribe of Chippewa Indians' Request for Rehearing, Docket No. ER14-1242-002, *et al.*, at 2-3 (filed Mar. 23, 2015).

⁶² The Mines Request for Rehearing at 8-9.

⁶³ *Id.* at 10-11.

⁶⁴ 426 U.S. 271 (1976).

Mines state that in that case, the Supreme Court required the Commission to consider the relation between retail and wholesale rates in setting just and reasonable wholesale rates, and to generally examine the entire context on which the wholesale rate will function.⁶⁶

C. Requests for Rehearing: Refunds

30. The Michigan Commission and Integrys state that the Commission erred by imposing retroactive refunds associated with a new cost allocation method, as its decision was inconsistent with the Commission's policy to avoid retroactive implementation of rate design changes.⁶⁷ The Michigan Commission argues that the Commission has traditionally declined to order refunds where the company has collected the proper level of revenues, but it is later determined that these revenues should have been allocated differently.⁶⁸ The Michigan Commission argues that the filed rate doctrine protects ratepayers from paying retroactive surcharges, and that section 206 of the FPA authorizes only retroactive refunds and not retroactive surcharges.⁶⁹ The Michigan Commission states that, if the February 2015 Order is construed to require not just retroactive refunds, but retroactive surcharges, the February 2015 Order constitutes an unlawful surcharge on Michigan ratepayers.⁷⁰

31. The Michigan Commission and Integrys state that there was no basis for the Commission's finding that retroactive refunds of Presque Isle SSR costs back to April 3, 2014 are warranted because the revised cost allocation methodology is not a new methodology, but rather conforms the allocation of SSR costs in the ATC footprint to the existing methodology applied throughout the rest of MISO.⁷¹ They state that the

⁶⁵ The Mines Request for Rehearing at 11.

⁶⁶ *Id.* at 11-12 (citing *FPC v. Conway Corp.*, 426 U.S. 271, 277-278, 280 (1976)).

⁶⁷ *Id.*; Request for Rehearing of Integrys Energy Services, Inc., Docket No. ER14-1242-000, *et al.*, at 11-13 (filed Mar. 23, 2015) (Integrys Request for Rehearing).

⁶⁸ Michigan Commission Request for Rehearing at 16-17.

⁶⁹ *Id.* at 17-18 (citing *Occidental Chemical Corp. v. PJM Interconnection, L.L.C. and Delmarva Power & Light Co.*, 110 FERC ¶ 61,378, at P 10 (2013); *City of Anaheim, California v. FERC*, 558 F.3d 521 (D.C. Cir. 2009) (*City of Anaheim*)).

⁷⁰ *Id.* at 18.

⁷¹ *Id.* at 19 (citing February 2015 Order, 150 FERC ¶ 61,104 at P 90); Integrys Request for Rehearing at 13.

February 2015 Order unambiguously directed a revised study method that did not exist, and ordered it to apply retroactively. In addition, the Michigan Commission states that there was no basis for the Commission's finding that parties had reasonable notice that MISO's allocation of Presque Isle SSR costs might be changed, because the parties only had notice that MISO's existing SSR cost allocation methodology might be applied to the ATC footprint.⁷²

32. Integrys asserts that there was no basis for the Commission's conclusion that refunds are justified because the SSR costs to be refunded are limited to a single SSR Unit and allocated among a defined set of customers for a limited period of time.⁷³ Integrys notes that the retroactive application of the new rate design methodology affects three SSR Units, and even though there is a defined set of customers affected, the impact of the challenges in effectuating the revised cost allocation is significant. Integrys further notes that, at the time of its request for rehearing, MISO had not yet submitted its compliance filing proposing a new study methodology, and the initial four-month refund period is likely to be over 18 months.⁷⁴ The Michigan Commission states that the Commission should reverse its retroactive allocation of SSR costs for the Presque Isle, Escanaba, and White Pine SSR Units and require allocation under MISO's new methodology to become effective the date of issuance of an order approving the new methodology.⁷⁵

33. Integrys argues that retroactive application of the new rate design is unjust and unreasonable because it creates market uncertainty, such that when market rules change after the transactions are entered, sellers' expectations in such transactions can be detrimentally impacted.⁷⁶ Integrys states that Commission policy is clear – it will not order refunds when doing so would change the economic and commercial expectations of market participants with respect to their transactions which they cannot undo.⁷⁷ Integrys

⁷² Michigan Commission Request for Rehearing at 19-20.

⁷³ Integrys Request for Rehearing at 14 (citing February 2015 Order, 150 FERC ¶ 61,104 at P 91).

⁷⁴ *Id.* at 17.

⁷⁵ Michigan Commission Request for Rehearing at 20.

⁷⁶ Integrys Request for Rehearing at 16.

notes that retroactive re-billing and reassessment of rates is particularly difficult for LSEs like Integrys that provide competitive retail services, because these entities must be able to reasonably rely on the effectiveness of tariffs and business practice manuals.⁷⁸

IV. Discussion

A. Procedural Matters

34. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2016), the Commission will grant the City of Escanaba's late-filed motion to intervene in Docket Nos. ER14-1724 and ER14-1725. When late intervention is sought after the issuance of a dispositive order, the prejudice to other parties and burden upon the Commission of granting the late intervention may be substantial. Thus, movants bear a higher burden to demonstrate good cause for granting such late intervention.⁷⁹ We find that the City of Escanaba has met this higher burden of justifying late intervention.

35. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 358.213(a)(2) (2016), prohibits an answer to a protest or an answer unless otherwise ordered by the decisional authority. We accept the answers because they have assisted us with our decision-making process.

B. Substantive Matters

1. Requests for Clarification and Requests for Rehearing of the SSR Cost Allocation Methodology

36. We grant the City of Escanaba's request for clarification that the Commission did not intend to categorically reject all use of an optimal load-shed methodology or the use of LBA boundaries in identifying the LSEs that require the SSR Units for reliability within MISO. The Commission found in the February 2015 Order that, for the SSR Units at issue in MISO's ATC footprint, the optimization-LBA cost allocation

⁷⁷ *Id.* (citing *New York Indep. Sys. Operator, Inc.*, 92 FERC ¶ 61,073, at 61,307 (2000) (*NYISO*), *reh'g denied*, 97 FERC ¶ 61,154, at 61,673 (2001); *Ameren Services Co.*, 127 FERC ¶ 61,121, at P 155 (2009) (*Ameren*)).

⁷⁸ *Id.* at 17.

⁷⁹ *See, e.g., Midwest Indep. Transmission Sys. Operator, Inc.*, 102 FERC ¶ 61,250, at P 7 (2003).

methodology was not shown to produce SSR cost allocation results that were just and reasonable and not unduly discriminatory.⁸⁰ The Commission further stated that, if any party proposes in the future to use an optimal load-shed methodology or LBA boundaries in allocating SSR costs, the party must show that such a method allocates costs directly to those LSEs that benefit from operation of the SSR Units, as required by MISO's Tariff.⁸¹

37. We dismiss as moot the Michigan Commission's requests for clarification and rehearing related to (1) whether the February 2015 Order prejudged the justness and reasonableness of MISO's proposed study methodology and (2) whether the Michigan Commission was precluded from addressing its concerns with MISO's proposed study methodology and proposing an alternative methodology or requesting a hearing on issues related to the proposed study methodology. The Commission has evaluated the justness and reasonableness of MISO's proposed study methodology and accepted the methodology with some modifications.⁸² The Michigan Commission had the opportunity to provide its concerns for the Commission's consideration.⁸³ With respect to the Michigan Commission's request for clarification of whether the refund effective dates set in the February 2015 Order constituted new findings, we note that the April 3, 2014 refund effective date for Presque Isle was set in the prior Wisconsin Commission Complaint Order and the refund effective dates for the Escanaba and White Pine SSR Units aligned with the effective dates of the SSR agreements and rate schedules that had been previously accepted (subject to condition) by the Commission in Docket Nos. ER14-2180-000 and ER14-1725-000, respectively.

⁸⁰ February 2015 Order, 150 FERC ¶ 61,104 at P 86.

⁸¹ *Id.* n.210.

⁸² *See* September 2015 Order, 152 FERC ¶ 61,216; May 2016 Order, 155 FERC ¶ 61,134.

⁸³ *See* Motion of the Michigan Public Service Commission for Access to Information and Answer in Support of Motion of Verso Corporation for Access to Information, Docket No. ER14-2952-003 (filed June 1, 2015); Protest of the Michigan Public Service Commission, Docket No. ER14-2952-003 (filed June 10, 2015); Protest of the Michigan Public Service Commission, Docket No. ER14-2952-004, *et al.* (filed Oct. 29, 2015); Michigan Commission Request for Rehearing of the September 2015 Order, Docket No. ER14-2952-006, *et al.* (filed Oct. 19, 2015).

2. Requests for Rehearing: Compensation for SSR Service

38. We deny requests for rehearing of the Commission's finding that retail rate treatment is not relevant to setting the just and reasonable level of compensation for Commission-jurisdictional service provided by an SSR Unit under the MISO Tariff.⁸⁴ The establishment of retail rates properly rests with state public utility commissions, not the Commission.⁸⁵ We are not persuaded by allegations that the Wisconsin Commission lacks authority to protect ratepayers against double recovery of SSR costs included in retail rates set by that commission, and therefore that the Commission must adjust wholesale SSR compensation to prevent double recovery. Indeed, we note that it was the Wisconsin Commission that challenged the previous *pro rata* SSR cost allocation methodology to ensure that costs associated with the Presque Isle facility are properly allocated to the entities that benefit from its continued operation. We continue to find that it is the Commission's responsibility to set appropriate SSR compensation and cost allocation at the wholesale level, and we decline to intrude on the prerogatives of the Wisconsin Commission to oversee retail rates subject to its jurisdiction.⁸⁶ Furthermore, as the Commission noted in the February 2015 Order, the fact that the retail rate allocator for Wisconsin Electric's generation allocates the majority of that company's embedded generation costs to Wisconsin customers does not necessarily correlate to the same load that requires the designation of an SSR Unit for the purposes of establishing a just and reasonable allocation of SSR costs under the MISO Tariff.⁸⁷

⁸⁴ February 2015 Order, 150 FERC ¶ 61,104 at P 75.

⁸⁵ See *Southwest Power Pool, Inc.*, 119 FERC ¶ 61,199, at P 37 (2007).

⁸⁶ 16 U.S.C. §§ 824, 824d, 824e (2012) (vesting wholesale rate authority in the Commission); see, e.g., *Western Massachusetts Elec. Co.*, 23 FERC ¶ 61,025, at 61,063-64, *reh'g denied*, 23 FERC ¶ 61,345 (1983) (state commission cannot establish Commission-jurisdictional rates); *Houlton Water Co. v. Maine Pub. Service Co.*, 60 FERC ¶ 61,141, at 61,514 (1992) (federal and state ratemaking bodies are not bound to use same ratemaking principles); *Central Power and Light Co.*, 98 FERC ¶ 61,069, at 61,184 n.24 (2002) (Commission is not bound by actions of state commission); *Barton Village Inc.*, 100 FERC ¶ 61,244, at P 12 (2002) ("Under the Federal Power Act . . . the Commission has exclusive jurisdiction over [Commission-jurisdictional] rates Thus, we have no legal obligation to review, much less rely on, the findings by the [state commission]."), *aff'd sub nom. on other grounds, Barton Village Inc., v. FERC*, No 02-4693 (2d Cir. June 17, 2004) (unpublished).

⁸⁷ February 2015 Order, 150 FERC ¶ 61,104 at P 75.

39. The Mines cite to *FPC v. Conway Corp.* for the proposition that the Commission must consider the relation between retail and wholesale rates in setting just and reasonable wholesale rates.⁸⁸ However, we find that *FPC v. Conway Corp.* does not require the Commission to adjust the level of SSR compensation for the Presque Isle SSR Units to offset the alleged double-recovery of these costs in Wisconsin Electric's retail rates. In that case, a power company that sold electricity at both wholesale and retail sought to raise its wholesale rates.⁸⁹ The company's wholesale customers stated that they were in competition with the company for industrial retail accounts and argued that the increase was discriminatory because it was an attempt to squeeze the company's customers out of competition, such that it would be impossible for the customers to sell power to an industrial load at a competitive price with the company.⁹⁰ The Supreme Court found that section 205 of the FPA forbids maintenance of any unreasonable difference in rates with respect to any sale subject to the jurisdiction of the Federal Power Commission (FPC), and that if undue preference or discrimination is traceable to the jurisdictional wholesale rate, then the FPC could adjust the jurisdictional rate to compensate for such discrimination.⁹¹ In this case, there have been no allegations that Wisconsin Electric has attempted to adjust the level of compensation for continued operation of the Presque Isle SSR Units in a discriminatory manner; rather, Wisconsin Electric properly filed an Attachment Y notice with MISO when it decided to retire the Presque Isle SSR Units, and MISO determined that the units were needed for reliability. According to MISO's Tariff, Wisconsin Electric is entitled to compensation for the continued operation of the Presque Isle SSR Units, and the costs to operate the units are properly recoverable from the LSEs that benefit from such continued operation.

3. Requests for Rehearing: Refunds

40. We deny requests for rehearing of the Commission's findings that: (1) MISO must issue refunds of Presque Isle SSR costs that have been allocated to LSEs that are

⁸⁸ The Mines Request for Rehearing at 11-12 (citing *FPC v. Conway Corp.*, 426 U.S. at 277-278, 280).

⁸⁹ *FPC v. Conway Corp.*, 426 U.S. at 272-273.

⁹⁰ *Id.* at 274.

⁹¹ *Id.* at 277. Furthermore, in *FPC v. Conway Corp.*, the Supreme Court found that the FPC should put the company's rates within the lower range of the zone of reasonableness in view of the utility's decision to curb the retail competition of its wholesale customers. *Id.* at 279. Here, there is no such range in the zone of reasonableness.

higher than the costs to be allocated to those LSEs according to the forthcoming study, with such refunds to begin as of the refund effective date of April 3, 2014; (2) MISO must refund any White Pine SSR costs that have been allocated to LSEs that are higher than the costs to be allocated to those LSEs according to the forthcoming study for the White Pine SSR Unit, with such refunds to begin April 16, 2014; and (3) MISO must refund any Escanaba SSR costs that have been allocated to LSEs that are higher than the costs to be allocated to those LSEs according to the forthcoming study for the Escanaba SSR Units, with such refunds to begin June 15, 2014.⁹² As further discussed below, we find that refunds are warranted due to the equitable considerations in these specific circumstances.

a. The Commission's Refund Policy

41. Section 206(b) of the FPA states that:

the Commission may order refunds of any amounts paid, for the period subsequent to the refund effective date through a date [15] months after such refund effective date, in excess of those which would have been paid under the just and reasonable rate, charge, classification, rule, regulation, practice, or contract which the Commission orders to be thereafter observed and in force.

In two recent cases, the Commission restated its general refund policy when addressing refund requests in cases where a cost allocation or rate design has been found to be unjust and unreasonable.⁹³ *Black Oak* was initiated after a complaint was filed challenging the marginal line loss method and the related allocation methodology for recovering transmission line losses in the PJM Interconnection L.L.C. (PJM) tariff. The Commission found that PJM had incorrectly excluded virtual marketers that paid certain transmission charges from the allocation of marginal line loss over-collections.⁹⁴ After initially requiring PJM to pay refunds to virtual marketers, the Commission reversed its decision. The Commission stated that it has established a policy of not ordering refunds in rate design and cost allocation cases to account for the utility's inability to retroactively charge customers in order to cover refund payments, referencing the

⁹² February 2015 Order, 150 FERC ¶ 61,104 at P 91.

⁹³ *La. Pub. Serv. Comm'n v. Entergy Corp.*, 155 FERC ¶ 61,120 (2016) (*Entergy*); *Black Oak Energy L.L.C. v. PJM Interconnection, L.L.C.*, 155 FERC ¶ 61,013 (2016) (*Black Oak*).

⁹⁴ *Black Oak*, 155 FERC ¶ 61,013 at P 2.

United States Court of Appeals for the District of Columbia Circuit's (D.C. Circuit) holding in *City of Anaheim* for the proposition that section 206(b) of the FPA does not authorize the Commission to impose a surcharge to one group of customers to pay for the refunds to the other customers.⁹⁵

42. In *Entergy*, the Commission noted that, in a case where the company collected the proper level of revenues, but it is later determined that those revenues should have been allocated differently, the Commission traditionally has declined to order refunds.⁹⁶ The Commission explained that, if the utility collected no more than it was entitled to, refunds would potentially result in under-recovery; this would be unfair because it would result in a loss of revenue from the reallocation when the utility would not have the opportunity to file a new rate case to recover those revenues.⁹⁷ In addition, the Commission explained that in cost allocation and rate design cases, a different cost allocation or rate design could have led to different decisions by consumers or a utility, but it is now too late to alter the decisions that were in fact made. The Commission in *Entergy* stated that it was mindful of the D.C. Circuit's statement that invoking a Commission policy on refunds does not eliminate the need to consider the fact that an unjust and unreasonable cost allocation caused some consumers to pay too much and other consumers to pay too little.⁹⁸ However, the Commission stated that refunds in cost allocation cases where over-recovery has not occurred must be implemented through surcharges, which create a zero sum game in which customers, not regulated public utilities, are the source of refunds made to other customers. While the Commission conceded that it may be inequitable that some customers paid too much under the filed rate, it also explained that it must consider the equities involved in assessing additional charges on other customers who were not responsible for the misallocation but who would be required to make additional payments for past purchases they reasonably concluded were final and cannot revisit.

43. The Commission's "no-refund" policy, as reiterated in *Black Oak* and *Entergy*, is not a strict requirement in every cost allocation case. Rather, as stated in *Entergy*, "the Commission has never enunciated a single, general policy on refunds ... [t]he Commission's approach to refunds has instead been shaped by the way certain equitable

⁹⁵ *Id.* PP 12, 15, 17.

⁹⁶ *Entergy*, 155 FERC ¶ 61,120 at P 25.

⁹⁷ *Id.* P 28.

⁹⁸ *Id.* P 36 (citing *La. Pub. Serv. Comm'n v. FERC*, 772 F.3d 1297, at 1305 (D.C. Cir. 2014)).

considerations are typically associated with certain specific fact patterns.”⁹⁹ The Commission’s refund authority is “discretionary, and refund decisions are to be guided by equitable principles... [i]n short, the basic consideration in ruling on refunds is one of fairness.”¹⁰⁰ The question becomes whether the facts presented support following the Commission’s policy of not awarding refunds in cost allocation cases. We find that, under the specific circumstances present in these proceedings, the equitable considerations require a narrow exception to the general “no refund” policy for cost allocation cases, as discussed below.¹⁰¹

44. The Commission has cited two primary grounds for its general “no refund” policy in cost allocation cases: (1) the unfairness that results from retroactive implementation of a new rate for both utilities and customers who cannot alter their past actions in light of that new rate, and (2) the potential for under-recovery.¹⁰² We find that neither of these grounds applies here, and thus fairness considerations do not require automatic application of the Commission’s general “no refund” policy.

45. First, we note that Integrys, which sought rehearing on the first ground cited above, has not identified any particular decisions made in reliance on the previous SSR cost allocation methodology. In *Entergy*, for instance, the Commission found that the Entergy System Agreement provision challenged by the complaint created a disincentive to make curtailable sales.¹⁰³ The Commission found that refunds would serve to impose potentially unrecoverable costs on Entergy Operating Companies that, based on the incentives that the System Agreement created, chose to engage in firm sales

⁹⁹ *Id.* P 20.

¹⁰⁰ *Id.* PP 26, 27.

¹⁰¹ *Black Oak* and *Entergy* reiterate and clarify the Commission’s general policy against granting refunds in cost allocation cases due to fairness considerations. However, even if these cases were considered to adopt a strict “no refund” policy in every cost allocation case going forward, no matter the equitable considerations, we would find it reasonable to apply the Commission’s pre-existing policy due to the unique factual circumstances of the present case, as described herein. *See Consolidated Edison Co. of New York, Inc. v. FERC*, 315 F.3d 316 (D.C. Cir. 2003) (“An agency may decide to apply a pre-existing policy to resolve a pending case, so long as that policy is not otherwise arbitrary and the agency provides a reasoned explanation for its decision”).

¹⁰² *Entergy*, 155 FERC ¶ 61,120 at P 30.

¹⁰³ *Id.* P 35.

that cannot now be undone instead of curtailable sales that the System Agreement discouraged from their perspective. In *Black Oak*, the Commission noted that, assuming that PJM was permitted to surcharge customers to provide a refund to others that should have been allocated transmission line loss overcollections, exporters within PJM relied on the existing PJM tariff when they engaged in export transactions into MISO with the expectation that they would receive a *pro rata* share of the surplus revenues PJM allocated for transmission loss charges.¹⁰⁴

46. Here, Integrys only stated generally that retroactive application of the new rate design is unjust and unreasonable because it creates market uncertainty, such that when market rules change after the transactions are entered, sellers' expectations in such transactions can be detrimentally impacted.¹⁰⁵ Integrys notes that retroactive re-billing and reassessment of rates is difficult for LSEs that provide competitive retail services, because these entities must be able to reasonably rely on the effectiveness of tariffs and business practice manuals, but does not cite to any particular instances where this reliance had a detrimental impact on its retail services.¹⁰⁶ Integrys merely states that MISO market customers are faced with retroactive adjustments and had no means by which to adjust their operations, or plan for or anticipate these costs. Integrys cites to precedent that is not applicable in the circumstances present here, because those cases denied refunds where the Commission found that energy market prices, or the allocation of payments related to the real-time energy market, were unjust and unreasonable, such that refunds would have (1) been difficult to calculate, (2) undermined confidence in those markets, and (3) prevented parties from making retroactive adjustments to their market conduct to account for refunds.¹⁰⁷ By contrast, in this case, as discussed further below, SSR Unit designation and subsequent SSR cost allocation is an out-of-market process. Because there are no markets involved, there is no undermining of those markets, nor is there previous market conduct that would have been adjusted to account for eventual refunds.

¹⁰⁴ *Black Oak L.L.C. v. PJM Interconnection L.L.C.*, 139 FERC ¶ 61,111, at P 43 n.57 (2012).

¹⁰⁵ Integrys Request for Rehearing at 16.

¹⁰⁶ *Id.* at 17.

¹⁰⁷ *Id.* at 16 (citing *NYISO*, 92 FERC ¶ 61,073 at 61,306-307 (denying refunds when considering remedies for energy market flaws); *Ameren*, 127 FERC ¶ 61,121 at PP 155-157 (reversing decision to grant refunds to market participants that made virtual offers in the real-time energy market and that had been over-allocated Revenue Sufficiency Guarantee costs)).

47. Second, there is not a potential for under-recovery here because MISO has a record of the SSR costs paid by each LSE under the previous SSR cost allocation methodology, and MISO can calculate the exact amount of SSR costs that should be assessed to each LSE that underpaid in order to refund LSEs that overpaid, according to the revised just and reasonable methodology that was accepted in the May 2016 Order. This was not the case in *Entergy*, where there was a significant possibility that Entergy could not recover the necessary surcharges to provide refunds to wholesale customers after an unjust and unreasonable calculation of peak load responsibility, because some of the peak load during the refund period was made up of wholesale customers who were no longer Entergy customers.¹⁰⁸

48. We recognize that, in *Black Oak*, the Commission referenced *City of Anaheim* for the proposition that section 206(b) of the FPA does not authorize retroactive rate increases, such as those that MISO would have to assess on any LSEs that paid too little for Presque Isle, Escanaba, and White Pine SSR costs in order to cover the refunds to other LSEs that paid too much. However, we find that *City of Anaheim* does not bar the relief here. In that case, California wholesale electricity generators filed a section 206 complaint alleging that they were under-compensated as a result of the Commission-approved rate they were required to charge to local cities and other electricity purchasers.¹⁰⁹ The Commission agreed and used its refund authority under section 206(b) as justification for ordering a retroactive rate increase requiring the cities to pay more for electricity purchased from those generators. The court reversed, explaining that section 206(b) “applies in cases where the complainant is a *purchaser* alleging that the rates it paid were too high.... By contrast, this case involves a complainant *seller* alleging that the rates it received were too low.”¹¹⁰ Accordingly, unlike the instant case where the Commission has not changed the SSR rates established under the Tariff, *City of Anaheim* involved the Commission’s direct imposition of retroactive surcharges to effectuate a rate increase that the parties could not have foreseen. In these proceedings, the filing of the complaint under section 206 put the parties on notice that refunds, and therefore also surcharges, may be awarded.¹¹¹

¹⁰⁸ *Entergy*, 155 FERC ¶ 61,120 at P 31. In addition, the Arkansas Commission had rejected Entergy’s request to recover surcharges from its retail customers. *Id.* P 32.

¹⁰⁹ *City of Anaheim*, 558 F.3d at 522.

¹¹⁰ *Id.* at 524.

¹¹¹ See *Canadian Ass’n of Petroleum Producers v. FERC*, 254 F.3d 289, 299 (D.C. Cir. 2001) (stating that “[s]o long as the parties had adequate notice that surcharges

49. Moreover, under *Xcel Energy Services, Inc. v. FERC (Xcel)*,¹¹² *City of Anaheim* does not bar refunds in these proceedings. In *Xcel*, the Commission had allowed Southwest Power Pool, Inc.'s (SPP) formula rates for a non-jurisdictional participating transmission owner to go into effect without suspension or a voluntary refund commitment from the owner to refund the difference between the as-filed rate and the rate ultimately found to be just and reasonable by the Commission, which was in violation of section 205 of the FPA.¹¹³ Although the Commission later admitted its legal error, the Commission concluded that, according to *City of Anaheim*, it was powerless to do more than order SPP to fix the just and reasonable rate prospectively pursuant to section 206 of the FPA.¹¹⁴ Xcel Energy petitioned for review of the Commission's orders denying a refund of the unlawful rates it paid. The D.C. Circuit remanded, emphasizing that the "primary aim [of the FPA] is the protection of consumers from excessive rates and charges."¹¹⁵ The court stated that "[t]he Commission appears...to have misapprehended its remedial powers and thus arbitrarily declined to weigh the equities underlying [Xcel Energy's] request for retroactive relief."¹¹⁶ The court further stated that "no precedent is cited, and we are aware of none, for the proposition that the Commission's equitable authority does not encompass refunds as well as surcharges."¹¹⁷

50. Because the two general justifications for the Commission's "no refund" policy in cost allocation cases are not present here, as noted above, pursuant to the court's directives in *Xcel*, we must meet our obligation under section 206(a) of the FPA to weigh the equities underlying the provision of refunds that will restore the just and reasonable rate. After balancing the equitable considerations in these proceedings, as further discussed below, we find that the circumstances here require a narrow exception to the Commission's general policy of not providing refunds in a cost allocation case.

might be imposed in the future, imposition of surcharges does not violate the filed rate doctrine").

¹¹² 815 F.3d 947 (D.C. Cir. 2016).

¹¹³ *Id.* at 949.

¹¹⁴ *Id.* at 953.

¹¹⁵ *Id.* at 952.

¹¹⁶ *Id.* at 953.

¹¹⁷ *Id.* at 955.

b. Equitable Considerations Warrant Refunds

51. We find that, under the factual circumstances presented in these proceedings, when considered as a whole, the equitable considerations warrant refunds of Presque Isle, Escanaba, and White Pine SSR costs to those LSEs that paid too much of those costs under the previous unjust and unreasonable SSR cost allocation methodology, even though those refunds will be implemented through surcharges to LSEs that paid too little under the previous methodology. First, this case is unlike *Black Oak*, where the Commission noted that the surcharges may have to be imposed generally on all members of PJM, including those who may have had no connection with the line loss issues in this proceeding.¹¹⁸ In this case, there is no concern that refunds would be charged to persons without any connection to these proceedings – instead, SSR costs will be recovered directly from LSEs that paid too little for SSR service and refunds given directly to LSEs that paid too much for the same service. Furthermore, MISO would not be surcharging a different set of parties who did not have a timely opportunity to challenge the new cost allocation method – the parties have been on notice that the SSR cost allocation methodology might change since the Wisconsin Commission Complaint was filed on April 3, 2014, and the revised SSR cost allocation methodology has been challenged by many parties on rehearing of the Commission orders in these proceedings.

52. We find that the equitable considerations inherent in the MISO SSR process are distinguishable from *Black Oak* and *Entergy* and warrant refunds. SSR agreements in MISO are unilateral agreements of finite duration that must go into effect prior to the date an SSR Unit would otherwise go out of service in order to ensure reliability. After the owner of the generating unit submits the Attachment Y Notice informing MISO of the impending suspension or retirement, the SSR agreement immediately follows the 26-week study period if MISO cannot identify an SSR alternative that can be implemented prior to the retirement or suspension effective date. The agreement must go into effect quickly to ensure that the resource continues to operate, because it is needed for reliability. Although the agreement must be filed with the Commission, the Commission has granted waiver of the Commission's prior notice requirement to allow the SSR agreement to go into effect the day after the filing, because the SSR Unit is operating uneconomically and would otherwise have provided SSR service on an uncompensated basis while the required Tariff process took its course.¹¹⁹

¹¹⁸ *Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.*, 139 FERC ¶ 61,111 at P 29.

¹¹⁹ If need be, the Commission will set the fixed cost component of the SSR compensation for hearing and settlement judge procedures, but the SSR agreement

(continued...)

53. As a result, there is limited recourse for parties that are allocated SSR costs arising under an SSR agreement if those parties dispute the amount they are allocated under a cost allocation provision in MISO's Tariff. Such affected entities must file a complaint under section 206 of the FPA to dispute the SSR cost allocation, because the Tariff itself dictates how SSR costs are to be allocated. MISO SSR agreements have limited terms (one year with the option for renewal if necessary);¹²⁰ customers who are subjected to an unjust and unreasonable allocation of mandatory SSR costs may have more difficulty obtaining relief by filing a complaint under section 206 because of the short-term nature of the contract. As such, if relief is granted only on a prospective basis, the customers that had been allocated unjust and unreasonable costs would likely receive no compensation. The compulsory nature of the SSR agreement, whose purpose is to ensure reliability, further justifies the Commission crafting an exception to its general "no refund" policy in these circumstances.¹²¹

54. The SSR compensation in these proceedings was also out-of-market; pursuant to SSR agreements in MISO's Tariff, SSR costs are uplifted to applicable LSEs on a monthly basis, and such uplifts are assessed independently from the LSEs' purchases of energy and ancillary services through MISO's markets. Thus, prior market participant decisions were not predicated on the size or allocation of SSR costs. Granting refunds of Presque Isle, Escanaba, and White Pine SSR does not require any markets to be re-run, as there is no need to recreate prices or economic behavior to determine which parties are responsible for SSR costs; instead, MISO must merely identify the discrepancy in cost allocation amounts to LSEs between its previous cost allocation methodology and its final just and reasonable methodology. Thus, subsequent changes to the allocation of

remains in effect during this process. *See, e.g., Wisconsin Commission Complaint Order*, 148 FERC ¶ 61,071, at PP 89, 114 (2014); *Midcontinent Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,147, at PP 36, 39 (2015); *Midcontinent Indep. Sys. Operator, Inc.*, 148 FERC ¶ 61,057, at PP 155, 160 (2014).

¹²⁰ *See* MISO FERC Electric Tariff, Attachment Y-1 (Standard Form Support Supply Resource (SSR) Agreement), § 3(A)(2) (0.0.0).

¹²¹ We note that MISO and the California Independent System Operator Corporation are the only regions that can compel generators to operate for reliability purposes, even when the generator would otherwise retire. *See* MISO FERC Electric Tariff, Module C, § 38.2.7, "Generation Suspension, Generation Retirement, and System Support Resources" (44.0.0); CAISO Tariff, § 41.2 "Designation of Generating Unit as Reliability Must-Run Unit" (0.0.0) and Appendix G, Pro Forma Reliability Must-Run Contract, Art. 2.1 (5.0.0).

such costs will not undermine confidence in the settlements produced by any markets. Furthermore, SSR agreements in MISO are involuntary because they are a last resort measure to maintain reliability. So, in the MISO SSR context, a customer's inability to adjust past actions to anticipate for SSR costs is not a relevant consideration, because there is no choice involved. These facts, when considered in conjunction with the other distinguishing aspects of these proceedings described above, provide further justification for refunds.

55. As the D.C. Circuit has emphasized, the primary aim of the FPA is the protection of consumers from excessive rates and charges.¹²² The circumstances in these proceedings are that, as a result of an unjust and unreasonable cost allocation, MISO LSEs paid Presque Isle, Escanaba, and White Pine SSR costs that were not commensurate with the amount they benefitted from operation of those SSR Units. Invoking a Commission policy on refunds does not eliminate the need to consider the fact that an unjust and unreasonable cost allocation caused some consumers to pay too much and other consumers to pay too little; instead, our refund authority is discretionary, and refund decisions are to be guided by equitable principles.¹²³

56. In sum, we affirm the finding that refunds are warranted for the Presque Isle, Escanaba, and White Pine SSR Units back to the dates previously indicated, given: (1) that the two primary grounds for the Commission's general denial of refunds in cost allocation cases are not present here; (2) that SSR costs can be recovered directly from LSEs that paid too little for SSR service and refunds given directly to LSEs that paid too much for the same service without requiring the re-running of any markets; (3) that the parties have been on notice that the SSR cost allocation methodology might change and that refunds (and surcharges) might be applied; and (4) the nature of the obligatory,¹²⁴ short-term, out-of-market MISO SSR Agreement.

c. Specific Rehearing Arguments

57. Although many of the specific arguments on rehearing are addressed in some form in the discussion above, we address each of these arguments separately. We agree with the requests for rehearing that certain justifications for granting refunds given in the

¹²² *Xcel*, 815 F.3d at 952.

¹²³ *Id.*; *Entergy*, 155 FERC ¶ 61,120 at P 26 (“the Commission’s refund authority...is discretionary, and refund decisions are to be guided by equitable principles.”).

¹²⁴ *See supra* n.121.

February 2015 Order no longer apply, and find that: (1) the final SSR cost allocation methodology cannot be said to be an existing methodology, because the Commission directed MISO to create a new methodology for allocating costs in the ATC footprint that is different from the generally-applicable SSR cost allocation methodology applicable to the rest of the MISO region; and (2) the SSR costs to be refunded are no longer limited to one SSR Unit, to be allocated among a defined set of customers within a limited geographic area, for a period of four months. However, we find that, regardless of these arguments, the equitable considerations in these specific circumstances warrant refunds, as described above.

58. We reject arguments that the Commission is barred from ordering refunds where such refunds would be accomplished by MISO imposing surcharges to LSEs that paid too little under the old SSR cost allocation methodology. As discussed above, the refunds in these proceedings are not barred under the FPA or Commission or court precedent.

59. We reject arguments that the Commission erred in holding that refunds are appropriate because they will not require broader adjustments to MISO's markets, as, it is argued, the ease of implementation is not a legitimate basis for ordering refunds. We have not relied upon the ease of implementation as a basis for granting refunds in this case. Rather, we have found that the out-of-market nature of mandatory SSR costs means that market participant decisions were not predicated on the size or allocation of SSR costs; therefore, subsequent changes to the allocation of such costs will not amount to a re-running of the markets or undermine confidence in the settlements produced by such markets. Similarly, we reject arguments that retroactive application of the new rate design is unjust and unreasonable because it creates market uncertainty. The parties have not identified any particular decisions made in reliance on the previous SSR cost allocation methodology that detrimentally impacted their business, or how they would have adjusted their operation to plan for revised SSR costs.

60. We reject the Michigan Commission's and Integrys' arguments that there was no basis for the Commission's finding that parties had reasonable notice that MISO's allocation of Presque Isle SSR costs might be held unjust or unreasonable as of the filing on April 3, 2014 of the Wisconsin Commission Complaint. In cases where the Commission institutes an investigation on complaint under section 206 of the FPA, section 206(b) requires the Commission to establish a refund effective date that is no earlier than the date a complaint was filed, but no later than five months after the filing. In the Wisconsin Commission Complaint Order, the Commission decided to set the earliest possible refund effective date of April 3, 2014; therefore, the parties were aware that refunds could be issued as of that date.

61. The Michigan Commission also asserts that the parties only had notice that MISO's existing optimization-LBA cost allocation methodology as outlined in its BPM might be applied to the ATC footprint; they had no notice that the Commission would order MISO to create an entirely new method of allocating SSR costs in the ATC

footprint and apply it retroactively to Presque Isle, Escanaba, and White Pine SSR Units.¹²⁵ However, all parties were on notice upon filing of the Wisconsin Commission Complaint that SSR costs might be governed by section 38.2.7.k of the Tariff, extending to the ATC footprint the general SSR cost allocation Tariff language, which requires MISO to allocate SSR costs to “the LSE(s) which require(s) the operation of the SSR Unit for reliability purposes,” regardless of the methodology used in reaching that result. Moreover, in determining whether a Tariff is just and reasonable, or whether a Tariff is being implemented in a just and reasonable manner, the Commission has broad remedial authority to require just and reasonable compliance filings.¹²⁶ The Commission’s authority to order remedies is not constrained by the parties’ expectations of what those remedies might or might not entail. In addition, once the Wisconsin Commission Complaint was filed, parties were on notice that the rates they paid for SSR costs under the then-existing Tariff might not be the rates that they would ultimately pay under a revised just and reasonable Tariff.

4. Refund Reports and Protective Agreement Filing

a. Protests

i. Refund Reports

62. Marquette argues that MISO has not demonstrated the justness and reasonableness of the charges in the Refund Report resulting from application of the SSR allocation formula; rather, Marquette avers that the Refund Report shows that the SSR cost allocation methodology is flawed because (1) it imposes costs on captive customers who bear significant SSR costs that are attributable to customers that were not involved in the decisions that led to the significant cost impact from Presque Isle retirement and SSR designation, and (2) MISO has over-assumed Marquette’s load levels and reliance on SSR Units.¹²⁷ Specifically, Marquette states that the Attachment Y Study that led to the designation of the Presque Isle SSR Units assumed a minimum load of 15 MW for Marquette, but that Marquette was denied firm service during the SSR period and was limited to non-firm transmission service, and its historical average hourly purchase from

¹²⁵ Michigan Commission Request for Rehearing at 19-20.

¹²⁶ See *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967) (the Commission’s breadth of discretion is “at its zenith” when fashioning remedies).

¹²⁷ Protest of the Marquette Board of Light and Power, Docket No. ER14-2952-005, at 5 (filed July 1, 2016).

MISO is actually below four MW.¹²⁸ Marquette states that its purchase and generation dispatch decisions in MISO require a reasonable knowledge of cost differences between available supply options, because Marquette only purchases energy from the MISO Day Ahead Market when such purchases are more economical than Marquette's own generation.¹²⁹ Marquette states that the allocation of significant after-the-fact SSR costs creates an unjust and unreasonable impediment to its ability to economically operate its system, and states that it could have made different decisions had it received appropriate advanced price signals.¹³⁰

63. Cloverland states that the refund schedule in the Refund Report is unreasonable in that it starts too soon and collects over too short a period, and that it will be difficult to acquire the funds to pay for surcharges on this timeline.¹³¹ Cloverland explains that its rates are subject to a Power Supply Cost Recovery Mechanism approved by the Michigan Commission, and that it will take 60-75 days to collect funds for surcharges, which are due to MISO within seven days of receiving the invoice.¹³² Cloverland states that it would have to borrow money on a short-term basis at a high rate of interest in order to pay the invoice. Cloverland asks the Commission to delay invoices until October and, given the rate shock from the large amounts of surcharges to Cloverland, asks that the surcharges be spread over 24 months instead of the 14 proposed by MISO.¹³³

64. Several parties argue that the Refund Report should be rejected because it lacks detail as to what SSR cost allocation methodologies have been used by MISO, what related SSR charges have been previously collected from/refunded to customers since April 3, 2014, and how the dollar amounts of refunds were derived.¹³⁴ The

¹²⁸ *Id.* at 6.

¹²⁹ *Id.* at 7.

¹³⁰ *Id.* at 8-9.

¹³¹ Protest of Cloverland Electric Cooperative, Docket No. ER14-2952-005, *et al.*, at 4-5 (filed July 5, 2016) (Cloverland Protest).

¹³² *Id.* at 5.

¹³³ *Id.* at 5-6.

¹³⁴ Protest of the Michigan Aligned Parties, Docket No. ER14-2952-000, *et al.*, at 8, 34 (filed July 5, 2016); Cloverland Protest at 2-3; Joint Protest of the Michigan Public Service Commission, the Michigan Agency for Energy, and the

Michigan Aligned Parties argue that the Commission should order MISO to provide detailed explanations of its billing practices, the allocation formulas applied by MISO during relevant periods, the allocation formula being applied on a retroactive basis, the amounts of previous SSR cost refunds and surcharges implemented by MISO, and an explanation of how those previous billing adjustments have been reflected in the Refund Report.¹³⁵ The City of Escanaba states that the Refund Report unlawfully includes interest on the retroactive surcharges, as the Commission's regulations only permit interest on refunds.¹³⁶ Some parties argue that the new SSR cost allocation methodology must be implemented prospectively from either (1) May 3, 2016¹³⁷ or (2) the date of the Commission's order on the refund report,¹³⁸ as the rate was not fixed under section 206 of the FPA until those dates. Finally, some parties state that the Refund Report imposes retroactive surcharges in a cost allocation case in violation of the FPA, court precedent, and Commission policy, and ask the Commission to hold the refund/surcharge process in abeyance until the D.C. Circuit reviews the Commission orders and a Commission order is issued determining the just and reasonable amounts of SSR costs.¹³⁹

ii. Protective Agreement

65. The Wisconsin Parties state that the Protective Agreement purports to protect confidential information contained in the Refund Report, but that this protection is

Michigan Attorney General Bill Schuette, Docket No. ER14-2952-000, at 7-8 (filed July 5, 2016) (Protest of the Joint Michigan Parties); Protest of the Michigan Public Service Commission, Docket No. ER14-1243-000, *et al.*, at 6-7 (filed July 5, 2016) (Michigan Commission Protest).

¹³⁵ Protest of the Michigan Aligned Parties at 9, 34.

¹³⁶ Protest of the City of Escanaba, Michigan, Docket No. ER14-2952-000, *et al.*, at 8 (filed July 1, 2016) (City of Escanaba Protest).

¹³⁷ Cloverland Protest at 2; Protest of the Joint Michigan Parties at 15-19; Protest of the Michigan Aligned Parties at 30-33; Michigan Commission Protest at 15-18.

¹³⁸ Protest of Refund Report of Constellation Energy, Docket No. ER14-1242, *et al.*, at 4-7 (filed July 5, 2016).

¹³⁹ City of Escanaba Protest at 1, 4-9; Cloverland Protest at 2-3; Protest of the Joint Michigan Parties at 8-15; Protest of Upper Peninsula Power Company, Docket No. ER14-2952-005, *et al.*, at 2 (filed July 5, 2016); Protest of the Michigan Aligned Parties at 11-30, 35-37; Michigan Commission Protest at 8-14.

eviscerated because MISO considers itself to be under no obligation to either (1) notify the owners of the confidential information when requests to release the information are made or (2) object to the disclosure of the information.¹⁴⁰ The Wisconsin Parties state that the data in the Refund Report reflects load patterns and usage, and is of the type generally exempt from mandatory public disclosure requirements of the Freedom of Information Act, 5 U.S.C. 552 (FOIA).¹⁴¹ The Wisconsin Parties state that the data should not be disclosed as confidential business information under FOIA Exemption 4, which would prevent disclosure of documents that would reveal trade secrets and commercial or financial information if such disclosure is found to cause substantial harm to the competitive position of the person from whom it was obtained.

66. The Wisconsin Parties note that MISO intends to release the confidential information on the fifth day following a request if no objection has been filed, and they point out that MISO could provide such information before the comment due date of July 6, 2016.¹⁴² They ask the Commission to clarify that MISO is prohibited from disclosing any confidential information before the close of the comment period. In addition, they argue that MISO should be required to comply with Attachment Z and section 38.9 of its Tariff, which govern the treatment of confidential information provided to MISO. Finally, the Wisconsin Parties request that the Commission clarify that sections 388.112(d) and (e) of the Commission's Rules and Regulations apply. They state that section 388.112(d) requires the Commission to give notice to the owner of privileged or Critical Energy Infrastructure Information (CEII) that is requested by a FOIA or CEII requester, and provide an opportunity of at least five calendar days in which to comment on the request.¹⁴³ The Wisconsin Parties state that MISO did not interpret this provision as applicable to it because it pertains to FOIA requests made to the Commission; however, they note that under MISO's interpretation, notice of requests for disclosure would never go to the owner of the information. They further state that section 388.112(e) provides that the Commission will give at least five calendar days' notice to the owner of the privileged or CEII information before it discloses such information.

¹⁴⁰ Protest and Objection of Wisconsin Electric Power Company and Wisconsin Public Service Corporation to Disclosure of Confidential Information, Docket No. ER14-2952-000, *et al.*, at 2 (filed June 21, 2016).

¹⁴¹ *Id.* at 3.

¹⁴² *Id.* at 4.

¹⁴³ *Id.* at 5-6.

67. The Michigan Aligned Parties have no objection to the Protective Agreement Filing, provided that information required to evaluate the Refund Report is fully disclosed, and they ask the Commission to extend the comment period on the Refund Report until the parties have been granted access to the redacted information contained in MISO's filing.¹⁴⁴ They state that the Wisconsin Parties have not met their burden to show that a protective order will not adequately safeguard their interest, and that this concern outweighs the need for the material to develop the record.¹⁴⁵

b. Answers

i. Refund Reports

68. The Wisconsin Commission submits an answer to correct the protesters' assertions that the Commission is prohibited from directing MISO to issue refunds to remedy the misallocation of SSR costs to Wisconsin customers.¹⁴⁶ The Wisconsin Commission argues that the Commission correctly exercised its discretion to order refunds, and that refunds are consistent with the Commission's authority under the FPA, Commission precedent, court precedent, and the equities in this case.¹⁴⁷

69. MISO argues that all protests of the cost allocation methodology used in the Refund Report and Errata Refund Report constitute impermissible collateral attacks on prior Commission orders.¹⁴⁸ WPPI Energy states that, to the extent the protests challenge the established refund effective dates, they are impermissible collateral attacks on Commission addressing tariff filings made under section 205 of the FPA setting forth the

¹⁴⁴ Michigan Aligned Parties Answer to MISO Application for Protective Order, Docket No. ER14-2952-000, *et al.*, at 2 (filed July 1, 2016).

¹⁴⁵ *Id.* at 3.

¹⁴⁶ Answer to Protests of the Public Service Commission of Wisconsin, Docket No. ER14-2952-000, *et al.*, at 2 (filed July 20, 2016).

¹⁴⁷ *Id.* at 11-32.

¹⁴⁸ MISO Answer to Protests, Docket No. ER14-2952-005, *et al.*, at 4 (filed July 20, 2016) (MISO Answer).

just and reasonable rate for the SSR Units, and that they are also untimely requests for rehearing of those orders.¹⁴⁹

70. MISO rejects Marquette's protest of the Attachment Y Study on the grounds that it led to an over-allocation of SSR costs, as MISO states that the planning study is only used to determine the issues for which the SSR is needed. MISO explains that the constraints identified in the planning study are used to identify the elemental pricing nodes that are responsible for costs, but that the shares of SSR costs are determined by the monthly peak hour of actual energy withdrawals for the LSEs whose elemental pricing nodes were identified.¹⁵⁰

71. MISO disagrees with the various requests to delay action.¹⁵¹ MISO states that the 24 month period for repayments suggested by Cloverland is well beyond any period over which SSR costs would ever have been collected, and that the Commission's orders do not contain any requirements relating to delaying an order until litigation over the Presque Isle SSR agreements is finalized. MISO states that, "[h]owever, the final Commission-ordered SSR costs could be used in the scheduled adjustments whereby such amounts will begin in November 2016."¹⁵²

72. MISO refutes arguments that the Refund Report and Errata Refund Report do not provide enough detail.¹⁵³ MISO states that the usual refund report would only show principal and interest amounts for affected entities, but that it included additional information such as a separate accounting for interest accruals, monthly calculations by affected LSE and SSR agreement, a monthly table of refunds/charges with interest calculations, and the resettlement schedule that presents resettlement amounts by month for each SSR agreement.

73. In their answer to the Wisconsin Commission's answer, the Michigan Commission and the Michigan Aligned Parties clarify that they do not argue that the Commission does not have authority to direct refunds under section 206 of the FPA, only that the

¹⁴⁹ WPPI Energy Answer to Protests, Docket Nos. ER14-2952-005 and ER15-767-002, at 4-5 (filed July 20, 2016).

¹⁵⁰ MISO Answer at 5-6.

¹⁵¹ *Id.*

¹⁵² *Id.* at 6.

¹⁵³ *Id.* at 6-7.

Commission lacks authority to impose surcharges to pay for those refunds.¹⁵⁴ They state that the Commission is acting here under section 206 of the FPA, and that the Commission cannot modify MISO rates filed under section 205 of the FPA. They state that the Wisconsin Commission mischaracterizes Commission precedent and inappropriately relies on inapplicable case law, and that even if the Commission were authorized to impose surcharges to accomplish refunds, the equities in this case do not require refunds.¹⁵⁵ In their answer to the Michigan Commission and the Michigan Aligned Parties answer, the Citizens Utility Board of Wisconsin and the Wisconsin Industrial Energy Group refute the claim that the Commission may not order refunds and surcharges under section 205 of the FPA.¹⁵⁶ They argue that the Commission is clearly acting under both sections 205 and 206 of the FPA in the proceedings, and in any case, the Commission may act under section 205 to direct MISO to make a compliance filing to modify its proposed rates so long as MISO consents to the modification. The Michigan Commission and the Michigan Aligned Parties answer that the utility's consent cannot create Commission jurisdiction under section 206 of the FPA to impose surcharges that does not otherwise exist.¹⁵⁷

ii. Protective Agreement

74. The Wisconsin Parties argue that a protective agreement alone is insufficient protection of confidential information, as it does not take into account MISO's position regarding requests for the release of confidential load data.¹⁵⁸ They state that MISO attached confidential information belonging to the Wisconsin Parties without any notice,

¹⁵⁴ Michigan Commission and the Michigan Aligned Parties Answer to Wisconsin Commission Answer, Docket No. ER14-2952, *et al.*, at 2-5 (filed Aug. 4, 2016).

¹⁵⁵ *Id.* at 5-12.

¹⁵⁶ Motion for Leave to Answer and Answer of the Citizens Utility Board of Wisconsin, and the Wisconsin Industrial Energy Group, Docket No. ER15-2952-000, *et al.*, at 3-10 (filed Aug. 15, 2016).

¹⁵⁷ Joint Answer of the Michigan Public Service Commission and the Michigan Aligned Parties in Opposition to the Motion for Leave to Answer and Answer of the Citizens Utility Board of Wisconsin and the Wisconsin Industrial Energy Group, Docket No. ER14-2952-005, *et al.*, at 4 (Aug. 26, 2016).

¹⁵⁸ Motion for Leave to Answer and Answer of Wisconsin Electric Power Company and Wisconsin Public Service Corporation, Docket No. ER14-2952, *et al.*, at 7 (filed Aug. 1, 2016).

as required under the Tariff.¹⁵⁹ They argue that section 388.112 of the Commission's regulations does not provide any notice or process akin to those of the Tariff, as it only sets forth general rules on privileged and CEII treatment for documents filed with the Commission, while in this case, the confidential information at issue was not filed with the Commission but submitted to and/or gathered by MISO directly by the Wisconsin Parties. The Wisconsin Parties request that the Commission incorporate the notice and process provisions of MISO's Tariff pertaining to the release of information into the proposed Protective Agreement or otherwise require MISO to comply with the confidentiality provisions of its Tariff.¹⁶⁰

75. MISO states that the monthly information was redacted from the public report, that it filed the Protective Agreement pursuant to 18 C.F.R. § 388.112(b)(2)(i) (2016), and that it received the information required by 18 C.F.R. § 388.112(b)(2)(iii) (2016) from various parties.¹⁶¹ MISO further states that, consistent with 18 C.F.R. § 388.112(b)(2)(iv) (2016), MISO will not release the non-public information until ordered by the Commission or a decisional authority.

c. **Discussion**

i. **Refund Reports**

76. We reject the arguments that the Commission has no authority to order refunds in a cost allocation case and that MISO improperly imposes retroactive surcharges to effectuate such refunds. As explained above, that issue has been decided here on rehearing of the February 2015 Order, and today's order is final with respect to the refund issue. As discussed above, the Commission is not barred from granting refunds, and the equitable considerations warrant refunds of Presque Isle, Escanaba, and White Pine SSR costs to those LSEs that paid too much of those costs under the previous unjust and unreasonable SSR cost allocation methodology. We also reject protests of the SSR cost allocation methodology, as the Commission specifically approved the use of this methodology for the Presque Isle, Escanaba, and White Pine SSR Units in the May 2016 Order.¹⁶²

¹⁵⁹ *Id.* at 5-6.

¹⁶⁰ *Id.* at 8.

¹⁶¹ MISO Answer at 8.

¹⁶² May 2016 Order, 155 FERC ¶ 61,134 at P 53.

77. We find that the Refund Report and the Errata Refund Report meet the Commission's directive in the May 2016 Order to describe how MISO intends to effectuate the payment of refunds to those LSEs that were overcharged under the previous SSR cost allocation methodology for the Presque Isle, Escanaba, and White Pine SSR Units.¹⁶³ The reports include monthly amounts previously billed to each affected LSE by month and SSR agreement, a monthly table of refunds and charges to be assessed under the new SSR cost allocation methodology per affected LSE and SSR agreement, with interest calculations, and the proposed resettlement schedule that shows resettlement amounts by month for each SSR agreement. We reject requests to order MISO to submit additional details of how its calculations were derived, such as specific data inputs or detailed summaries of its previous billing amounts and the equations used to derive the numbers in the report. As the administrator of its system, MISO manages the data that goes into the SSR cost allocation formula, and maintains the record of amounts previously charged – MISO is in the best position to apply the allocation formula and calculate refunds. If the parties feel that the calculations in the formula are incorrect, the parties are free to dispute the calculation with MISO directly or submit a complaint with the Commission.¹⁶⁴

78. We reject Marquette's argument that charges resulting from the implementation of MISO's SSR cost allocation formula are unreasonable because they impose costs on captive customers who bear significant SSR costs that are attributable to customers that were not involved in the decisions that led to the Presque Isle retirement and SSR designation. We note that all interested parties were afforded an opportunity to participate in both the Attachment Y process under the MISO Tariff leading up to Presque Isle's SSR designation, as well as in the relevant subsequent Commission proceedings. Regardless of whether customers chose to directly participate in decisions leading to retirement and subsequent SSR cost allocation, the relevant consideration is that these LSEs' loads necessitated, and correspondingly benefited from, the operation of the SSR Units. We also reject Marquette's contention that errors in the Attachment Y Study over-ascribed load to Marquette. This argument is also immaterial because, under the new SSR cost allocation methodology approved by the Commission in the May 2016 Order, the Attachment Y Study is not used to determine the amount of minimum load associated with each LSE; rather, it is used only to identify thermal and voltage constraints. We further disagree with Marquette's contention that the allocation of

¹⁶³ *Id.*

¹⁶⁴ We note that any such dispute should not challenge the SSR cost allocation methodology used by MISO to calculate refunds or the ability of the Commission to allow refunds in this case, as those issues have already been decided.

significant after-the-fact SSR costs impedes the economic operation of the system and is unreasonable because Marquette argues that it could have made different decisions had it received appropriate advanced price signals. As described above, we find that retroactive application of the just and reasonable cost allocation and the associated refunds and surcharges are acceptable under these narrow circumstances. Furthermore, the SSR Units were needed for reliability; the degree of such costs was not foreseeable and reallocation of such costs is not tantamount to re-running a market.

79. We disagree with the City of Escanaba's contention that interest on surcharges is unlawful. The Commission's regulations and precedent do not expressly prohibit interest on surcharges. Moreover, in order to provide interest on refunds, as required by the Commission's regulations, MISO must logically charge mathematically corresponding interest on surcharges; MISO, as a non-profit entity,¹⁶⁵ must fund the refunds entirely through surcharges. Additionally, to the extent that some LSEs initially paid fewer SSR costs than were just and reasonable, they had access to that capital during the interim period, which offsets the interest on surcharges that they are now assessed.

80. We reject Cloverland's objection to MISO's proposed refund schedule. We find that Cloverland had adequate notice of the amounts of SSR surcharges it might pay, as the Commission first found that refunds of Presque Isle SSR costs were warranted in the Wisconsin Commission Complaint Order, and upheld refunds of the Presque Isle, Escanaba, and White Pine SSR Units in the February 2015 Order. We also find that MISO's proposed resettlement schedule of 14 months is just and reasonable, as this time frame reflects the approximate period over which the payment of SSR costs for the Presque Isle, Escanaba, and White Pine SSR Units would have been paid (April 3, 2014 to June 14, 2015).

81. We note that the SSR costs associated with the Presque Isle SSR Units are not final. The Commission established hearing and settlement judge procedures regarding all cost-related issues under the original and replacement Presque Isle SSR Agreements,¹⁶⁶ and an Initial Decision concerning those costs was issued in Docket No. ER14-1242-006, *et al.*, on July 25, 2016. The Commission is not prejudging any issues raised on exceptions, but believes it is appropriate to delay refunds until it determines the final costs to be allocated under the Presque Isle SSR Agreements. We therefore direct MISO

¹⁶⁵ See *City of Holland, Michigan v. Midwest Indep. Transmission Sys. Operator, Inc.*, 154 FERC ¶ 61,204, at P 25 (2016); *Midcontinent Indep. Sys. Operator, Inc.*, 151 FERC ¶ 61,143, at PP 9-10 (2015).

¹⁶⁶ See *Midcontinent Indep. Sys. Operator, Inc.*, 148 FERC ¶ 61,071, at P 89 (2014); *Midcontinent Indep. Sys. Operator, Inc.*, 149 FERC ¶ 61,114, at P 24 (2014).

to suspend refunds of Presque Isle SSR costs until the Commission has issued an order on the Initial Decision finalizing the amount of Presque Isle SSR costs that will be allocated among benefiting LSEs. We further direct MISO, within 45 days of the Commission order on the Initial Decision in Docket No. ER14-1242-006, *et al.*, to file a detailed refund report describing how MISO intends to effectuate the payment of refunds to those LSEs that were overcharged under the optimization LBA-approach formerly used for the Presque Isle SSR Units and adjusting to account for resettlements of Presque Isle SSR costs that have already been made according to the Refund Report and Errata Refund Report filed in this proceeding.

ii. Protective Agreement

82. We find that MISO correctly followed the Commission's regulations applicable to the privileged and confidential information contained in the Refund Report and Errata Refund Report. Section 388.112 of the Commission's regulations permits any person filing a document with the Commission to request privileged treatment for some or all of the information contained in the document that the filer claims is exempt from the mandatory public disclosure requirements of the FOIA. To obtain privileged treatment, the filer must (1) include a justification for requesting privileged treatment, (2) designate the document as privileged, and (3) submit a public version of the document with the information that is claimed to be privileged material redacted, to a practicable extent.¹⁶⁷ However, when such material is filed in a proceeding to which a right to intervene exists (as is the case here), the filer is required to include a proposed form of protective agreement with the filing and provide the public version of the document and its proposed form of protective agreement to each entity that is required to be serviced with the filing.¹⁶⁸ We find that MISO correctly followed these procedures. We reject the Wisconsin Parties' request that the Commission clarify that the notice provisions of sections 388.112 (d) and (e) of the Commission's regulations apply in this case, as we find that these sections are not applicable.

83. We direct MISO, five days after the issuance of this order, to provide a complete, un-redacted copy of the Refund Report and Errata Refund Report to participants in these proceedings that have submitted a signed a non-disclosure certificate, pursuant to the terms of the Protective Agreement.¹⁶⁹ We also direct MISO to provide a complete,

¹⁶⁷ 18 C.F.R. § 388.112(b)(1) (2016).

¹⁶⁸ 18 C.F.R. § 388.112(b)(2)(i) (2016).

¹⁶⁹ See 18 C.F.R. § 388.112(b)(2)(iii) (2016) ("Any person who is a participant in the proceeding or has filed a motion to intervene or notice of intervention in the proceeding may make a written request to the filer for a copy of the complete, non-public

(continued...)

un-redacted copy of the refund reports to any parties that sign a non-disclosure certificate in the future, within five days of the receipt of the certificate. Although we recognize that the non-public information submitted by MISO in the Refund Report and Errata Refund Report may provide insight into monthly load patterns, which the Wisconsin Parties argue is sensitive business information that should not be disclosed, it is appropriate for parties to a proceeding to use a protective agreement to gain access to confidential and proprietary information submitted on a non-public basis while at the same time ensuring such information is neither publicly disclosed nor used by parties for purposes unrelated to their participation in the proceeding.¹⁷⁰ The Commission has previously found that the use of such agreements appropriately balances the interests of filers in protecting sensitive information against inappropriate disclosure and the right of intervenors to access information necessary to their full and meaningful participation in a contested proceeding.¹⁷¹ The Wisconsin Parties have failed to demonstrate why the non-public information contained in the Refund Report and Errata Refund Report cannot be protected by means of the Protective Agreement filed by MISO.¹⁷²

84. In response to the Wisconsin Parties' request that the Commission require MISO to provide notice before disclosing the non-public information in the Refund Report and Errata Refund Report, we find that this order provides notice to the affected parties that the non-public information in the reports will be released, pursuant to the Protective Agreement, to the parties that have submitted a signed non-disclosure certificate. We agree with the Wisconsin Parties that MISO should comply with Attachment Z and Section 38.9 of its Tariff in regard to the treatment of confidential information provided to MISO by MISO participants, but the Wisconsin Parties do not explain what specific section of the Tariff they believe MISO did not comply with in this case.

version of the document.”). To date, the following parties have submitted signed non-disclosure certificates: Verso, the Tribe, the Mines, the City of Mackinac Island, and the Bay Hills Indian Community. Bay Hills Indian Community has not filed a motion to intervene in these proceedings.

¹⁷⁰ See, e.g., *Arlington Storage Co., LLC*, 145 FERC ¶ 61,025, at P 9 (2013); *West Deptford Energy, LLC*, 134 FERC ¶ 61,189, at P 29 (2011); *Southern Co. Energy Marketing, Inc.*, 111 FERC ¶ 61,011 (2005).

¹⁷¹ See, e.g., *Essential Power, LLC*, 155 FERC ¶ 61,095, at PP 15-16 (2016).

¹⁷² We also find that the Wisconsin Parties' concerns about MISO disclosing confidential information before the close of the comment period is moot, as MISO stated that it would not disclose any information until ordered to do so by the Commission pursuant to 18 C.F.R. § 388.112(b)(2)(iv) (2016). See MISO Answer at 8.

The Commission orders:

(A) The requests for clarification of the February 2015 Order are granted in part and dismissed as moot in part, as discussed in the body of this order.

(B) The requests for rehearing of the February 2015 Order are denied, as discussed in the body of this order.

(C) MISO's Refund Report and Errata Refund Report meet the Commission's directives in the May 2016 Order, as discussed in the body of this order.

(D) MISO is hereby directed to provide a complete, un-redacted copy of the Refund Report and the Errata Refund Report to the parties that have submitted a signed non-disclosure certificate, pursuant to the terms of the Protective Agreement, as required by section 388.112(b)(2) of the Commission's regulations, within five days of the issuance of this order, as discussed in the body of this order. MISO is similarly directed to provide a complete, un-redacted copy of the Refund Report and the Errata Refund Report to any parties that sign a non-disclosure certificate in the future, within five days of the receipt of the certificate.

(E) MISO is hereby directed to suspend refunds of Presque Isle SSR costs until the Commission issues an order on the Initial Decision in Docket No. ER14-1242-006, *et al.*, as discussed in the body of this order. MISO is further directed to file a detailed refund report within 45 days of the date of the Commission order on the Initial Decision in Docket No. ER14-1242-006, *et al.*, as discussed in the body of this order.

By the Commission. Commissioner Honorable is not participating.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.