

153 FERC ¶ 61,248
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Tilden Mining Company L.C. and Empire Iron Mining Partnership Docket No. EL14-103-001

v.

Midcontinent Independent System Operator, Inc. and
Wisconsin Electric Power Company

Michigan Public Service Commission Docket No. EL14-104-001

v.

North American Electric Reliability Corporation and
Wisconsin Electric Power Company

ORDER ON REHEARING

(Issued November 25, 2015)

1. In this order, we reject as untimely or otherwise deny the requests for rehearing of the Commission's February 19, 2015 order in the above-captioned proceedings.¹ In the February 19 Order, the Commission found that once the Midcontinent Independent System Operator, Inc. (MISO) develops a revised cost allocation methodology, as instructed in a concurrently-issued companion order,² the creation of a new Local

¹ *Tilden Mining Co. L.C. v. Midcontinent Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,105 (2015) (February 19 Order).

² *See Pub. Serv. Comm'n of Wisconsin v. Midcontinent Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,104 (2015) (MISO Rehearing Order).

Balancing Authority (LBA)³ in the Michigan Upper Peninsula would not affect the allocation of System Support Resource (SSR)⁴ costs associated with the Presque Isle SSR Units. Because the LBA-based cost allocation approach formed the basis of both complaints, the Commission dismissed the complaints as moot.

I. Background

A. Related Proceedings

2. Under MISO's Tariff, market participants that have decided to retire or suspend a generation resource or Synchronous Condenser Units 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.⁵ 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

³ The term "Local Balancing Authority" is not a North American Electric Reliability Corporation (NERC)-defined term, but one used only in MISO as part of the MISO's BA/LBA Coordinated Functional Registration with NERC. NERC instead uses the term "Balancing Authority," defined as "[t]he responsible entity that integrates resource plans ahead of time, maintains load-interchange-generation balance within a Balancing Authority Area, and supports Interconnection frequency in real time." In this order, we use LBA to refer to both.

⁴ MISO's Open Access Transmission, Energy, and Operating Reserve Markets Tariff (Tariff) defines SSRs as "Generation Resources or Synchronous Condenser Units [(SCU)] that have been identified in Attachment Y – Notification to this Tariff and are required by the Transmission Provider for reliability purposes" MISO, FERC Electric Tariff, 1.643, System Support Resource (SSR), 0.0.0. Unless indicated otherwise, all capitalized terms shall have the same meaning given them in the MISO Tariff.

⁵ See *Midwest Indep. Transmission Sys. Operator, Inc.*, 108 FERC ¶ 61,163, order on reh'g, 109 FERC ¶ 61,157 (2004).

with the Commission, a separate rate schedule must be filed to provide for the costs identified in the SSR agreement to be recovered from the identified load-serving entity (LSE) beneficiaries, consistent with section 38.2.7.k. of MISO's Tariff governing the allocation of such costs.

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.⁶ On July 22, 2014, the Commission conditionally accepted MISO's compliance filing, subject to further compliance.⁷

4. On January 31, 2014, in Docket No. ER14-1242-000, MISO submitted an SSR agreement under its Tariff between MISO and Wisconsin Electric Power Company (Wisconsin Electric) for the purpose of providing compensation for the continued availability of Wisconsin Electric's Presque Isle units as SSR Units (Original Presque Isle SSR Agreement). Also on January 31, 2014, in Docket No. ER14-1243-000, MISO submitted a proposed Tariff Rate Schedule 43G, which specified the allocation of the costs associated with the continued operation of Presque Isle units as SSR Units (Original Presque Isle Rate Schedule 43G). At the time of the filing, section 38.2.7.k of MISO's Tariff required that the costs associated with the Original Presque Isle SSR Agreement be allocated to all LSEs within the American Transmission Company (ATC) footprint on a *pro rata* basis.⁸ On April 1, 2014, the Commission issued an order accepting the Original Presque Isle SSR Agreement and Original Presque Isle Rate Schedule 43G, suspending them for a nominal period, to be effective February 1, 2014, as requested, subject to refund and further Commission order.⁹

5. The proper allocation of the Presque Isle units' (and other SSR units located in the ATC footprint) SSR costs has been at issue in a number of recent and ongoing

⁶ *Midwest Indep. Transmission Sys. Operator, Inc.*, 140 FERC ¶ 61,237 (2012), *order on compliance*, 148 FERC ¶ 61,056 (2014) (SSR Compliance Order).

⁷ SSR Compliance Order, 148 FERC ¶ 61,056. Compliance filings and requests for rehearing are pending before the Commission in Docket Nos. ER12-2302-003 and ER12-2302-002.

⁸ *See* MISO Original Presque Isle Rate Schedule 43G Filing, Docket No. ER14-1243-000, Transmittal Letter at 3 (filed Jan. 31, 2014).

⁹ *Midcontinent Indep. Sys. Operator, Inc.*, 147 FERC ¶ 61,004, at P 12 (2014).

Commission proceedings, including in a complaint proceeding filed by the Public Service Commission of Wisconsin (Wisconsin Commission) on April 3, 2014 in Docket No. ER14-34. In that complaint proceeding, the Wisconsin Commission argued that the MISO Tariff's approach to allocating SSR costs within ATC, which differed from the cost allocation approach for the rest of MISO, was unjust, unreasonable, and unduly discriminatory.

6. On July 29, 2014, the Commission issued an order that addressed the Wisconsin Commission's objections to MISO's cost allocation for SSR units in the ATC footprint.¹⁰ In that order, the Commission found that the MISO Tariff was unjust, unreasonable, unduly discriminatory, or preferential because the ATC SSR *pro rata* cost allocation method, as applied in Presque Isle Rate Schedule 43G, did not follow cost causation principles.¹¹ 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."¹² The Commission also required MISO to conduct a final load-shed study and submit a compliance filing to align cost allocation for its rate schedule for the Presque Isle units.¹³

7. On September 12, 2014, in Docket No. ER14-2860-000, MISO submitted a proposed Replacement Presque Isle SSR Agreement under its Tariff between MISO and Wisconsin Electric for the Presque Isle SSR units (Replacement Presque Isle SSR Agreement) and requested that the Original Presque Isle SSR Agreement be terminated

¹⁰ *Midcontinent Indep. Sys. Operator, Inc.*, 148 FERC ¶ 61,071 (2014) (Wisconsin Commission Complaint Order).

¹¹ *Id.* PP 59-61.

¹² *Id.* P 66.

¹³ In subsequent orders, the Commission required MISO to modify its cost allocation for other SSR units in the ATC footprint to reflect the Commission's findings in the Wisconsin Commission Complaint Order. *See Midcontinent Indep. Sys. Operator, Inc.*, 148 FERC ¶ 61,136 (2014) and *Midcontinent Indep. Sys. Operator, Inc.*, 148 FERC ¶ 61,116 (2014), respectively.

effective October 15, 2014.¹⁴ Also on September 12, 2014, in Docket No. ER14-2862-000, MISO submitted a revised Presque Isle Rate Schedule 43G under its Tariff to reflect the new requested effective date of October 15, 2014. On November 10, 2014, the Commission issued an order accepting the Replacement Presque Isle SSR Agreement, suspending it for a nominal period, to be effective October 15, 2014, subject to refund, setting the cost-related issues for hearing and settlement judge proceedings, consolidating those proceedings with the ongoing hearing and settlement judge procedures established in the Wisconsin Commission Complaint Order, and terminating the Original Presque Isle SSR Agreement.¹⁵ The Commission also noted that revised Presque Isle Rate Schedule 43G includes cost allocation language that involves several issues that have been raised on rehearing and compliance to the Wisconsin Commission Complaint Order.¹⁶ Accordingly, the Commission accepted revised Presque Isle Rate Schedule 43G, suspended it for a nominal period, to be effective October 15, 2014, subject to refund and further Commission order in the Wisconsin Commission Compliant Order rehearing and compliance proceedings.

B. Complaints Objecting to Formation of Michigan Upper Peninsula LBA and Resulting SSR Cost Allocation Under MISO Tariff

8. On September 19, 2014, two separate complaints were filed in the above-captioned dockets, both of which were primarily concerned with Wisconsin Electric's creation of a new LBA in the Michigan Upper Peninsula, and the effect it would have on the allocation of certain costs for SSRs between Wisconsin and Michigan customers under MISO's Tariff.

9. In Docket No. EL14-103-000, Tilden Mining Company L.C. and Empire Iron Mining Partnership (together, the Mines) filed a complaint against MISO and Wisconsin

¹⁴ The Replacement Presque Isle SSR Agreement reflected: (1) a new Attachment Y Notice from Wisconsin Electric indicating its intent to retire, rather than temporarily suspend operation of, the Presque Isle SSR units; and (2) increased SSR compensation in accordance with the Commission's determination that compensation provided under an SSR agreement should not exceed a resource's full cost of service. *See* MISO Replacement Presque Isle SSR Agreement Filing, Docket No. ER14-2860-000, Transmittal Letter at 2, 13 (filed Sept. 12, 2014) (citing *Midcontinent Indep. Sys. Operator, Inc.*, 148 FERC ¶ 61,057, at P 82 (2014)).

¹⁵ *Midcontinent Indep. Sys. Operator, Inc.*, 149 FERC ¶ 61,114 (2014) (November 10, 2014 Order).

¹⁶ *Id.* P 78.

Electric (Mines' Initial Complaint) pursuant to sections 206, 306 and 309 of the Federal Power Act (FPA)¹⁷ and Rule 206 of the Commission's Rules of Practice and Procedure.¹⁸ In their Initial Complaint, the Mines asked the Commission to prohibit Wisconsin Electric from splitting the Wisconsin Electric LBA (WEC LBA) into the WEC LBA and a new Michigan Upper Peninsula LBA without Commission approval, and to prohibit MISO from accepting and implementing the proposed formation of the Michigan Upper Peninsula LBA without a Commission-approved rate filing. In addition, the Mines filed a Motion for Leave to File Amended Complaint and Amended Complaint against MISO and Wisconsin Electric (Amended Complaint) on November 14, 2014, which questioned the validity of MISO's Replacement Presque Isle SSR Agreement with Wisconsin Electric, and argued that MISO violated its Tariff by accepting the agreement, based, *inter alia*, on MISO's failure to consider whether Wisconsin Electric was legally in a position to retire the Presque Isle units.

10. In Docket No. EL14-104-000, the Michigan Public Service Commission (Michigan Commission) filed a complaint pursuant to FPA sections 206, 306 and 309 and Rule 206 of the Commission's Rules of Practice and Procedure against NERC and Wisconsin Electric (Michigan Commission Complaint). In its complaint, the Michigan Commission asked the Commission to reverse NERC's certification of the Michigan Upper Peninsula LBA, or in the alternative, to clarify that such certification will not have an effect on the allocation of SSR costs that would otherwise occur under MISO's Tariff.

C. February 19 Order Dismissing Complaints

11. In the February 19 Order to which parties seek rehearing, the Commission dismissed the Mines' Initial and Amended Complaints and the Michigan Commission Complaint, relying on certain findings made in a companion order issued in several related MISO proceedings, including the requests for rehearing of the Wisconsin Commission Complaint Order.¹⁹ In dismissing these complaints, the Commission explained that the MISO Rehearing Order included a finding that the cost allocation approach proposed by MISO for the Presque Isle units, which used the optimization-LBA approach in MISO's Business Practice Manual, was not just and reasonable. In the MISO Rehearing Order, the Commission found that, as to the Presque Isle units (and two separate other SSR units located in the ATC footprint), the LBA-based cost allocation approach was inconsistent with section 38.2.7.k of MISO's Tariff, which

¹⁷ 16 U.S.C. §§ 824e, 825e, and 825h (2012).

¹⁸ 18 C.F.R. § 385.206 (2015).

¹⁹ *See* MISO Rehearing Order, 150 FERC ¶ 61,104.

requires MISO to allocate SSR costs to “the LSE(s) which require(s) the operation of the SSR Unit for reliability purposes.” The Commission further explained that the findings in the MISO Rehearing Order rendered the complaints concerning cost allocation for the Presque Isle SSR units given MISO’s LBA split moot, since the Commission was rejecting the LBA-based rate schedule under which the Presque Isle units’ costs were to be allocated, and since the new methodology MISO was required to develop would not be LBA-based.²⁰ Having dismissed the complaints on these grounds, the Commission did not respond to certain arguments raised in the complaints, including whether the Commission must approve the creation or certification of a new LBA where such certification will have an impact on jurisdictional rates.²¹

12. The Commission did make certain findings related to the challenges to NERC’s certification process and the parties’ standing to bring a complaint about that process or the certification of an LBA to the Commission. The Commission found no basis for overturning NERC’s certification of the new LBA, and further found that NERC properly assessed whether the Michigan Upper Peninsula LBA had the technical capability to ensure compliance with all applicable Reliability Standards.²² While the Commission found that NERC had no obligation to find that the certification of the new LBA would enhance reliability or to examine its economic implications, it noted that those findings should not be taken to suggest any limitation on its own “authority or obligation to review and approve any changes in cost allocation or tariff rates that could occur as a result of a change in LBA status.”²³ Similarly, the Commission rejected Wisconsin Electric’s assertions that the Michigan Commission could not properly challenge NERC’s certification of the new LBA under NERC’s Rules of Procedure, finding that NERC’s rules contain no such limitation in bringing a challenge to NERC’s or a Regional Entity’s²⁴ certification decisions to the Commission.²⁵

²⁰ February 19 Order, 150 FERC ¶ 61,105 at P 63.

²¹ *Id.* P 64.

²² *Id.* P 65.

²³ *Id.*

²⁴ ReliabilityFirst is the Regional Entity for the Wisconsin Electric operating area (i.e., the entity with certain delegated enforcement authority from NERC), and therefore had the initial responsibility to review Wisconsin Electric’s application to create two separate LBAs.

²⁵ February 19 Order, 150 FERC ¶ 61,105 at P 67.

13. With respect to the various arguments raised by the Mines questioning the validity of the Replacement Presque Isle SSR Agreement, the Commission found that each underlying argument had been addressed in prior orders.²⁶ The Commission noted that it had already determined in the November 10, 2014 Order that MISO properly followed SSR study and review procedures in accordance with its Tariff, and had adequately demonstrated that the five applicable Presque Isle units were needed for reliability.²⁷ Similarly, the Commission found that in the November 10, 2014 Order, it had already addressed arguments concerning the need to obtain state approvals prior to retiring the Presque Isle units.²⁸ Finally, with respect to arguments concerning double recovery of the Presque Isle units' costs due to the inclusion of Presque Isle unit costs in Wisconsin Electric's retail rate base, the Commission found that retail rate treatment was not relevant to setting the reasonable level of compensation for the Commission-jurisdictional SSR services.²⁹

II. Requests for Rehearing

14. Timely requests for rehearing of the February 19 Order were filed by the Mines and by the City of Mackinac Island (City of Mackinac).

15. The Mines argue that the Commission erred in failing to address the Mines' claims that MISO's Tariff is unjust and unreasonable to the extent that it does not require a demonstration of qualification for SSR status. The Mines note that Commission precedent is clear that use of an SSR agreement "is a last-resort measure to prevent needed generation from leaving the market."³⁰ The Mines maintain that MISO's Tariff is deficient, however, because it "does not require proof that the resource may be suspended or terminated under state law."³¹ The Mines maintain that the Commission failed to address at least two "critical failures" of the MISO Tariff – the lack of a requirement to

²⁶ *Id.* P 66.

²⁷ *Id.*

²⁸ *Id.* (citing November 10, 2014 Order, 149 FERC ¶ 61,114 at P 38).

²⁹ *Id.*

³⁰ Mines Request for Rehearing at 9.

³¹ *Id.* at 10.

demonstrate that the SSR agreement is a last-resort measure, and the lack of a requirement to show that termination of operations is legally possible.³²

16. The Mines distinguish Wisconsin Electric's situation from that of other generator owners seeking SSR status by noting that the Presque Isle units are included in Wisconsin Electric's regulated cost-of-service rates, unlike merchant generator-owned units. Unlike such merchant generators, the Mines argue, Wisconsin Electric has an obligation to serve customers in its service area and cannot discontinue such service or "abandon its customers" without regulatory approval.³³ The Mines state that Wisconsin Electric did not obtain, and MISO did not require, such approvals before seeking an SSR agreement. The Mines maintain that the lack of any such requirement in MISO's Tariff renders it unjust and unreasonable, and argue that the Commission's failure to evaluate the Tariff in light of this omission is unlawful, lacks reasoned decision making, and is arbitrary and capricious.

17. Finally, the Mines maintain that the Commission cannot "shirk its responsibility" to examine the reasonableness of the MISO Tariff based on the claim that the issue involves state law over which the Commission lacks jurisdiction.³⁴ The Mines reiterate that the Commission must construe the "factual allegation (that [Wisconsin Electric] lacked authority to terminate operations at [Presque Isle]) in the light most favorable to the Mines."³⁵ As such, the Mines assert that the Commission erred in failing to set the Mines' Amended Complaint for hearing, claiming that the Amended Complaint raised several issues of material fact that should have been viewed in a light most favorable to the Mines' arguments. Moreover, the Mines maintain that the Commission "misconstrued" the Mines' legal arguments in "assuming that the Amended Complaint required the Commission to decide state-law questions."³⁶ Instead, the Mines state that the Amended Complaint merely asked the Commission to examine the reasonableness of the MISO Tariff, and to determine whether the failure of the MISO Tariff to consider the issue or to require Wisconsin Electric to demonstrate it can legally retire the Presque Isle units, renders the Tariff unjust and unreasonable.

³² *Id.* at 10-11.

³³ *Id.* at 11-12.

³⁴ *Id.* at 13.

³⁵ *Id.* at 14.

³⁶ *Id.* at 15.

18. The City of Mackinac makes essentially the same two specifications of error as the Mines, maintaining that the Commission acted arbitrarily and capriciously in construing facts against the Mines rather than in the light most favorable to complainants, and in ignoring the Mines' arguments that MISO's Tariff is unjust and unreasonable. In support of its arguments, the City of Mackinac asserts that Wisconsin Electric cannot unilaterally terminate service to its Michigan customers, and instead must obtain Michigan Commission approval before doing so.³⁷ Based on these obligations, the City of Mackinac maintains that Wisconsin Electric cannot retire the Presque Isle units without the Michigan Commission's approval, and further maintains that MISO failed to follow its Tariff in failing to consider whether such retirement was legally permissible.

19. The City of Mackinac also asserts that MISO failed to follow its Tariff requirement that the decision to retire or suspend must be definitive (citing to MISO Tariff 38.2.7). The City of Mackinac relies on testimony submitted in Docket Nos. ER14-1242 and ER14-1243 as "indicat[ing] that a definitive decision [to retire Presque Isle] had not been made." Specifically, the City of Mackinac points to the testimony of Wisconsin Electric witness Mary L. Wolter, who "states that the 'M&S (materials and supplies) inventories would remain on site because they might be difficult or more costly to reacquire *if/when the Units are brought back into service.*'"³⁸

III. Commission Determination

20. In their requests for rehearing, the Mines and the City of Mackinac challenge the Commission's prior acceptance in the November 10, 2014 Order of the Replacement Presque Isle SSR Agreement as a last resort measure to ensure reliability. They also raise arguments concerning whether state approval must be obtained before a generator, such as Presque Isle, may seek to suspend service or retire a generating unit under Attachment Y of the MISO Tariff, which also was addressed in the November 10, 2014 Order.³⁹ On this basis, we reject these arguments as untimely requests for rehearing of the November 10, 2014 Order in violation of section 313(a) of the FPA⁴⁰ and Rule 713(b) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(b) (2015), which require a request for rehearing to be filed within 30 days after issuance of any final decision or other final order in a proceeding.

³⁷ City of Mackinac Rehearing Request at 3.

³⁸ *Id.* at 4 (emphasis supplied).

³⁹ November 10, 2014 Order, 149 FERC ¶ 61,114 at PP 36, 38.

⁴⁰ 16 U.S.C. § 825k (2012).

21. Moreover, these arguments were also specifically addressed on rehearing in the MISO Rehearing Order, as well as reiterated in the February 19 Order. For example, in the MISO Rehearing Order, the Commission affirmed its previous determination in the November 10, 2014 Order that MISO “properly followed the SSR study and review process in accordance with the Tariff and adequately demonstrated that all five Presque Isle units are needed for reliability during the term of the SSR agreement that was accepted in the November 10, 2014 Order.”⁴¹ Additionally, in the MISO Rehearing Order, the Commission affirmed its previous determination in the November 10, 2014 Order addressing the same concerns about state law impediments to the retirement of the Presque Isle units:

With regard to arguments that Wisconsin Electric did not receive the necessary state regulatory approvals to retire Presque Isle Units 5-9, the Commission found in the November 10, 2014 Order that if there are state laws that prevent the retirement, the enforcement of those laws is beyond the scope of the SSR proceeding.⁴²

The Mines and City of Mackinac have provided no persuasive basis on rehearing to warrant changing the Commission’s previous findings in this regard.

22. Finally, we find no error in the Commission’s dismissal of the Mines’ Amended Complaint in the February 19 Order without setting it for hearing, and therefore deny rehearing of this determination. A hearing is warranted only when a party disputes a material issue of fact,⁴³ and the Mines and the City of Mackinac do not challenge factual issues but instead raise legal questions. For example, whether Wisconsin Electric can retire the Presque Isle units without obtaining Michigan Commission approvals is, by definition, a legal question. Likewise, whether the MISO Tariff requires an adequate demonstration that no alternatives to SSR status exist raises a legal question of the

⁴¹ MISO Rehearing Order, 150 FERC ¶ 61,104 at P 99 (citing November 10, 2014 Order, 149 FERC ¶ 61,114 at P 36); *see also* February 19 Order, 150 FERC ¶ 61,105 at P 66.

⁴² *Id.* (citing to November 10, 2014 Order, 149 FERC ¶ 61,114 at P 38); *see also* February 19 Order, 150 FERC ¶ 61,105 at P 66.

⁴³ *See General Motors Corp. v. FERC*, 656 F.2d 791, 795 (D.C. Cir. 1981).

justness and reasonableness of the Tariff. Thus, the Commission is not required to hold a hearing when, as here, issues of material fact are not in dispute.⁴⁴

The Commission orders:

The requests for rehearing are hereby rejected and denied, 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.

⁴⁴ See, e.g., *BP West Coast Products LLC v. SFPP, L.P.*, 121 FERC ¶ 61,239, at P 35 (2007).