

168 FERC ¶ 61,177
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick and Bernard L. McNamee.

City of Prescott, Arkansas

Docket No. EL19-60-000

v.

Southwestern Electric Power Company
Midcontinent Independent System Operator, Inc.

ORDER ON COMPLAINT, ESTABLISHING HEARING AND SETTLEMENT
JUDGE PROCEDURES, AND ESTABLISHING REFUND EFFECTIVE DATE

(Issued September 19, 2019)

1. On April 5, 2019, pursuant to sections 206, 306, and 309 of the Federal Power Act (FPA)¹ and Rules 206 and 212 of the Commission's Rules of Practice and Procedure,² the City of Prescott, Arkansas (Prescott) filed a complaint (Complaint) against Southwestern Electric Power Company (SWEPCO) and Midcontinent Independent System Operator, Inc. (MISO). Prescott alleges that MISO violated the Joint Operating Agreement (JOA) between MISO and Southwest Power Pool, Inc. (SPP) and that the MISO Open Access Transmission, Energy and Operating Reserve Markets Tariff (MISO Tariff) and Business Practices Manual (BPM) are unjust and unreasonable. Prescott also alleges that SWEPCO is administering certain provisions of the Power Supply Agreement, FERC Rate Schedule No. 127 (Prescott PSA), in an unjust and unreasonable manner, or otherwise, that certain provisions of the Prescott PSA are unjust and unreasonable.

2. As discussed below, we deny the Complaint in part, grant it in part, set certain issues for hearing and settlement judge procedures, and establish a refund effective date of April 5, 2019.

¹ 16 U.S.C. §§ 824e, 825e, 825h (2018).

² 18 C.F.R. §§ 385.206, 385.212 (2019).

I. Complaint

3. Prescott states that it is a municipality located within the MISO footprint that owns and operates a municipal utility system and is interconnected to the transmission system owned by Entergy Arkansas, Inc. (Entergy). Prescott states that it is party to the Prescott PSA with SWEPCO,³ which owns and operates facilities for the generation, transmission, and distribution of electric power and energy in the SPP footprint. Although Prescott is physically located in MISO, Prescott is served by SWEPCO resources located in SPP through a pseudo-tie to SWEPCO that was established in 2007. Prescott states that its costs escalated after Entergy integrated into MISO in 2013 and after SPP implemented its Integrated Marketplace in 2014. Specifically, Prescott states that its monthly transmission costs increased from approximately \$65,000 to \$175,000.⁴ Prescott adds that it has attempted to negotiate with SWEPCO to address these excessive costs and has corresponded with SWEPCO regarding a settlement SWEPCO reached with the City of Minden, Louisiana (Minden) in Docket No. EL18-122 concerning a power supply agreement between SWEPCO and Minden. Prescott states that the discussions were not fruitful and have been concluded.

4. Prescott alleges that: (1) it is assessed both MISO and SPP market-to-market congestion charges so that the impact of the pseudo-tie is double-counted; (2) MISO and SWEPCO thwarted Prescott's efforts to secure the purchase of electric power from other suppliers; (3) it should be allowed to settle congestion charges based on Day-Ahead prices; (4) SWEPCO has not hedged Prescott's congestion costs effectively, contrary to the Prescott PSA; and (5) certain cost-of-service provisions of the Prescott PSA are unjust and unreasonable.

5. First, Prescott alleges that it is assessed both MISO and SPP market-to-market congestion charges for the same pseudo-tie, resulting in double-counting of the impact of the pseudo-tie, which Prescott maintains violates the methodology for assessing market-

³ SWEPCO is a wholly-owned subsidiary of American Electric Power Company, Inc. and an affiliate of American Electric Power Service Corporation, which is the agent for the AEP Operating Companies for transmission service under the MISO Tariff. For the purposes of this order, we refer to American Electric Power Service Corporation as "AEP."

⁴ Complaint at 10 (citing Direct Testimony of Henry H. Thompson, Ex. 3, at 5).

to-market congestion contained in the JOA.⁵ Prescott states that such “pancaked rates”⁶ were charged by MISO to SWEPCO, and that in a complaint AEP filed against MISO in Docket No. EL17-89-000 (AEP Complaint), AEP itself acknowledged that such rates are unjust and unreasonable.⁷ Prescott adds that, in the AEP Complaint, AEP has sought relief for these charges assessed to Minden, but has not sought relief for Prescott. Prescott contends that, because SWEPCO is Prescott’s agent, SWEPCO is responsible for protecting Prescott from, or mitigating the effects of, such charges. Prescott contends that, if SWEPCO is not required to mitigate these effects, the only reasonable alternative is to terminate the Prescott PSA as contrary to the public interest so that Prescott may choose another provider within the MISO footprint.⁸

6. Second, Prescott alleges that in thwarting Prescott’s efforts to explore the purchase of power from other sources within the MISO footprint, SWEPCO violated its obligations as Prescott’s agent⁹ and MISO violated the MISO Tariff and BPM.¹⁰ Prescott asserts that under the MISO Tariff it is a network customer as it entered into a network integration transmission service agreement (NITSA) with Entergy in 2009 (Prescott-Entergy NITSA) that was subsequently assumed by MISO in 2013.¹¹ Prescott claims that in September 2017 when it attempted to make changes to its Elemental Pricing Nodes (nodes) and requested a study from MISO in order to change its supplier for the purchase of power, MISO responded that such requests could only be made by SWEPCO as Prescott’s market participant. Prescott states that SWEPCO then notified Prescott and MISO that SWEPCO would not make such a request. Prescott asserts that when it subsequently requested information from MISO about how it might elect a new market

⁵ *Id.* at 14.

⁶ Prescott uses the terms “rate pancaking” or “pancaked rate” to refer to its claim that it is subject to overlapping congestion charges.

⁷ Prescott Complaint at 14. On September 15, 2017, AEP, on behalf of its operating company affiliate, SWEPCO, filed a complaint against MISO and SPP in Docket No. EL17-89-000.

⁸ *Id.*

⁹ Prescott states that SWEPCO’s role as Prescott’s agent is described in section 3.2 of the Prescott PSA, in the Prescott-Entergy NITSA, and through the relationship of the parties. *Id.* at n.6.

¹⁰ *Id.* at 11.

¹¹ *Id.* (citing *Midcontinent Indep. Sys. Operator, Inc.*, 145 FERC ¶ 61,249 (2013)).

participant, MISO stated that Prescott could not choose a new market participant unless SWEPCO acknowledged the release of its status as Prescott's market participant. Prescott states that SWEPCO refused to grant such a release. Prescott concludes that this situation produced an absurd result wherein the agent prohibited the principal from acting in the principal's own interest.¹² Prescott states that it thus seeks an order amending the Prescott PSA to terminate SWEPCO's role as Prescott's agent, or alternatively, that it seeks an explicit transmission agency agreement, similar to that recently agreed to by SWEPCO and Minden in Docket No. EL18-122, for the purpose of ensuring SWEPCO's future compliance with its agency obligations to Prescott. Prescott includes a proposed draft of such a transmission agency agreement in its filing.¹³

7. Prescott also alleges that SWEPCO's actions in inhibiting Prescott from exploring alternative transmission solutions violates Rule 358 of the Commission's regulations¹⁴ regarding the separation of a transmission provider's marketing and transmission functions. Prescott states that the independent functioning rule prohibits a transmission provider from permitting its marketing function employees to perform transmission functions. Prescott alleges that AEP and SWEPCO representatives interfered directly in Prescott's request to MISO.¹⁵

8. Third, Prescott alleges that the MISO Tariff and BPM are unjust and unreasonable because they do not allow pseudo-tied loads to settle congestion charges based on MISO's Day-Ahead energy market.¹⁶ Prescott argues that by not allowing the settlement of congestion based on the Day-Ahead energy market, pseudo-tied loads face unreasonable real-time congestion exposure that cannot be hedged by financial transmission rights. Prescott further argues that, under the existing MISO Tariff and BPM, the Prescott load, which is part of SPP's network load, not only pays MISO for using its transmission system but is also required to pay MISO for MISO's non-market-to-market congestion. Prescott asserts that, by contrast, the owners of generation, load, and energy transfers outside of MISO's footprint are not charged by MISO for their contributions to MISO's non-market-to-market congestion, and do not pay to use MISO's transmission system. Prescott argues that the Commission should direct MISO to revise the MISO Tariff and BPM to exempt pseudo-tied load from congestion charges and the

¹² *Id.* at 12.

¹³ *Id.* at Ex. 4.

¹⁴ 18 C.F.R. § 358.5.

¹⁵ Prescott Complaint at 13.

¹⁶ *Id.* at 15.

assignment of Auction Revenue Rights or, alternatively, direct MISO to revise the MISO Tariff and BPM to allow pseudo-ties to be settled in the Day-Ahead market.¹⁷

9. Fourth, Prescott alleges that SWEPCO has failed to adhere to the terms of the Prescott PSA that require SWEPCO to effectively hedge Prescott's congestion risks and economic penalties.¹⁸ Prescott states that it cannot determine the extent of SWEPCO's failure because SWEPCO has refused to provide the data necessary to make such a determination. Prescott further states that, when it noticed unexplained and substantial increases in its MISO congestion charges in 2014, Prescott contacted SWEPCO and was informed by a SWEPCO representative that SWEPCO had not been handling Auction Revenue Rights and Financial Transmission Rights appropriately, leading to the increased charges. Prescott states that while the spikes in the charges seemed to decrease in magnitude and frequency following that exchange, Prescott was unable to determine what, if anything, was done by SWEPCO to cause the issue or to resolve it, as SWEPCO has not made information available to Prescott, which Prescott states is contrary to SWEPCO's fiduciary obligation as Prescott's agent. Prescott also states that a SWEPCO representative advised Prescott that SWEPCO was incorrectly assigning wholesale Financial Transmission Rights to protect its retail customers. Prescott requests that the Commission find that the Prescott PSA mandates that SWEPCO, as Prescott's agent, implement an effective congestion hedging strategy, or that continuation of the Prescott PSA without an effective congestion hedging strategy violates the public interest and justifies its termination. Further, Prescott requests that the Commission find that SWEPCO's failure to mitigate or address the MISO charges to Prescott, including double-counting of the congestion charges, is unjust and unreasonable and order SWEPCO to mitigate these costs unless and until they are eliminated and pay refunds, in the amount of \$770,000 per annum plus interest, from the date of the filing of this Complaint. In the alternative, Prescott requests that the Commission find that continuation of the Prescott PSA without mitigation of the excessive MISO charges violates the public interest and justifies termination of the Prescott PSA.¹⁹

10. Finally, Prescott alleges that five elements of the Prescott PSA are unjust, unreasonable and unduly discriminatory.²⁰ Specifically, Prescott alleges that: (1) the formula rate protocols do not conform to the Commission's policy guidance on formula rates and should be amended to provide notice of changes in accounting standards and evidence of the reasonableness of projected costs with each annual true-up; (2) the

¹⁷ *Id.*

¹⁸ *Id.* at 14 (citing section 3.2 and section 5.1 of the Prescott PSA).

¹⁹ *Id.* at 20.

²⁰ *Id.* at 16-18.

Prescott PSA should be amended to allow Prescott to prove a “price squeeze” under the “just and reasonable standard” if the price squeeze is caused by MISO congestion costs; (3) the Prescott PSA should be amended to require that SWEPCO’s depreciation rates—a composite of rates from the Commission and three state jurisdictions—be based on a reasonably up-to-date Commission jurisdictional depreciation study because Prescott cannot participate meaningfully in state commission proceedings; (4) SWEPCO’s double collection of depreciation expense and inclusion of non-production related Construction Work in Progress contributes to an unjust and unreasonable rate and that the provisions of the Prescott PSA related to Construction Work in Progress should be amended to also apply to depreciable base; and (5) several items in SWEPCO’s 2017 annual formula rate true-up may be unfunded reserves and the Prescott PSA should be amended to account for the effect of these unfunded reserves on rate base.²¹

II. Notice and Responsive Pleadings

11. Notice of the Complaint was published in the *Federal Register*, 84 Fed. Reg. 14,934 (2019) with interventions and protests due on or before April 25, 2019. On April 17, 2019, SWEPCO filed a motion for extension of time to extend the comment period to May 10, 2019. On April 23, 2019, the Commission granted this motion.²²

12. Timely motions to intervene were filed by: Entergy Services, Inc., Exelon Corporation, Missouri Joint Municipal Electric Utility Commission, Ameren Services Company, Southern Company Services, Inc., GridLiance High Plains, LLC, and Minden. The Arkansas Public Service Commission filed a notice of intervention and the Missouri Public Service Commission (Missouri Commission) filed a motion to intervene out-of-time. On May 10, 2019, SWEPCO and MISO filed answers to the Complaint.

13. On May 28, 2019, Prescott filed a motion to strike and answer to SWEPCO’s and MISO’s answers. On June 6, 2019, SWEPCO and MISO filed answers to Prescott’s motion to strike and answer.

A. Answers to the Complaint

14. SWEPCO states that the Commission should deny the Complaint. SWEPCO states that Prescott has been a SWEPCO requirements customer for over ten years, and under the 30-year term of the Prescott PSA, SWEPCO serves as Prescott’s full requirements supplier. With regard to Prescott’s allegations, SWEPCO first argues that Prescott’s claim concerning overlapping congestion charges is based on the fact that

²¹ *Id.*

²² See Notice of Extension of Time, Docket No. EL19-60-000 (issued Apr. 23, 2019).

Prescott faces transmission charges from MISO and SPP because SWEPCO's delivery of power to Prescott must cross the seam between the two regional transmission organizations (RTOs). SWEPCO asserts that Prescott was aware from the outset that it would face transmission service charges from both Entergy and SPP. SWEPCO argues that, while Prescott may not have known that Entergy would join an RTO, Prescott understood that over the course of the 30-year Prescott PSA the underlying arrangements and charges, including for transmission, could change. Further, SWEPCO contends that although it indicated that it would help Prescott to manage the transition to MISO resulting from Entergy joining MISO, SWEPCO did not make any assurances that it would remedy any issues or problems relating to pancaked rates and congestion charges. SWEPCO asserts that Prescott presents nothing that suggests otherwise.²³ SWEPCO states that in section 3.6 of the Prescott PSA, the parties carefully addressed how the parties would accommodate certain enumerated regulatory changes, and Entergy's decision to join an RTO was not among those changes. According to SWEPCO, the parties entered into a commercial arrangement under which SWEPCO agreed for a period of thirty years to plan and operate its generating fleet to serve all of Prescott's electric requirements, and Prescott agreed to pay SWEPCO's costs of providing that service, as determined under the agreed-upon cost-of-service formula rate included with the Prescott PSA. SWEPCO adds that the parties further agreed that, for the duration of the agreement, Prescott would be fully responsible for all charges assessed by transmission providers to deliver energy to the Prescott system.²⁴

15. Second, SWEPCO asserts that Prescott's allegation that SWEPCO thwarted Prescott's effort to change its supplier are groundless and without legal support. SWEPCO argues that Prescott has no unilateral right to change network resources or the market participant designation, there are no grounds for ordering SWEPCO to enter into Prescott's proposed transmission agency agreement, SWEPCO did not violate the separation of functions prohibition under the Commission's regulations, and SWEPCO has no control over MISO's transmission and congestion charges.²⁵

16. Third, concerning Prescott's allegation that SWEPCO ineffectively hedged Prescott's congestion costs, SWEPCO argues that the Prescott PSA does not impose upon SWEPCO any contractual obligation or agency duty to underwrite Prescott's transmission costs.²⁶ SWEPCO argues that Prescott asks the Commission to read into the

²³ SWEPCO Answer to Complaint at 5, n.10.

²⁴ *Id.* at 5.

²⁵ *Id.* at 10-14.

²⁶ *Id.* at 8-9.

Prescott PSA an obligation that is not there—i.e., that SWEPCO must mitigate MISO transmission charges by assuming responsibility for an effective hedging strategy.²⁷ SWEPCO maintains that, by choosing to take service from a power supplier outside of the Entergy balancing authority area, Prescott understood that it would require transmission service from Entergy as well as from SPP, as the Prescott PSA expressly required Prescott to make the necessary arrangements for service over both systems.²⁸ SWEPCO asserts that although section 3.2 of the Prescott PSA gave Prescott the right to have SWEPCO arrange for transmission service, section 3.2 was also clear that Prescott would reimburse SWEPCO for all related charges. SWEPCO further asserts that Prescott misapprehends SWEPCO’s limited agent role of arranging for transmission service and that the Prescott PSA imposes no obligation on SWEPCO to effectively hedge Prescott’s transmission risks and economic penalties.²⁹ SWEPCO argues that Prescott provides no Commission precedent that would suggest that an agreement to act as a transmission agent carries with it any fiduciary obligation under which SWEPCO would be required to incur the costs and risks of hedging RTO congestion charges.³⁰

17. Next, SWEPCO disputes Prescott’s allegations pertaining to five cost of service elements of the Prescott PSA. Regarding the formula rate update process, SWEPCO argues that Prescott failed to show that the previously agreed-upon formula rate update process has become unjust and unreasonable. SWEPCO asserts that the formula rate adjustment provisions at issue were revised as part of a comprehensive settlement package and that the basis for Prescott’s argument is its comparison to protocols approved for generally-available open access tariffs under which dozens of transmission customers may take service. According to SWEPCO, Prescott has provided no discussion of how the current Prescott PSA provisions fail to provide adequate transparency nor has Prescott contended that it was denied access to information needed to review and challenge the annual formula rate adjustments.³¹ Next, SWEPCO asserts that Prescott failed to satisfy its burden to demonstrate that the existing price squeeze provision in the Prescott PSA “adversely affect[s] the public interest” by seriously harming the consuming public.³² Further, SWEPCO argues that a price squeeze would,

²⁷ *Id.* at 2.

²⁸ *Id.* at 8 (citing Prescott PSA section 3.2).

²⁹ *Id.* at 9 (citing Complaint at 14).

³⁰ *Id.*

³¹ *Id.* at 16.

³² *Id.* at 17 (citing Complaint at 16-17).

under the Commission's rules and precedent, involve a comparison of the Prescott PSA's wholesale rates to SWEPCO's retail rates, which Prescott did not provide.³³

18. Further, SWEPCO argues that Prescott's claims regarding depreciation costs should be dismissed because the depreciation rates were accepted by the Commission in December 2018 and Prescott presents no analysis as to why the depreciation rate—which SWEPCO acknowledges reflects a composite of rates from state commission approved rates in the three states in which SWEPCO operates generation—are unjust and unreasonable.³⁴ SWEPCO also argues that Prescott did not provide rate analysis or precedent to support its claim regarding double collection of depreciation expense. According to SWEPCO, it has adhered to the Prescott PSA template as drafted and agreed upon. SWEPCO also argues that Prescott failed to provide any evidence suggesting that the existing Prescott PSA provisions impose an excessive burden on consumers or otherwise seriously harm the public interest, as Prescott must do under section 15.3(f) of the Prescott PSA.³⁵ Finally, SWEPCO argues that Prescott's claims regarding unfunded reserves should be rejected because Prescott does not provide an explanation of why the items listed in the Complaint should be categorized as the type of unfunded reserves for which a rate base deduction might be appropriate and Prescott cites no legal authority.³⁶

19. MISO argues that the Commission should dismiss MISO as a respondent in this proceeding because the Complaint does not establish any MISO Tariff or BPM violation or that any provision of the MISO Tariff or BPM is unjust, unreasonable, or unduly discriminatory or preferential.³⁷ MISO also asserts that Prescott fails to meet the requisite burdens of proof under sections 206, 306, and 309 of the FPA and fails to comply with the Commission's complaint regulations.³⁸

³³ *Id.* (citing *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348, 355 (1956); *Morgan Stanley Capital Grp. Inc. v. Public Util. Dist. No. 1 of Snohomish Cty.*, 554 U.S. 527, at 530, 545-546 (2008) (*Morgan Stanley*)).

³⁴ *Id.* at 18 (citing *See Southwestern Elec. Power Co.*, Letter Order, Docket No. ER19-334-000 (Dec. 21, 2018)).

³⁵ *Id.* at 19 (citing *Morgan Stanley*, 554 U.S. at 553).

³⁶ *Id.* (citing Complaint at n.32).

³⁷ MISO Answer to the Complaint at 4.

³⁸ *Id.*

20. With regard to Prescott's allegations, first, MISO asserts that Prescott provides no support for its claim that it faces unjust, unreasonable, and unduly discriminatory costs as a result of the assessment of congestion charges for its pseudo-tie. MISO argues that other than Prescott's statement that it is assessed market-to-market congestion charges by MISO and SPP for the same pseudo-tie, resulting in double counting, and that the assessment of congestion costs is a violation of the JOA and results in pancaked rates, Prescott provides no evidence, except for reference to the ongoing AEP Complaint.³⁹ MISO argues that a citation to a separate complaint proceeding initiated by an unrelated party does not meet the requirements set forth in section 206 of the FPA.⁴⁰ MISO maintains that Prescott fails to explain how MISO allegedly violated the JOA and that, even if Prescott had provided an argument similar to what was provided in the AEP Complaint proceeding, the assertion would fail. MISO argues that, as it explained in the AEP Complaint proceeding, nothing in the JOA states or implies that pseudo-tied loads like Prescott's are exempt from any applicable congestion charges and, in fact, such an exemption would be contrary to the filed rate and would not be just and reasonable. MISO contends that, similar to MISO network load that procures energy from an external network resource, SWEPCO supplies the Prescott load by injecting the actual megawatts into the MISO transmission system at MISO's interfaces with SPP, which are then withdrawn at Prescott's interconnection point within MISO. MISO asserts that, like other importers, SWEPCO, on behalf of Prescott, is required to procure transmission service from MISO to enable its pseudo-tie deliveries to the Prescott load and to pay various charges associated with its transmission service and system usage. MISO argues that if Prescott does not pay for the congestion that its transactions cause on the MISO transmission system, other market participants will be required to bear the cost, and that this will violate the Commission's cost causation principles, resulting in unjust and unreasonable rates.⁴¹

21. MISO also argues that Prescott's assertion that others outside of MISO's footprint do not get charged by MISO for their contributions to MISO's non-market-to-market congestion incorrectly assumes that Prescott is comparably situated to others outside of MISO's footprint.⁴² MISO asserts that, because Prescott is physically located inside MISO's footprint and its withdrawals from the MISO transmission system cause

³⁹ *Id.* at 5.

⁴⁰ *Id.* at 13. MISO requests that to the extent the Commission decides to consider any allegations made in the AEP Complaint proceeding in its decision-making in this proceeding that MISO's answer the SWEPCO be incorporated by reference in this proceeding. *Id.* n.63.

⁴¹ *Id.* at 14.

⁴² *Id.* (citing Complaint at 15).

congestion and losses, the physical use of MISO's transmission system related to Prescott is indistinguishable from that of any MISO internal network load. MISO adds that Prescott is not similarly situated to SPP's internal loads and generation as far as congestion on the MISO transmission system is concerned and that Prescott should not be treated similarly for congestion purposes.

22. In addition, MISO argues that Prescott's claim of rate pancaking is baseless and that Prescott's transactions cross the boundary between MISO and SPP and require use of transmission facilities in both RTOs so that Prescott must obtain transmission service from both MISO and SPP. MISO asserts that it is well-established that such "separate 'inter-RTO' transmission charges are consistent with Commission precedent, which allows RTOs to collect transmission charges from a load-serving entity for every transmission system that the load-serving entity uses."⁴³ MISO further asserts that Commission policy does not require the elimination of inter-RTO pancaked transmission rates where customers take service on more than one RTO system.⁴⁴

23. Second, concerning Prescott's allegation that MISO thwarted Prescott's efforts to explore other options for the purchase of power, MISO contends that it is not a party to the Prescott PSA and takes no position on SWEPCO's performance under that bilateral arrangement, but disagrees that its actions and communications with Prescott in any way violated the MISO Tariff, the BPM, or thwarted Prescott's efforts to explore other supply options. To prove this point, MISO provides a summary of communications between Prescott and MISO from September to December 2017 and asserts that it advised Prescott that AEP, as Prescott's current supplier and market participant, would need to submit an Attachment B form—Notice of Change of Information—to remove nodes associated with Prescott's load and that, thereafter, a new market participant would need to submit an Attachment B form to add the nodes for Prescott's load. MISO states that it explained to Prescott that MISO's directions were consistent with the MISO Tariff and BPM, and that AEP, as the market participant and representative for the Asset Owner, Prescott, is the entity authorized to remove Prescott's nodes. MISO states that it also explained to Prescott that the BPM-001 further details how entities become market participants and

⁴³ *Id.* at 15 (citing *Sw. Power Pool, Inc.*, 153 FERC ¶ 61,051, at P 52 (2015)).

⁴⁴ *Id.* (citing *Cal. Indep. Sys. Operator Corp.*, 147 FERC ¶ 61,231, at P 155 (2014) (citing Order No. 2000, 89 FERC ¶ 61,285 at 31,174-75) ("As a matter of policy, the Commission generally has not required the elimination of inter-RTO rate pancaking, but has required the elimination of intra-RTO rate pancaking.")).

register assets. MISO reiterates that, under these rules, Prescott's nodes were registered by AEP and can be removed only by AEP.⁴⁵

24. Concerning Prescott's claim that the Prescott-Entergy NITSA gives Prescott the right to switch suppliers, MISO notes that Prescott states that the Prescott-Entergy NITSA was transferred to MISO and argues that Prescott, as the transmission customer under that agreement, has the right to terminate a designated network resource, such as the Prescott PSA and to designate a new network resource, irrespective of AEP's status as its market participant.⁴⁶ MISO maintains that this argument fails for several reasons. First, MISO contends that Prescott incorrectly identifies the Prescott-Entergy NITSA as currently serving its pseudo-tied load. According to MISO, the Prescott load is served through the AEP NITSA, under which SWEPCO is responsible for making all arrangements and executing all agreements that are necessary to provide service to Prescott. MISO states that, in anticipation of Entergy's integration, AEP and MISO executed a network integration transmission service Transaction Specification Sheet that went into effect on December 19, 2013, the date of Entergy's integration into MISO, and that the Transaction Specification Sheet specifically addresses transmission service to Prescott's load. MISO contends that under the AEP NITSA, Prescott is not the transmission customer, but is rather AEP's network load.⁴⁷ MISO asserts that, as such, Prescott is not authorized to submit notices, request modifications or take other actions under the AEP NITSA. MISO states that no transaction specification sheets were executed under the Prescott-Entergy NITSA, and Prescott never registered as a market participant in MISO. Accordingly, MISO states that there are no Prescott-Entergy NITSA reservations on MISO's OASIS and MISO bills AEP for AEP's network integration transmission service, under which Prescott's load is served. MISO argues that, therefore, Prescott's assertion that it is able to make changes to its service under the Prescott-Entergy NITSA is misplaced.⁴⁸ In addition, MISO argues that Prescott ignores that all MISO network service agreements expressly incorporate the entire MISO Tariff and all of its terms and conditions, thus MISO's rules applicable to asset registration are part of these service agreements and Prescott is required to comply with them. MISO maintains that, under these rules, Prescott, as an Asset Owner, was not authorized to

⁴⁵ *Id.* at 7-10.

⁴⁶ *Id.* at 10.

⁴⁷ *Id.* at 11 (citing Attachment 3 to the MISO Answer, Transaction Specification Sheet, section 9.0).

⁴⁸ *Id.* at 11.

make the changes it sought, but instead Asset Owners are represented by market participants.⁴⁹

25. Third, regarding Prescott's argument that the MISO Tariff and BPM are unjust and unreasonable because they do not allow pseudo-ties to settle congestion charges based on MISO's Day-Ahead energy market, MISO argues that no basis exists for Prescott's contention that pseudo-ties are faced with unreasonable real-time congestion exposure that cannot be hedged by Financial Transmission Rights. MISO asserts that, throughout its Complaint, Prescott inappropriately seeks preferential treatment for hedging congestion charges. MISO maintains that the MISO Tariff provides market participants with pseudo-ties comparable opportunities as other market participants to hedge congestion charges, that MISO does not provide special hedging mechanisms for pseudo-tie transactions, and that MISO is unaware of any Commission policy requiring it to do so.⁵⁰

B. Prescott's Motion to Strike and Answer to the SWEPCO and MISO Answers

26. Prescott requests that the Commission strike portions of MISO's and SWEPCO's answers that respond to Prescott's allegation that it was thwarted in seeking a new supplier by asserting that Prescott receives transmission service in MISO under the terms and conditions of the AEP NITSA rather than the Prescott-Entergy NITSA.⁵¹ Prescott goes on to discuss why it disagrees with MISO's and SWEPCO's assertions noting that, in 2013, MISO submitted a filing to the Commission in which MISO stated that it would assume functional control of several agreements, including the Prescott-Entergy NITSA, in order to provide transmission service to customers previously served by Entergy.⁵² Prescott notes that the Prescott-Entergy NITSA is represented on the MISO website as a service agreement under the MISO Tariff and contends that although MISO attached the Transaction Specification Sheet to its answer to the Complaint, MISO designated it as

⁴⁹ *Id.* at 12.

⁵⁰ *Id.* at 16-17 (citing *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890-A, 121 FERC ¶ 61,297, at PP 630-31 (2007)).

⁵¹ Prescott requests to strike certain sentences in MISO's Answer at page 3, page 10, and requests to strike Attachment 2 (AEP NITSA) and Attachment 3 (Specifications Sheet for AEP NITSA), and Prescott requests to strike certain sentences of SWEPCO's Answer at pages 10 and 11. Prescott Motion to Strike and Answer at 3.

⁵² *Id.* at 4 (citing MISO, Transmittal Letter, Docket No. ER14-148-000, at 1-2 (Oct. 21, 2013)).

CEII but failed to provide any of the justification required under the Commission's regulations.⁵³

27. In addition, Prescott argues that although MISO and SWEPCO claim that the Transaction Specification Sheet was executed in May 2013, MISO filed notice with the Commission that it would assume control of the Prescott-Entergy NITSA in order to serve Prescott five months later in October 2013. Further, Prescott argues that the AEP NITSA and the associated Network Operating Agreement specify no term for the service while the Prescott-Entergy NITSA states that it is effective beginning in 2009 through the end of 2038.⁵⁴ Prescott also argues that MISO claims that the Prescott-Entergy NITSA is no longer effective but provides no evidence of a notice or request terminating the Prescott-Entergy NITSA.

28. Prescott also asserts that it has provided expert testimony, exhibits, and additional sources, and has provided analysis of this evidence sufficient to meet its burden to show that the contract terms and/or the interpretation of those terms by SWEPCO and MISO may be unjust and unreasonable. Prescott argues that there exist genuine issues of material fact in dispute and requests that the Commission set these matters for evidentiary hearing or settlement procedures. According to Prescott, these issues of material fact include SWEPCO's disagreement with many of Prescott's characterizations of the parties' prior discussions and, as raised in the answers to the Complaint, which NITSA governs Prescott's transmission service.⁵⁵

29. Finally, Prescott contends that because Prescott, Minden, and SWEPCO are parties to the Minden Complaint proceeding in Docket No. EL18-122 and this proceeding, issues raised in sections IV(C) and (D) of the Complaint (i.e., allegations of failure to hedge congestion charges and of unjust, unreasonable, and discriminatory provisions cost-of-service provisions of the Prescott PSA) are subject to the doctrines of *res judicata* and collateral estoppel because they have been determined in a prior Commission proceeding involving the same parties.⁵⁶ Prescott asserts that in the

⁵³ *Id.* at 7-8 (citing 18 C.F.R. § 388.113(d)(1)(i)).

⁵⁴ *Id.* at 8 (citing MISO, Filing, Tab B, Docket No. ER14-148-000 (Oct. 21, 2013)).

⁵⁵ *Id.* at 15-16.

⁵⁶ *Id.* at 16 (citing *Entergy Servs., Inc.*, 127 FERC ¶ 61,226 (2009)).

alternative, the Commission's decision in the Minden Complaint proceeding creates a strong precedent for making the same determination in this proceeding.⁵⁷

C. SWEPCO's Answer Opposing Prescott's Motion to Strike and Answer

30. SWEPCO notes that Prescott moves to strike portions of MISO's and SWEPCO's answers because Prescott asserts that MISO and SWEPCO focused on the wrong NITSA. SWEPCO argues that the motion to strike is inappropriate and that Prescott cites no supporting authority for the relief it seeks. SWEPCO contends that Prescott may disagree with arguments in the answers to the Complaint but there is no legal basis to strike them. SWEPCO states that it understands that MISO will address Prescott's substantive arguments, but in any event, which NITSA is in effect is irrelevant to addressing Prescott's allegations against SWEPCO.⁵⁸ SWEPCO maintains that Prescott does not challenge SWEPCO's legal positions, but instead stresses disputed issues that allegedly merit a hearing. According to SWEPCO, the facts Prescott alleges to be in dispute are not material to resolving the key issues in this case and thus, even if taken as true, they would not sustain the legal findings that Prescott advocates.⁵⁹

31. Specifically, SWEPCO asserts that Prescott's expert does not contend that SWEPCO agreed to absorb RTO transmission costs or that this was required under section 3.2 of the Prescott PSA. SWEPCO also states that, while Prescott re-raises allegations that SWEPCO violated the Commission's Standards of Conduct, Prescott ignores the fact that MISO is the transmission provider and it has no market function employees and that the SWEPCO personnel implicated by Prescott are not MISO market function employees and they did not conduct transmission functions for MISO. Further, SWEPCO argues that resolution of the question of whether SWEPCO is obligated under the Prescott PSA to underwrite the congestion and transmission charges imposed upon Prescott by MISO and SPP turns solely on the interpretation of section 3.2 of the Prescott PSA and that Prescott did not argue that section 3.2 is unambiguous or unclear. SWEPCO asserts that Prescott argues that the event of Entergy joining MISO in 2013 somehow transformed a provision in section 3.2 that gave Prescott the right to have SWEPCO perform the task of arranging transmission service into a provision that imposes upon SWEPCO an agency duty to "mitigate" the RTO transmission charges.

32. Regarding Prescott's argument that *res judicata* and collateral estoppel compel the Commission to set a hearing in this case because Prescott raises the same issues as those

⁵⁷ *Id.* at 17.

⁵⁸ SWEPCO June 6 Answer at 5.

⁵⁹ *Id.* at 1.

set for hearing in the Minden Complaint proceeding, SWEPCO asserts that the case cited by Prescott undermines its own argument, as it makes clear that those doctrines apply only to “re-litigation of issues already decided on the merits.”⁶⁰ SWEPCO argues that the hearing order in the Minden Complaint proceeding did not decide any issues on the merits and that the Commission has repeatedly stated that orders establishing hearings are interlocutory in nature and are not merits rulings. SWEPCO also argues that even if the Commission determined that the cost-of-service issues merit an evidentiary hearing, it need not, and should not, establish a hearing on the issue of whether the Prescott PSA should be interpreted or revised to impose upon SWEPCO the obligation to incur RTO transmission and congestion costs that Prescott previously and expressly agreed were its sole responsibility.⁶¹

D. MISO’s Answer Opposing Prescott’s Motion to Strike and Answer

33. MISO argues that the Commission should reject the motion to strike because MISO is entitled and required to answer Prescott’s Complaint. MISO argues that it attached the AEP NITSA and the Transaction Specification Sheet with its answer and that it pointed out that Prescott had incorrectly identified the relevant transmission service agreement in its Complaint. According to MISO, instead of acknowledging its mistake, Prescott requests that the Commission strike the attachments and MISO’s discussion of them. However, MISO asserts that Rule 213(c)(4) of the Commission’s Rules of Practice and Procedure requires MISO’s answer to the Complaint to “include documents that support the facts in the answer in possession of, or otherwise attainable by, the respondent, including but not limited to, contracts and affidavits.”⁶² MISO contends that the AEP NITSA and the Transaction Specification Sheet are precisely the documents contemplated by this regulation. In addition, MISO asserts that motions to strike are disfavored under Commission precedent and that it is well established that “objectionable material will not be struck unless the matters sought to be omitted from the record have no possible relationship to the controversy, may confuse the issues, or otherwise prejudice a party.”⁶³

⁶⁰ *Id.* at 7 (citing Prescott Answer at 16 (citing *Entergy Servs., Inc.*, 127 FERC ¶ 61,226 at P 10)).

⁶¹ *Id.* at 8.

⁶² MISO June 6 Answer at 3 (citing 18 C.F.R. § 385.213(c)(4)).

⁶³ *Id.* (citing *La. Pub. Serv. Comm’n v. Entergy Servs., Inc.*, 163 FERC ¶ 61,117, at P 74 (2018)).

34. MISO also argues that Prescott's criticism of MISO's requested CEII designation for the 2013 Transaction Sheet is unwarranted as the transaction sheet includes a one-line diagram of transmission facilities owned by SWEPCO and Entergy which likely constitutes CEII and Prescott is able to obtain access to the privileged version by executing a non-disclosure certificate but Prescott has chosen not to do so.⁶⁴

35. Additionally, MISO asserts that Prescott's argument that MISO's actions in entering into the Transaction Specification Sheet were contrary to the Prescott-Entergy NITSA disregards that the arrangement resulted from Prescott granting agency authority to SWEPCO to effectuate transmission service transactions on its behalf. MISO notes that Prescott did not register as a market participant and did not complete any other tasks required under the MISO Tariff and the BPM to schedule transmission service transactions. According to MISO, instead, Prescott appointed AEP as its agent under the Prescott PSA for purposes of "making all arrangements and executing all agreements for the use of" third-party transmission systems, such as the MISO transmission system, including, specifically for network integrated transmission service transactions.⁶⁵ MISO argues that, in accordance with this mandate, AEP executed the Transaction Specification Sheet under its long-standing AEP NITSA to ensure continued transmission service to Prescott's loads in MISO after the Entergy integration date. Additionally, MISO argues that consistent with the Transaction Specification Sheet and the AEP NITSA, MISO billings for transmission service and other charges associated with MISO's service for Prescott's loads have consistently been settled with AEP. MISO argues that the Complaint is clear that, during all relevant periods, Prescott was fully aware of and consented to this arrangement, and that the Commission should reject Prescott's claims that the AEP arrangement was improper or unknown to Prescott.⁶⁶

III. Discussion

A. Procedural Matters

36. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, §§ 385.214 (2019), the notice of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2019), the Commission will grant the Missouri Commission's late-filed

⁶⁴ *Id.* at 8.

⁶⁵ *Id.* at 6 (citing Prescott PSA, section 3.2; SWEPCO Answer to Complaint at 8-9).

⁶⁶ *Id.* at 7 (citing Complaint at 9-10).

motion to intervene given its interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

37. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2019) prohibits an answer to an answer unless otherwise ordered by the decisional authority. We will accept the answers filed in this proceeding because they have provided information that assisted us in our decision-making process.

38. We deny the motion to strike. The Commission generally disfavors motions to strike, stating that they will be denied unless the moving party has carried its burden to establish that the material has "no possible relationship to the controversy, may confuse the issues, or otherwise prejudice a party."⁶⁷ Furthermore, proponents of motions to strike carry a "heavy burden" in light of the Commission's general preference for a complete record.⁶⁸ Prescott has failed to meet this burden.

39. In the motion to strike, Prescott appears to seek to strike material included in the answers to the Complaint that contradict its assertions as to which NITSA applies to the transmission service it receives in MISO. However, despite the heavy burden it has as the proponent of the motion, Prescott does not explain why the material it seeks to remove from the record has no possible relationship to the controversy, may confuse the issues, or otherwise prejudices it or another party. We agree with MISO that, as a respondent in this FPA section 206 complaint proceeding, it is required to include with its answer documents that support the facts put forth in its answer. Here, the AEP NITSA and the Transaction Specification Sheet go directly to MISO's response that Prescott is not the transmission customer under the MISO Tariff and is therefore not authorized to terminate a designated network resource, such as the Prescott PSA, and to designate a new network resource irrespective of AEP's status as Prescott's market participant. Accordingly, we deny the motion to strike.

B. Substantive Matters

40. We deny the Complaint in part, grant it in part, set certain issues for hearing and settlement judge procedures, and establish a refund effective date of April 5, 2019, as discussed below. In addition, as explained further below, we are concurrently issuing a separate order in this proceeding and Docket No. EL17-89-000 to investigate the potential for overlapping or duplicative charges on the MISO-SPP seam and any appropriate remedy.

⁶⁷ See *Constellation Mystic Power, LLC*, 165 FERC ¶ 61,267 (2018) (citing *Power Mining, Inc.*, 45 FERC ¶ 61,311, at 61,972 n.1 (1988)).

⁶⁸ *Sw. Power Pool, Inc.*, 166 FERC ¶ 61,019, at P 8 (2019).

41. First, we find that Prescott has not shown that SWEPCO and MISO thwarted its efforts to explore the purchase of power from other sources within the MISO footprint. In its answer to the Complaint, MISO provides a summary of the communication that occurred between Prescott and MISO in 2017 regarding Prescott's efforts to explore other power suppliers. It is evident that MISO provided guidance to Prescott on how to proceed with its proposed alternative supply arrangements consistent with the MISO Tariff and BPM. In short, MISO advised Prescott that, in MISO's view, as an Asset Owner and not a market participant, Prescott did not have the right to unilaterally terminate its relationship with SWEPCO. We agree with MISO and find that Prescott is mistaken that the Prescott load is served under the Prescott-Entergy NITSA; rather, the Prescott load is served through the AEP NITSA, under which SWEPCO is responsible for making all arrangements and executing all agreements necessary to provide service to Prescott. As MISO explains, in anticipation of Entergy's integration, AEP and MISO executed the Transaction Specification Sheet that went into effect on December 19, 2013, the date of Entergy's integration into MISO. The Transaction Specification Sheet specifically addresses transmission service to Prescott's load, and under the AEP NITSA, Prescott is not the transmission customer, but is rather AEP's network load.⁶⁹ As such, Prescott is not authorized to submit notices, request modifications, or take other actions under the AEP NITSA. Furthermore, no transaction specification sheet was executed under the Prescott-Entergy NITSA and Prescott did not register as a market participant in MISO. Accordingly, there are no Prescott-Entergy NITSA reservations on MISO's OASIS, and MISO bills AEP for AEP's NITS service, under which Prescott's load is serviced. We find, therefore, that Prescott's assertions that it is able to make changes to its service under the Prescott-Entergy NITSA are misplaced.

42. Similarly, we find that SWEPCO did not have an obligation to grant Prescott's request to change Prescott's supplier. We find that Prescott has not shown that SWEPCO unlawfully obstructed Prescott's efforts to seek out a new supplier contrary to the Prescott PSA or the Commission's regulations. We therefore decline to amend the Prescott PSA to terminate SWEPCO's role as Prescott's agent, and we decline to require SWEPCO and Prescott to enter into a transmission agency agreement.

43. Second, we find that Prescott has not persuasively shown that we should direct MISO to allow pseudo-ties to settle financially based on day-ahead prices. Prescott argues that pseudo-ties are faced with real-time congestion exposure that cannot be hedged by Financial Transmission Rights. However, although Financial Transmission Rights may not be a perfect hedge because of the difference between day-ahead and real-time prices, we are not persuaded that the lack of a perfect hedge for the Prescott load makes the underlying congestion charges and the MISO Tariff provisions related to

⁶⁹ See MISO Answer, Attachment 3 (Transaction Specification Sheet, section 9.0).

hedging congestion unjust and unreasonable. As MISO notes, the Commission does not require public utilities and RTOs to offer special terms and conditions to accommodate pseudo-tie requests.⁷⁰ Further, market participants can utilize virtual schedules to move their price exposure from the real-time market to the day-ahead market, which, in combination with Financial Transmission Rights, could mitigate exposure to real-time congestion charges.⁷¹

44. We also reject Prescott's claim that the MISO Tariff and BPM are unjust and unreasonable because they require pseudo-ties to pay for MISO's non-market-to-market congestion when others outside of MISO's footprint are not charged by MISO for their contributions to MISO's non-market-to-market congestion. We find that it is not unjust and unreasonable, nor unduly discriminatory, for MISO to impose non-market-to-market congestion charges on loads pseudo-tied out of MISO into SPP (i.e., the Prescott load) but not impose those charges for load physically located within SPP.⁷² The Prescott load is not similarly situated to load located outside of MISO's footprint because Prescott's load is physically located in MISO and, thus, SWEPCO imposes congestion costs on the MISO transmission system when it serves this load.

45. Third, we deny Prescott's request that the Commission order SWEPCO to mitigate congestion costs until they are eliminated and pay refunds to Prescott in the amount of \$770,000 per year from the date of the complaint in light of SWEPCO's alleged mismanagement of congestion costs or, alternatively terminate the Prescott PSA as contrary to the public interest so that Prescott may choose another provider within the MISO footprint. Prescott's requests rely on a misreading of the terms of the Prescott PSA and a corresponding misunderstanding of SWEPCO's responsibilities in relation to Prescott. Specifically, the two sections of the Prescott PSA that Prescott appears to rely on (sections 3.2 and 5.1⁷³) do not support its claims. Under section 3.2 (Transmission, Ancillary and Local Facilities Service), SWEPCO is responsible for arranging for

⁷⁰ See *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890-A, 121 FERC ¶ 61,297 at PP 630-631.

⁷¹ See, e.g., MISO Answer to the Complaint at 16-17.

⁷² See *State Corp. Comm'n of Kan. v. FERC*, 876 F.3d 332, 335 (D.C. Cir. 2017) (internal citations omitted) (explaining that "a difference in [RTO] rate design can be discriminatory only if the contested design 'has different effects on similarly situated customers.'"); see also *Transmission Agency of N. Cal. v. FERC*, 628 F.3d 538, 549 (D.C. Cir. 2010); *Sacramento Mun. Util. Dist. v. FERC*, 474 F.3d 797, 802 (D.C. Cir. 2007).

⁷³ See *supra* n.23.

Prescott's network integration transmission service and Prescott, in turn, is responsible for paying the network transmission service and related charges. Specifically, section 3.2 provides as follows:

If requested in writing by Customer [Prescott], Company [SWEPCO] shall act as Customer's agent and shall arrange for Network Integration Transmission Service (NITS) for Customer's Retail Load and shall be responsible during the Delivery Period for the provision of all such service. Customer shall be responsible for paying all NITS, related SPP and Entergy charges, and any other charges for the use of third-party transmission systems for the delivery of Requirements Service.⁷⁴

We do not interpret this provision as creating an affirmative duty for SWEPCO to go beyond arranging for network integration transmission service for Prescott. Likewise, we do not find anything that would mandate SWEPCO to "effectively manage" Prescott's congestion costs, as requested by Prescott. Additionally, section 5.1 (Implementation) sets forth SWEPCO's and Prescott's responsibilities for implementation of service under the Prescott PSA such as filing documents necessary for the SWEPCO to fulfill its obligations under the agreement and agreeing that SWEPCO will be the market participant that registers the load and resources with SPP related to Prescott's requirements service. But section 5.1 does not contain any language requiring SWEPCO to effectively manage Prescott's congestion costs.⁷⁵ Accordingly, we deny the Complaint as to this allegation.

46. Although we find that Prescott has not met its burden under section 206 of the FPA as to the allegations discussed above, consistent with our concurrent determination in the AEP Complaint Order, we find that the potential for overlapping or duplicative charges for congestion by MISO and SPP exists and therefore grant the complaint on this allegation. In this regard, with respect to Prescott's argument that the Prescott load has been assessed both MISO and SPP market-to-market congestion charges, MISO acknowledges—in its answer in the AEP Complaint proceeding—that, for pseudo-tied loads, in limited circumstances, a congestion charge overlap occurs with respect to market-to-market flowgates.⁷⁶ In addition, in the AEP Complaint proceeding, SPP also

⁷⁴ Prescott PSA, section 3.2.

⁷⁵ Prescott PSA, section 5.1.

⁷⁶ *Am. Elec. Power Serv. Corp. v. Midcontinent Indep. Sys. Operator, Inc.*, 168 FERC ¶ 61,176, at P 16 (2019) (AEP Complaint Order) (citing MISO Answer to the AEP Complaint, Docket No. EL17-89-000 at 5, 8-9, 15, 25; and Prepared Direct Testimony of Kevin A. Vannoy on behalf of MISO at 12-17).

admits that some congestion charge overlap may occur.⁷⁷ In the AEP Complaint Order issued concurrently in Docket No. EL17-89-000, we find that the potential for overlapping or duplicative charges for congestion by the RTOs exists.⁷⁸ Prescott, like Minden, is a pseudo-tied load physically located in MISO and supplied by SWEPSCO in SPP. Therefore, the finding in the AEP Complaint Order regarding the potential for overlapping or duplicative charges for congestion is also relevant to Prescott. We find that to the extent loads pseudo-tied from MISO to SPP, such as the Prescott load, are subject to overlapping or duplicative congestion charges by the RTOs, such charges are unjust, unreasonable, unduly discriminatory or preferential.⁷⁹ Further, we find that to the extent that the potential for such overlapping or duplicative congestion charges result from the RTOs' Tariff and/or JOA provisions, contract provisions, and/or practices, such provisions and/or practices are unjust, unreasonable, unduly discriminatory or preferential. Accordingly, we grant Prescott's Complaint, in part, to the extent necessary to remedy such provisions and/or practices.

47. We do not have sufficient information to identify the provisions and/or practices that may cause overlapping or duplicative congestion charges, or the extent such charges have been assessed, based on the record before us. As noted above, the issue of potential duplicative congestion charges on the MISO-SPP seam has also been raised in the AEP Complaint proceeding in Docket No. EL17-89-000, in which we are concurrently issuing an order.⁸⁰

48. Therefore, in order to investigate the potential for overlapping or duplicative charges on the MISO-SPP seam and any appropriate remedy, we are also concurrently issuing a separate order in both the instant docket and in the AEP Complaint proceeding that directs further briefing on this issue. We believe that conducting this inquiry

⁷⁷ *Id.* P 18 (citing SPP Answer to the AEP Complaint, Docket No. EL17-89-000 at 4-5).

⁷⁸ AEP Complaint Order, 168 FERC ¶ 61,176.

⁷⁹ *See, e.g., Midwest Indep. Transmission Sys. Operator, Inc.*, 108 FERC ¶ 61,163, at P 222 (2004) (requiring MISO to modify its proposal to "clarify that external transactions will not be double-charged for congestion and losses").

⁸⁰ In the AEP Complaint proceeding in Docket No. EL17-89-000, AEP alleges, *inter alia*, that Minden faces unjust, unreasonable, and unduly discriminatory costs as a result of the congestion charges associated with its pseudo-tie arrangements. AEP claims that Minden is assessed duplicative market-to-market congestion charges for the same pseudo-tie by both MISO and SPP. AEP Complaint, Docket No. EL17-89-000.

simultaneously in both proceedings will promote administrative efficiency. To the extent necessary, additional procedures may be ordered in either or both dockets.

49. Finally, concerning the five elements of the Prescott PSA that Prescott challenges as unjust, unreasonable, and unduly discriminatory,⁸¹ we find that the Complaint raises issues of material fact that cannot be resolved based upon the record before us and that are more appropriately addressed in the hearing and settlement judge procedures ordered below. Accordingly, we will set this element of the Complaint for investigation and a trial-type evidentiary hearing under section 206 of the FPA.

50. While we are setting the matters for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their dispute before hearing procedures commence. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.⁸² If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding. The Chief Judge, however, may not be able to designate the requested settlement judge based on workload requirements which determine judges' availability.⁸³ The settlement judge shall report to the Chief Judge and the Commission within thirty (30) days of the date of the appointment of the settlement judge, concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

51. In cases where, as here, the Commission institutes an investigation on complaint under section 206 of the FPA, section 206(b) requires that the Commission establish a refund effective date that is no earlier than the date a complaint was filed, but no later than five months after the filing date. Section 206(b) permits the Commission to order refunds for a 15-month refund period following the refund effective date. Consistent

⁸¹ *See supra* P 10.

⁸² 18 C.F.R. § 385.603 (2019).

⁸³ If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five (5) days of this order. The Commission's website contains a list of Commission judges available for settlement proceedings and a summary of their background and experience (<http://www.ferc.gov/legal/adr/avail-judge.asp>).

with our general policy of providing maximum protection to customers,⁸⁴ we will set the refund effective date at the earliest date possible, i.e., April 5, 2019.

52. Section 206(b) of the FPA also requires that if no final decision is rendered by the conclusion of the 180-day period commencing upon initiation of the section 206 proceeding, the Commission shall state the reason why it has failed to render such a decision and state its best estimate as to when it reasonably expects to make such a decision. Based on our review of the record, we expect that the Commission should be able to render a decision within 12 months of the commencement of the briefing.

The Commission orders:

(A) Prescott's Complaint is hereby granted in part, and denied in part, as discussed in the body of this order.

(B) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and the FPA, particularly section 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the FPA (18 C.F.R. Chapter I), a public hearing shall be held concerning the justness and reasonableness of certain formula rate provisions of the Prescott PSA, as discussed in the body of this order. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (C) and (D) below.

(C) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2019), the Chief Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge within five (5) days of the date of this order.

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

⁸⁴ See, e.g., *Seminole Elec. Coop., Inc. v. Fla. Power & Light Co.*, 65 FERC ¶ 61,413, at 63,139 (1993); *Canal Elec. Co.*, 46 FERC ¶ 61,153, at 61,539, *reh'g denied*, 47 FERC ¶ 61,275 (1989).

(60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(E) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within fifteen (15) days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Commission, 888 First Street, NE, Washington, DC 20426. Such a conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates, and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

(F) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and the FPA, particularly section 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the FPA (18 C.F.R. Chapter I), further procedures will be held concerning the potential for overlapping or duplicative congestion charges that result from MISO's and SPP's Tariff and/or JOA provisions, contract provisions, and/or practices, as discussed in the body of this order.

(G) The refund effective date established pursuant to section 206(b) of the FPA is April 5, 2019, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.