

106 FERC ¶ 61,262
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeem G. Kelly.

Midwest Independent Transmission System Operator, Inc., et al. Docket No. EL02-111-004

Ameren Services Company, et al. Docket No. EL03-212-002

ORDER ACCEPTING AGREEMENT ESTABLISHING GOING-FORWARD
PRINCIPLES AND PROCEDURES, AND EXTENDING DATES

(Issued March 19, 2004)

1. On March 5, 2004, the Chief Administrative Law Judge, acting as settlement judge in the above captioned proceeding, submitted a report to the Commission together with an agreement providing for going-forward principles and procedures in the above-captioned proceeding. In his report, he explained that, following 14 full days of formal settlement negotiations, 84 parties (some representing more than one utility) came to agreement on procedures and a timetable for developing and proposing a permanent long-term solution to the elimination of seams in the PJM Interconnection, L.L.C. (PJM) and Midwest Independent Transmission System Operator, Inc. (Midwest ISO) regions and elimination of through and out rates in those regions. In this order, we accept the agreement, and accordingly defer certain dates; the through and out rates will now be eliminated, to be replaced by a new long-term transmission pricing structure that eliminates seams throughout those regions, by December 1, 2004. Our action here benefits customers by establishing procedures and a timetable that will lead to the elimination of seams and through and out rates in those regions by December 1, 2004.

BACKGROUND

2. In earlier orders in this proceeding, the Commission ordered the elimination of regional through and out rates between the PJM and Midwest ISO regions effective April 1, 2004,¹ and also found unjust and unreasonable the through and out rates of individual public utilities that had not yet become members of PJM or the Midwest ISO effective April 1, 2004.² The Commission directed compliance filings to eliminate the

¹ Midwest Independent Transmission System Operator, Inc., et al., 104 FERC ¶ 61,105, order on reh'g, 105 FERC ¶ 61,212 (2003).

² Ameren Services Company, et al., 105 FERC ¶ 61,216 (2003).

through and out rates for new transactions, and allowed two-year transitional lost revenue recovery mechanisms, the so-called Seams Elimination Charge/Cost Adjustments/Assignments (SECAs), to be put in their place effective April 1, 2004.³ On December 17, 2003, the Commission clarified that the through and out rates were eliminated for reservations pursuant to requests made on or after November 17, 2003, for service commencing on or after April 1, 2004.⁴

3. Subsequently, the Commission provided time for the parties to participate in a stakeholder process to develop these transitional lost revenue recovery mechanisms. On February 6, 2004, noting that it had already allowed the parties some additional time for a stakeholder process, the Commission also established settlement judge procedures to further aid the parties in developing these transitional lost revenue recovery mechanisms.⁵ The Commission designated the Chief Judge as the settlement judge.

4. On February 4, 2004, the Chief Judge filed a report with the Commission on the progress made in the parties' ongoing discussions, together with their agreement that the date for elimination of the through and out rates should be extended from April 1, 2004 to May 1, 2004 (but with the transition continuing to run from April 1, 2004, *i.e.*, effectively shortening the transition).⁶ On February 6, 2004, the Commission accepted this agreement to extend the date for elimination of through and out rates to May 1, 2004, and so allowed the parties additional time to resolve matters consensually.⁷

5. On March 5, 2004, the Chief Judge filed the report and agreement which are at issue here. The Chief Judge noted that the parties had participated in 14 full days of formal settlement negotiations (often involving over 100 participants), and that there had been numerous meetings involving individual participants or groups of participants. The

³ See supra notes 1-2.

⁴ Midwest Independent Transmission System Operator, Inc., et al., 105 FERC ¶ 61,288 (2003).

⁵ Midwest Independent Transmission System Operator, Inc., et al., 106 FERC ¶ 61,105 (2004).

⁶ Midwest Independent Transmission System Operator, Inc., et al., 106 FERC ¶ 63,010 (2004).

⁷ Midwest Independent Transmission System Operator, Inc., et al., 106 FERC ¶ 61,106 (2004).

result of these efforts, the Chief Judge explained, was the agreement at issue here – supported or joined in by 84 parties (some representing more than one utility).⁸

6. The agreement establishes going-forward principles and procedures⁹ that, the Chief Judge states, will shorten the transition to the elimination of the through and out rates by 17 months; the agreement retains the through and out rates until December 1, 2004 (and thus keeps transmission providers revenue neutral until December 1, 2004), at which time they will be eliminated entirely. The agreement also provides for continued negotiations aimed at developing a long-term transmission pricing structure that eliminates seams in the PJM and Midwest ISO regions,¹⁰ to be submitted to the

⁸ These 84 parties are identified in Attachment A to the agreement.

⁹ The agreement provides that these going-forward principles and procedures address the condition placed earlier upon the regional transmission organization (RTO) choices of the so-called former Alliance Companies that a solution be developed to address through and out rates between PJM and the Midwest ISO, such that that condition will not preclude the integration of Commonwealth Edison Company (ComEd), American Electric Power Company (AEP) and Dayton Power & Light Company (DP&L) into PJM and the integration of Illinois Power Company (IP) into the Midwest ISO. Agreement at paragraph 12.

¹⁰ The agreement provides that the long-term transmission pricing structure “should. . . recognize[]” certain principles and “must meet” others:

Where transmission owners have turned over operational or functional control over their facilities to PJM or MISO, it would be unfair if that decision caused unreasonable economic harm to such transmission owners or the load serving entities and end-use customers within or to be included within PJM or MISO. Economic harm would include undue reductions in transmission revenue and/or cost shifts. This principle should be recognized as part of a long-term transmission pricing structure. A long-term transmission pricing structure that would result in material reductions in transmission revenues or costs shifts could allow for the possibility of a reasonable phase-in of such pricing structure. When fully implemented, the long-term transmission pricing structure will apply throughout the Combined Region. The long-term transmission pricing structure must meet the “just and reasonable” standard, allowing transmission owners an opportunity to recover their costs, including a fair return on investment, and the other standards of the FPA. An important factor in determining whether these standards have been met in any long-term transmission pricing structure is the

Commission pursuant to Section 205 of the Federal Power Act (FPA),¹¹ or, if a single solution cannot be agreed upon, multiple solutions, to be submitted to the Commission pursuant to Section 205 of the FPA. Such solution(s) must be filed on or before

degree to which cost responsibility for facilities is assigned to those who use or benefit from such facilities, regardless of whether those users or beneficiaries are located inside or outside the transmission owner's footprint. If the Commission requires a long-term pricing structure to be implemented or phased-in throughout the Combined Region, the implementing rate design within an RTO may not preclude achieving the economic objectives of such long-term transmission pricing structure within the Combined Region, as well as within the RTO.

Agreement at paragraph 11. The agreement further provides:

The Supporting Parties agree that a long-term transmission pricing structure(s) filed on October 1 by the PJM Transmission Owners pursuant to these Going-Forward Principles and Procedures may utilize and be based upon the transmission revenue requirements of the current PJM Transmission Owners that are then in effect under Attachment H of the PJM Open Access Transmission Tariff. Neither the Commission nor any Supporting Party shall use the filing of a long-term pricing structure pursuant to these Going-Forward Principles and Procedures as a basis for initiating an investigation into the then effective level of those revenue requirements. Nothing in this settlement shall limit or expand the rights or obligations of any Supporting Party with respect to the filing that the PJM Transmission Owners are required to make on December 31, 2004, pursuant to prior Commission orders, except that such filing shall be consistent with any long-term pricing structure filed pursuant to these Going-Forward Principles and Procedures and approved by the Commission. Nothing herein shall affect the otherwise applicable Section 205 or 206 rights of any party in a proceeding other than those proceedings referred to in this paragraph.

Agreement at paragraph 14.

¹¹ 16 U.S.C. § 824d (2000).

October 1, 2004, with an effective date of December 1, 2004 (following nominal suspension and subject to refund).¹²

7. The agreement further commits essentially all of the transmission owners in the PJM and Midwest ISO regions (whether they are or are not members of PJM or the Midwest ISO) to begin work on this long-term transmission pricing structure. The agreement provides that a proposal or proposals be put before stakeholders on or before July 1, 2004, with filings with the Commission to be made on or before October 1, 2004 pursuant to Section 205 of the FPA.¹³

8. The agreement provides an opportunity to reduce the capacity for the term of, or cancel, within ten business days of the date of an order accepting the agreement, confirmed reservations sinking in the PJM and Midwest ISO regions that had been requested between November 17, 2003 and the date of such order, for service beginning on or after April 1, 2004.¹⁴ The agreement also provides that the PJM through and out rate will be \$1.57/kW-month, beginning on the date that Commonwealth Edison Company (ComEd) is integrated into PJM through November 30, 2004, and also provides a credit against the applicable PJM through and out rate, for certain existing transactions, such that the effective rate for these transactions is \$1.00/kW-month while the through and out rates remain in effect.¹⁵

¹² The Commission is thus “commit[ted]” to “implement[ing] a pricing structure. . . as of December 1, 2004 that eliminates seams. . . and that implements a replacement transmission pricing structure as of that date.” The agreement also contains a so-called “backstop” process for making SECA compliance filings to take effect in the “unanticipated contingency” that the Commission is unable to “fulfill this commitment.” Agreement at paragraph 2.

¹³ The agreement addresses other matters as well: (1) the agreement addresses the Transitional Market Expansion Charge in Schedule 11 of PJM’s Tariff, and both a possible new charge to be added to the PJM Tariff in the event that ComEd, AEP, and DP&L are integrated into PJM prior to December 1, 2004, as well as the distribution of certain revenues from the Border Rate in Schedules 7 and 8 of the PJM Tariff (Agreement at paragraph 9); and (2) the agreement also provides that IP may file with the Commission to seek recovery of certain costs it or its affiliates incurred in connection with the development of the former Alliance RTO (Agreement at paragraph 15).

¹⁴ Agreement at paragraph 8.

¹⁵ Agreement at paragraph 10 & Att. B.

9. On March 10, 2004, the Midwest ISO filed comments. The Midwest ISO, while noting that it neither favors nor opposes the replacement of through and out rates with a transitional lost revenue recovery mechanism as allowed in the Commission's earlier orders, also notes that it does favor "definitive" resolutions that are consistent with the "eliminat[ion of] rate pancaking." And in light of "assur[ances]. . . that the [agreement] embraced the unalterable substantive agreement that [regional through and out agreements] will be eliminated on December 1, 2004," the Midwest ISO does not object to the agreement.

10. In this regard, Midwest ISO requests that the Commission "confirm fundamental understandings:" (1) that in no event will the through and out rates remain in place beyond December 1, 2004 irrespective of whether there is an agreed-upon long-term transmission pricing structure, and the Commission obligates itself to choose a replacement and to put that replacement in place on December 1, 2004, subject to refund; (2) that the agreement promotes satisfaction of, and does not undo, the conditions in the Commission's order conditionally accepting the regional transmission organization (RTO) choices of the former Alliance Companies¹⁶ (which will, as relevant here, be considered satisfied only if through and out rates are eliminated by December 1, 2004), and modifies those conditions only to the extent that the agreement allows integration of ComEd, AEP and DP&L into PJM prior to the elimination of the through and out rates; and (3) that the continuation of through and out rates to December 1, 2004 with a replacement effective December 1, 2004 is an agreed-upon transition mechanism favored by the parties and satisfies any obligation imposed on the Commission to fashion an appropriate remedy for rates, terms and conditions found to be unjust and unreasonable.

11. On March 10, 2004, Ameren Services Company (Ameren), Wisconsin Electric Power Company (WEPCO), and Edison Mission Energy, Edison Mission Marketing & Trading, Inc., and Midwest Generation EME, LLC (jointly, Edison) filed in opposition to the agreement. On March 17, 2004, Edison supplemented its earlier filing in opposition to the agreement. On March 17, 2004, AEP East Companies filed a response, and Edison filed a response to that response.

12. Ameren objects, claiming that the transitional lost revenue recovery mechanism previously discussed in the Commission's orders (the so-called SECAs) hold Ameren revenue neutral, while the continuation of through and out rates once it joins the Midwest ISO would not. Ameren further objects that the treatment it will be accorded by the Midwest ISO and the Midwest ISO's transmission owners upon its joining the Midwest ISO is not as favorable as the treatment accorded ComEd, AEP and DP&L by PJM and the PJM transmission owners upon their joining PJM.

¹⁶ See *Alliance Companies, et al.*, 100 FERC ¶ 61,137 (2002), *clarified*, 102 FERC ¶ 61,214, *order on reh'g*, 103 FERC ¶ 61,274 (2003).

13. WEPCO does not object to shortening the transition period or to implementing a long-term solution on December 1, 2004, but argues that the agreement fails to eliminate seams and continues rate pancaking, and provides no certainty that seams and rate pancaking would disappear post-December 1, 2004. In this latter regard, WEPCO states that the agreement merely puts off what it characterizes as the “hard decisions,” and leaves open the possibility that what may be proposed to be effective December 1, 2004 may well be a revenue-neutral/lost-revenue-recovery rate that will not eliminate the inefficiencies caused by through and out rates.¹⁷ WEPCO argues that the Commission has previously ruled on the importance of eliminating seams and rate pancaking and on the unreasonableness of the through and out rates, and has previously concluded that the through and out rates should be eliminated effective May 1, 2004. WEPCO contends that seams and the through and out rates therefore should be eliminated by May 1, 2004 rather than December 1, 2004.

14. WEPCO states that, while it has been argued that the replacement SECAs have adverse economic implications for several parties to this proceeding, the delay in the elimination of rates for through and out service results in significant harm to WEPCO and disparate rate treatment between WEPCO and entities within the expanded PJM.

15. Edison notes that the agreement delays the elimination of seams until December 1, 2004 at the earliest, two months after the date by which the Commission has directed AEP to join PJM and seven months after the date proposed by ComEd to join PJM. It contends that the mismatch of the dates for these events would result in the seams-related inefficiencies that the Commission previously found unjust and unreasonable and sought to avoid by eliminating through and out rates in the region effective April 1, 2004. In addition, it argues that, by delaying the elimination of the through and out rates beyond the integration of ComEd and AEP into PJM, the agreement violates the Commission’s July 31, 2002 Order conditioning its acceptance of ComEd’s and AEP’s choices to join PJM, in part, on a solution being developed to address rate pancaking between PJM and the Midwest ISO. Edison, therefore, recommends that the Commission require the long-term transmission pricing structure proposals to be filed by September 1, 2004 with a proposed effective date of October 1, 2004, to coincide with AEP’s integration into PJM, allowing ComEd to be integrated at the same time or shortly thereafter.

¹⁷ WEPCO is also concerned that the development of the long-term transmission pricing structure appears to be vested solely in the hands of the transmission owners.

In this regard, we wish to emphasize that we expect the process to be an open process, with consideration of substantive input of other interested stakeholders. And we further emphasize that the agreement leaves the Commission free to adopt a long-term transmission pricing structure that differs from what may be proposed on October 1, 2004.

16. Edison also argues that the agreement would harm customers who relied in good faith on the Commission's orders eliminating the through and out rates for reservations pursuant to requests made on or after November 17, 2003 for service commencing after April 1, 2004. According to Edison, the option to cancel such confirmed reservations does not shield customers from their detrimental reliance on the Commission's prior orders because it fails to recognize that the purpose of such reservations is to facilitate the sale of power and the option to cancel the transmission reservation after the sale is agreed upon cannot restore the economic status quo; according to Edison, it has entered into power sales agreements that require it to provide power into regions in which the through and out rates would continue under the agreement.

17. Edison requests that the Commission eliminate the through and out rates for reservations pursuant to requests made on or after November 17, 2003 but prior to February 6, 2004. It states that that such grandfathering of these reservations would prevent harm to customers who relied on the Commissions earlier orders in this proceeding.

DISCUSSION

18. Notwithstanding the opposition of Edison, WEPCO, and Ameren, we will accept the agreement and defer the dates in our earlier orders consistent with the agreement. The agreement is supported by the vast majority of the parties to this proceeding. The agreement ensures revenue neutrality for transmission providers until December 1, 2004, and, more importantly, shortens the two-year transition period for the elimination of seams and through and out rates in the PJM and Midwest ISO regions until December 1, 2004 – well over a year earlier than the Commission's earlier orders contemplated.¹⁸

19. With respect to the “fundamental understandings” that the Midwest ISO asks that the Commission confirm, we agree. As suggested by our discussion above, in no event will through and out rates remain in place beyond December 1, 2004 irrespective of whether there is an agreed-upon long-term transmission pricing structure, and the Commission likewise obligates itself to choose a replacement and to put that replacement in place on December 1, 2004 (subject to refund, if appropriate).¹⁹ In addition, we find that the agreement promotes satisfaction of, and does not undo, the conditions in the Commission's order conditionally accepting the RTO choices of the former Alliance

¹⁸ See supra notes 1-3, 5 and accompanying text.

¹⁹ While the Commission commits here to eliminate through and out rates effective December 1, 2004, as noted earlier in this order the Commission is not obligated to adopt any particular long-term transmission pricing structure over another. See supra note 17.

Companies and modifies those conditions only to the extent that the agreement allows integration of ComEd, AEP and DP&L into PJM prior to the elimination of the through and out rates. Likewise, we find that continuation of through and out rates to December 1, 2004 with a replacement effective December 1, 2004 is an agreed-upon transition mechanism favored by the parties and satisfies any obligation imposed on the Commission to fashion an appropriate remedy for rates, terms and conditions found to be unjust and unreasonable.

20. With respect to Ameren's objection to the agreement, we are not persuaded by its claim that continuation of through and out rates would not hold Ameren revenue neutral. The purpose of the SECAs, as Ameren itself acknowledges,²⁰ was to hold utilities revenue neutral, *i.e.*, to allow utilities the same revenue under the SECAs that they would have earned under the to-be-eliminated through and out rates. The SECAs were not intended to provide greater revenues.

21. It is Ameren's putting itself under the Midwest ISO's open access transmission tariff and, as relevant here, putting itself under the Midwest ISO's through and out rates that is what results in the difference that Ameren complains of; *i.e.*, Ameren compares its through and out rates (and replacement SECA rates) to the Midwest ISO's through and out rates, and argues that its revenues under the Midwest ISO's through and out rates may be less than the revenues it would have earned under its own SECA developed to keep it revenue neutral compared to its own through and out rates. Ameren's problem is, thus, that the through and out rates under the Midwest ISO's open access transmission tariff, and the related revenue distribution protocols under the Midwest ISO Agreement, do not provide revenue neutrality for the elimination of Ameren's through and out rate when it joins Midwest ISO and accepts the Midwest ISO's through and out rate. If Ameren felt that the Midwest ISO's rates or revenue distribution protocols did not provide for adequate compensation, it should have timely sought to modify the rates or revenue distribution protocols through an appropriate filing.²¹ In any event, we note that the

²⁰ See Ameren Comments at 5 ("The Commission intended the SECAs to replace the revenues lost when the [through and out rates] in a transmission owner's [open access transmission tariff] are terminated.").

²¹ Indeed, we note that Ameren participated, as one of the applicants, in a filing in Docket No. ER03-580-000, proposing to modify the rates under the Midwest ISO's open access transmission tariff to reflect inclusion of Ameren and other participants in GridAmerica LLC. See *Midwest Independent Transmission System Operator, Inc.*, 103 FERC ¶ 61,090 at P 1 (2003). That filing was made roughly five months prior to the Commission's order eliminating the through and out rate under the Midwest ISO's open access transmission tariff, *compare id.* at P 1 *with* 104 FERC ¶ 61,105 at P 1, and roughly nine months before the Commission's order adopting a SECA. *Compare id.* at P 1 *with*
(continued ...)

Midwest ISO's through and out rate, which under the agreement will remain in place until December 1, 2004, provides for recovery of revenues lost due to the elimination of rate pancaking.²²

22. Ameren also notes that those companies joining PJM are accorded more favorable treatment by PJM and its transmission owners than the companies joining the Midwest ISO are accorded by the Midwest ISO and its transmission owners. That PJM and its transmission owners may treat newly-joining companies more favorably than the Midwest ISO and its transmission owners treat newly-joining companies does not constitute undue discrimination; the two separate RTOs and their members have simply opted to adopt different treatments.

23. WEPCO's concerns are essentially that the agreement continues through and out rates beyond May 1, 2004, to December 1, 2004. While that is true, through and out rates throughout the PJM and Midwest ISO regions will be eliminated effective December 1, 2004, without any further transitional lost revenue recovery mechanism. Thus, compared to what would have occurred, *i.e.*, the elimination of through and out rates on May 1, 2004 but with a transitional lost revenue recovery mechanism to run for almost two more years, the agreement effectively eliminates both through and out rates and SECA rates more than a year earlier than would otherwise have been the case.

24. While we recognize that the task of developing a consensus long-term transmission pricing structure over the coming months will not be easy, it would not have been any easier having almost two years to do it – especially given that, at the same time, these same parties would also have been developing and fighting over a SECA. We are hopeful that, with only the job of developing a more permanent solution before them, and without the distraction of also developing a SECA, the parties will be better able to focus their energies and come up with a better and more permanent solution more quickly.

25. Edison's more general concerns essentially mirror those of WEPCO and the others, and are addressed above. What Edison argues more uniquely is that transmission customers who relied in good faith on the Commission's earlier orders and made reservations after November 17, 2003 are unfairly and inappropriately disadvantaged, and

(continued ...)

105 FERC ¶ 61,212 at P 1, 42-53, 97. If, at the time that filing was made, Ameren felt that Midwest ISO's rates did not provide for adequate recovery of lost revenues, it should have sought to modify those rates in that filing, rather than belatedly raise the issue in the instant proceeding.

²² See Midwest Independent Transmission System Operator, Inc., 98 FERC ¶ 61,076 at 61,227, 61,228 (2002).

that the right to reduce or cancel reservations is not an adequate solution. We disagree. While Edison may have made reservations, the agreement allows those reservations to be reduced or cancelled. And while Edison further argues that the option to reduce or cancel does not mitigate the harm because it needs those reservations to support power sale agreements that it had entered into, Edison does not identify the facts surrounding those power sale agreements – including the power sale customers, the quantities of power involved, the timeframes for such sales, and price information – and thus has not demonstrated any actual harm. On this basis, therefore, we must find that Edison is not entitled to any additional relief beyond what the agreement provides; Edison has not shown that it needs any additional relief.

The Commission orders:

(A) The agreement attached to the Chief Judge's March 5, 2004 report is hereby accepted, and the parties are hereby directed to make the compliance filings provided for in the agreement. The date for the elimination of through and out rates is hereby extended from May 1, 2004 until December 1, 2004, to be replaced by a transmission pricing structure effective December 1, 2004 (subject to refund, if appropriate) that eliminates seams throughout the PJM and Midwest ISO regions.

(B) The Chief Judge, as settlement judge, is hereby directed to hold a conference in this proceeding within 20 days of the date of this order to develop such procedures as may be appropriate to aid in the development of the long-term transmission pricing structure discussed in the body of this order.

(C) The Chief Judge is hereby directed to report to the Commission on the status of negotiations at reasonable intervals.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.