

106 FERC ¶ 61, 337
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Midwest Independent Transmission
System Operator, Inc.

Docket No. EL03-34-001

ORDER DENYING REHEARING
AND PROVIDING CLARIFICATION

(Issued March 31, 2004)

1. In this order, we deny the Midwest ISO Transmission Owners'¹ request for rehearing of the Commission's March 12, 2003 Declaratory Order, but provide clarification of that order.² In the Declaratory Order, the Commission found, inter alia,

¹ Ameren Services Company, as agent for Union Electric Company d/b/a AmerenUE and Central Illinois Public Service Company d/b/a AmerenCIPS; Alliant Energy Corporate Services, Inc. on behalf of Interstate Power and Light Company (f/k/a IES Utilities Inc. and Interstate Power Company); American Transmission Company LLC; Aquila, Inc. d/b/a Aquila Networks (f/k/a Utilicorp United, Inc.); Central Illinois Light Co.; Cinergy Services, Inc. (for Cincinnati Gas & Electric Co., PSI Energy, Inc., and Union Light Heat & Power Co.); City Water, Light & Power (Springfield, IL); Hoosier Energy Rural Electric Cooperative, Inc.; Indiana Municipal Power Agency; Indianapolis Power & Light Company; LG&E Corporation (for Louisville Gas and Electric Co. and Kentucky Utilities Co.); Lincoln Electric System; Michigan Electric Transmission Company, LLC; Minnesota Power, Inc. (and its subsidiary Superior Water, L&P); Montana-Dakota Utilities Co.; Northern States Power Company and Northern States Power Company (Wisconsin), subsidiaries of Xcel Energy Inc.; Northwestern Wisconsin Electric Company; Otter Tail Power Company; Southern Illinois Power Cooperative; Southern Indiana Gas & Electric Company, d/b/a Vectren Energy Delivery of Indiana; and Wabash Valley Power Association, Inc. (collectively, Midwest ISO TOs).

² 102 FERC ¶ 61,279 (2003) (Declaratory Order).

that the Midwest Independent Transmission System Operator, Inc.'s (Midwest ISO) load-serving stakeholders may make a rate filing with the Commission demonstrating and supporting that costs under Schedules 16 and 17 of the Midwest ISO Open Access Transmission Tariff (OATT) are currently unrecoverable and should be treated as a regulatory asset under the Commission's Uniform System of Accounts.

I. Background

2. The Midwest ISO OATT provides several means of cost recovery: (1) Schedule 1, for Scheduling, System Control, and Dispatch Service; (2) Schedule 10, for the ISO Cost Adder;³ and (3) Schedules 16 and 17, for the development costs of the Midwest ISO's Financial Transmission Rights (FTR) markets and day-ahead and real-time energy markets, respectively.⁴ Several interrelated proceedings have established the relationship between Schedule 10 and Schedules 16 and 17, and how specific types of costs may be recovered.

3. The Commission accepted the Midwest ISO's proposed Schedules 16 and 17, subject to refund and further filings, in an order dated November 22, 2002.⁵ In the November 22 Order, the Commission also: (1) ordered a paper hearing in which the Midwest ISO could provide additional support for the proposed billing determinants of the rates to be charged under Schedules 16 and 17; (2) directed the Midwest ISO to make

³ The ISO Cost Adder was designed to recover all costs that are not recovered under Schedule 1. These costs include the Midwest ISO's costs associated with building and operating the Security Center, "running" the ISO and administering the Midwest ISO OATT. See Midwest Independent Transmission System Operator, Inc., 102 FERC ¶ 61,192 at P 1 n.3 (2003) (Remand Order), order on reh'g, 104 FERC ¶ 61,012 (2003) (Remand Rehearing Order), appeal pending sub nom., Midwest ISO Transmission Owners, et al. v. FERC, Nos. 02-1121 and 02-1122 (D.C. Cir.).

⁴ Under these schedules, the Midwest ISO will defer the start-up costs incurred in developing these markets. Upon commencement of service, the Midwest ISO will begin to recover development costs over a transition period of five years and will also recover the ongoing costs of operating the FTR and energy markets.

⁵ Midwest Independent Transmission System Operator, Inc., 101 FERC ¶ 61,221 (2002) (November 22 Order), order on reh'g, 103 FERC ¶ 61,035 (2003) (April 11 Order).

periodic informational filings of projected and trued-up Schedule 16 and 17 costs; and (3) required the Midwest ISO to amend the ISO Cost Adder (provided for in Schedule 10) to exclude the costs recovered under Schedules 16 and 17.

4. At about the same time, but in a separate proceeding, the Commission was granted voluntary remand from the Court of Appeals for the District of Columbia Circuit.⁶ The underlying cases, Opinion Nos. 453 and 453-A,⁷ affirmed the findings of an administrative law judge that the Midwest ISO should be required to revise the ISO Cost Adder to include bundled retail load and load associated with grandfathered bundled wholesale agreements (grandfathered load) in the calculation of the ISO Cost Adder, since all load benefits from the ISO's regional administration of the transmission grid.

5. In the Remand Order, the Commission affirmed, with modification, Opinion Nos. 453 and 453-A. The Commission also addressed the possibility of under-recovery of costs due to the requirement that bundled retail load and grandfathered load must be included in the ISO Cost Adder calculation, and explained the availability of various mechanisms, as yet untried, for cost recovery. The Commission explained, among other things, that:

[I]t is unclear whether any costs will indeed be unrecovered as a result of our rulings in Opinion Nos. 453 and 453-A. The parties provide no concrete information concerning the existence of or the amount of the costs that the Midwest ISO TOs allegedly cannot recover However, in recognition of the parties' concerns that they may be unable to collect ISO Cost Adder charges, we will permit those parties, at their discretion, to make a filing with the Commission clearly demonstrating and supporting that such costs are indeed currently unrecoverable and should be treated as a regulatory asset under the Commission's Uniform System of Accounts⁸

⁶ See Midwest ISO Transmission Owners, et al., v. FERC, Nos. 02-1121 and 02-1122 (D.C. Cir. Dec. 6, 2002).

⁷ See Midwest Independent Transmission System Operator, Inc., Opinion No. 453, 97 FERC ¶ 61,033 (2001), order on reh'g, Opinion No. 453-A, 98 FERC ¶ 61,141 (2002).

⁸ Id. at P 30 (footnote omitted). Regulatory assets include "amounts of regulatory-created assets, not includible in other accounts, resulting from the ratemaking actions of regulatory agencies." 18 C.F.R. Part 101, § 182.3 (2003).

6. The Declaratory Order, which is the subject of the Midwest ISO TOs' rehearing request, responded to a request by the Midwest ISO for guidance, and further clarified points discussed in the Remand Order and the November 22 Order. First, the Midwest ISO sought assurance that the load-serving stakeholders subject to Schedule 16 and 17 charges would be given an opportunity to recover those charges from their customers. In response, the Commission emphasized its commitment to market development and noted that the Remand Order had allowed the Midwest ISO TOs to file, in the event they could not otherwise recover Schedule 10 costs charged to them, a request for rate recovery of such charges as a regulatory asset. The Commission stated that because it viewed "the charges assessed by [the] Midwest ISO under Schedules 16 and 17 to be analogous to the charges assessed by [the] Midwest ISO under Schedule 10," load-serving stakeholders would be entitled to make a rate filing clearly demonstrating and supporting that Schedule 16 and 17 costs are unrecoverable and should be treated as a regulatory asset.

7. Second, the Commission noted its disagreement with any implication that the procedures for making informational filings (of projected and trued-up Schedule 16 and 17 charges) spelled out in the November 22 Order, and the filings themselves (along with any review of those filings) constitute a de facto prudence review. The Commission stated that the informational filings "merely provide to interested parties and to the Commission information – but they are not more than that. . . ."⁹

II. Request for Rehearing

8. The Midwest ISO TOs seek rehearing of the Declaratory Order on three grounds. First, they argue that the Commission was incorrect in finding that the informational filings required in the November 22 Order do not constitute prudence reviews. They advocate that the Commission must clarify when and how it will review the Midwest ISO's market start-up costs for prudence and how it will protect Midwest ISO customers from "alternate means" of recovering any imprudent costs. Second, the Midwest ISO TOs aver that the Commission's reliance on the Remand Order to assert that transmission owners with cost-trapping concerns may file to request rate recovery of Schedule 16 and 17 costs as a regulatory asset does not adequately address those parties' concerns. They ask the Commission to pre-empt state law regarding these types of costs to prevent cost trapping. Third, the Midwest ISO TOs state that the Commission incorrectly relied on the Remand Order to suggest that transmission owners may seek modification of wholesale contracts under sections 205 or 206 of the Federal Power Act (FPA) to recover Schedule 16 and 17 costs.

⁹ Declaratory Order at P 22.

III. Discussion

A. Prudence Reviews

9. The Midwest ISO TOs argue that the Commission erred in stating that the Midwest ISO's informational filings do not constitute prudence reviews. They aver that the Commission ignored its own language in the November 22 Order, which: (1) acknowledged that an "after the fact" prudence review would be complicated because of the Midwest ISO's non-profit status, and (2) stated that the informational filings would support the Midwest ISO's prudently incurred costs. The Midwest ISO TOs submit that if the Commission is not going to use the informational filings to review the prudence of the Midwest ISO's market start-up costs, then the Commission must clarify when and how it will review these costs for prudence. They further argue that the Commission must explain how it will protect the Midwest ISO's customers from alternate means to recover any imprudent costs while ensuring the continued financial viability of the Midwest ISO.

10. The Commission explained, in the Declaratory Order and in a later proceeding, that the purpose of the informational filings is to monitor the Midwest ISO's actual and projected expenditures. Although the filings do not constitute de facto prudence reviews – the "informational filings are just that, informational filings" – they may become the basis for such a review if interested parties bring to our attention the need for closer examination.¹⁰ The Commission later explained that:

[The] Midwest ISO's informational filings will be used to indicate the expected expenditures and monitor the progress made by [the] Midwest ISO. However, we note that the informational filings are not intended to form the basis of an automatic prudence review of reported costs. Rather, these filings are intended to give the parties advance notice of potential cost issues which they can then raise via an appropriate filing with the Commission.¹¹

¹⁰ Declaratory Order at P 22.

¹¹ April 11 Order at P 13 (citing Declaratory Order at P 20 n.21). See also Declaratory Order at P 22; Ameren Services Company, et al., 104 FERC ¶ 61,097 at P 10-11 (2003) (discussing April 11 Order).

We take this opportunity to clarify our prior statement with respect to the means by which the TOs – or any other interested party – may raise concerns regarding the cost information contained in the informational filings. The parties may file a complaint or written comments within 20 days of receipt of an informational filing. The filing must specifically describe parties’ concerns about actual or projected costs described in the informational filings, and clearly describe the basis for concern. The filing also may suggest steps for the Commission, the Midwest ISO and intervenors to take in order to ensure that the expenditure is prudent and transparent to all parties. If the filing is made in the form of comments, the Midwest ISO may file responsive comments within 10 days of the time initial comments are filed.

11. The Midwest ISO TOs incorrectly argue that the Commission ignored the language of the November 22 Order. The November 22 Order directed the Midwest ISO to provide “detailed information on costs estimated to be incurred *over the following 120 days* for each service and detailed justifications for each of the costs; detailed information on the actual costs incurred over the previous 60 day period for each service,” actual cost information and an explanation for any discrepancy.¹² This requirement properly takes into account the Commission’s finding that the Midwest ISO’s non-profit status complicates a prudence review after costs are incurred. The informational filing requirements set forth in the November 22 Order give the Commission and the public an opportunity to monitor the Midwest ISO’s projected costs for two 60-day periods before the costs are incurred.

12. The Midwest ISO TOs next argue that the Commission failed to recognize the substantial dollar impact of its decision not to treat informational filings as prudence reviews “and the reality that, if the Midwest ISO’s costs were later found imprudent, the Midwest ISO presumably would be seeking alternate means of recovering these ‘imprudent’ costs from its customers.”¹³ We disagree. The Commission acknowledged in both the November 22 Order and in the Declaratory Order the statements of the Midwest ISO and intervenors that the Midwest ISO expects to incur substantial costs to develop its proposed energy and FTR markets.¹⁴ The Commission also made clear in both orders that it wanted to receive information about the Midwest ISO’s projected costs

¹² November 22 Order at P 36 (emphasis added).

¹³ Request for Rehearing of the Midwest ISO Transmission Owners at 8 (Apr. 11, 2003).

¹⁴ See November 22 Order at P 30, 35-36; Declaratory Order at P 12, 16.

on an ongoing basis, through the informational filings discussed above. The objective of doing so is to avoid the incurrence of imprudent costs. The Midwest ISO TOs provide no explanation for their statement that the Midwest ISO would use “alternate means” to seek to recover imprudently incurred costs from its customers. We therefore deny these aspects of the Midwest ISO TOs’ request for rehearing.

B. Regulatory Asset Treatment of Schedule 16 and 17 Costs

13. The Midwest ISO TOs argue that the Commission’s reliance on the Remand Order to suggest that transmission owners with cost-trapping concerns may request rate recovery of costs under Schedules 16 and 17 as a regulatory asset does not adequately address those parties’ concerns. In suggesting that these costs may be given regulatory asset treatment, the Midwest ISO TOs say, the Commission ignores its jurisdiction to preempt state law regarding these types of costs to prevent cost trapping. Citing Federal court authority, the Midwest ISO TOs argue that the Commission should exercise its jurisdiction to declare that Schedule 16 and 17 charges are federally set charges and that State retail rate freezes do not block their recovery. Further, the Midwest ISO TOs argue that the Commission’s regulatory asset solution is flawed because it fails to clearly set out how the solution will work. They ask that the Commission declare Schedule 16 and 17 costs recoverable and explain how its proposal provides a meaningful opportunity to recover those costs.

14. With regard to the Midwest ISO TOs’ argument with respect to preemption, while we agree that Schedule 16 and 17 charges are Commission-jurisdictional rates,¹⁵ it is merely speculative whether states with retail rate freezes will block the recovery of any Commission-established rates.¹⁶ Moreover, the validity of State-regulated rates denying recovery of Commission-approved charges is challengeable in State fora.¹⁷ In any event, as stated in the Declaratory Order, the Commission views the Midwest ISO’s charges under Schedules 16 and 17 as analogous to its charges under Schedule 10 since they are

¹⁵ Cf. Midwest Independent Transmission System Operator, Inc., 103 FERC ¶ 61,205 at P 21 (2003) (Schedule 10 Compliance Order) (finding that Schedule 10 is a Commission-jurisdictional rate schedule).

¹⁶ See Remand Order at P 26-30; see also Remand Rehearing Order at P 21, 24-26.

¹⁷ See Entergy Louisiana, Inc. v. Louisiana Public Service Commission, 123 S.Ct. 2050, 2056-57 (2003) (finding that states cannot “trap” at the retail level costs that already have been approved at the wholesale level by the Commission).

all administrative costs.¹⁸ As with Schedule 10 charges, the Declaratory Order provided an opportunity for Midwest ISO load-serving stakeholders, in the event that they cannot otherwise recover Schedule 16 and 17 charges, to make a filing that demonstrates and supports that such costs are currently unrecoverable and should be treated as a regulatory asset.¹⁹ With regard to the regulatory asset approach, as the Commission has stated in previous orders, the Commission will continue to apply the existing standard as set forth in 18 C.F.R. Part 101, Account No. 182.3 (2003).²⁰

15. In general, this standard requires a utility to recognize a regulatory asset where it determines it is probable that a cost that would otherwise be charged to expense in one period will be recovered in rates in another. Accordingly, any party desiring to recover the Schedule 16 and 17 charges in rates other than the period in which they would ordinarily be charged to expense must submit a filing demonstrating that their retail rates in effect applicable to that period do not or will not permit recovery of those costs in that period and a rate plan for recovery of them in a different period. While there may be some uncertainty about future service and the jurisdictional status of the market participants from whom the Schedule 16 and 17 charges are to be recovered, this uncertainty alone should not act as a bar to meeting the “probability” test required for recognition of a regulatory asset for Schedule 16 and 17 charges. All available evidence should be considered in making that determination. On that score, we note that the development of the Midwest ISO’s FTR markets and day-ahead and real-time energy markets are essential to meeting RTO requirements. The Commission remains committed to fully compensating parties for the Schedule 16 and 17 costs they incur.

C. Modifications of Wholesale Contracts

16. The Midwest ISO TOs argue that the Commission erred in relying on the Remand Order to suggest that transmission owners may seek modification of wholesale contracts to recover charges under Schedules 16 and 17 of the Midwest ISO OATT. They argue that this proposed solution does not adequately address the parties’ concerns that costs associated with Schedules 16 and 17 may be trapped. The Midwest ISO TOs argue that the Commission’s proposed solution fails to consider the fact that many wholesale contracts – including many of the grandfathered contracts that the Midwest ISO TOs seek

¹⁸ Declaratory Order at P 15. See also Ameren Services Company, et al., 104 FERC ¶ 61,097 at P 11 (2003).

¹⁹ See id.

²⁰ See Remand Rehearing Order at P 29; Schedule 10 Compliance Order at P 22.

to modify – do not contain language allowing for such filings under sections 205 or 206 of the FPA. The Midwest ISO TOs ask the Commission to remedy these deficiencies by generically amending these contracts. Under this approach, they argue, section 206 could be a viable avenue for relief from the cost trapping that the Commission’s orders create.

17. We will deny the Midwest ISO TOs’ request that the Commission generically amend those wholesale contracts that do not contain language allowing filings with the Commission to recover charges under Schedules 16 and 17 of the Midwest ISO OATT. The Midwest ISO TOs have provided no justification for such an approach. They have failed to identify the wholesale contracts that they claim do not contain language that allows for filings under sections 205 or 206 of the FPA. Rather, they base their request entirely on an unsupported general assertion that “many” wholesale contracts do not contain language that would allow section 205 or 206 filings. This is not a sufficient basis for the Commission to generically amend all such contracts.

18. When the wholesale contracts do not contain language allowing for filings pursuant to sections 205 or 206 of the FPA, another option may be available to seek rate recovery of costs for Commission-jurisdictional contracts under Schedules 16 and 17. The Commission recently permitted Pacific Gas & Electric Corporation (PG&E) to pass through Grid Management Charge (GMC) costs to certain transmission customers because the GMC was “a new and different service in addition to the service [transmission customers] already receive.”²¹ On rehearing, the Commission explained that ISOs provide a new scope of functions for which customers should pay:

[B]y combining the pre-ISO control areas and eliminating pancaked rates, the ISO operations allow greater access to generation alternatives so that the ISO can provide ancillary services to the existing transmission contracts in the most cost-effective and efficient manner possible on a broad regional basis. Regional planning and operation of the combined ISO grid maximizes efficiencies when compared to the pre-existing utility operations. Consolidating scheduling maximizes transmission usage,

reduces ancillary services requirements and provides greater reliability by

²¹ California Independent System Operator Corporation, Opinion No. 463, 103 FERC ¶ 61,114 at P 46 (2003), order on reh’g, Opinion No. 463-A, 106 FERC ¶ 61,032 (2004).

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allowing the operation of more facilities to respond to contingencies. The customers receiving these new services should pay their share of them.²²

The Midwest ISO TOs may make a filing with the Commission that proposes, as PG&E's filing did, to recover Schedule 16 and 17 costs from their customers as new services.

The Commission orders:

The Midwest ISO TOs' request for rehearing is hereby denied, and clarification is hereby provided, as discussed in the body of this order.

By the Commission. Commissioner Kelliher concurring with a separate statement attached.

(S E A L)

Magalie R. Salas,
Secretary.

²² Opinion No. 463-A at P 26.

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Joseph T. KELLIHER, Commissioner *concurring*:

1. I write separately to address the section of the order that invites the Midwest ISO Transmission Owners to make a filing with the Commission that proposes to recover Schedule 16 and 17 costs from the holders of existing contracts as “new services.” In setting forth this option, the Commission notes that it recently permitted Pacific Gas & Electric Company (PG&E) to pass through costs to its transmission customers as “a new and different service in addition to the service they already receive” in Opinion No. 463.¹

2. As I explained in Opinion No. 463-A, in my view there was no demonstration that the service that the transmission customers receive is, in fact, a new service warranting the imposition of costs that would otherwise be unrecoverable under the existing transmission contracts.² Rather, at hearing, the Commission’s Trial Staff concluded that there is no new service justifying pass through of the Grid Management Charge (GMC) to Control Area Agreement (CAA) Customers because no new benefit is conferred under the Pass-Through Tariff and the CAA Customers do not receive anything above and beyond the service PG&E used to provide.³ According to Trial Staff, “[A]ll that has changed is the manner in

¹ California Independent System Operator Corporation *et al.*, Opinion No. 463, 103 FERC ¶ 61,114 at P 46 (2003), *order on reh’g*, Opinion No. 463-A, 106 FERC ¶ 61,032 (2004).

² *Id.* at 61,119 (Kelliher, dissenting in part).

³ California Independent System Operator Corporation *et al.*, 99 FERC ¶ 63,020 at 65,161 (2002).

which service is procured for the same CAA Customers. PG&E is procuring service from a new control area operator (the ISO) instead of providing the service itself as a control area operator.”⁴ I agreed.

3. In order to grant recovery of Schedule 16 and 17 costs as new services, it would seem to be necessary to determine, as an initial matter, what services are provided under the existing contracts. That may not be an easy matter. In this instance, the Midwest ISO Transmission Owners have provided virtually no information about the nature of the contracts in question, contracts they have asked the Commission to generically reform.⁵ They have described these contracts as “wholesale contracts”, a category that presumably includes both wholesale power sales and transmission contracts. The scope of services provided under these contracts may vary significantly. It would also seem necessary to determine that the contract holders are in fact actually receiving new services, not merely that new services are available to them.

4. In my view, a general declaration that benefits spring from the establishment of MISO would be an insufficient basis for allowing passthrough under a “new services” rationale. Accordingly, in the event Midwest ISO Transmission Owners make a filing with the Commission that proposes to recover Schedule 16 and 17 costs from the holders of existing contracts as new services, I believe the appropriate course would be to set the filing for hearing to determine as a factual matter what services are provided under the existing contracts, and whether customers are indeed receiving new services.

Joseph T. Kelliher

⁴ Id. at 65,165.

⁵ Order at P17.