

124 FERC ¶ 61,173
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Ameren Services Company
Northern Indiana Public Service Company

Docket No. EL07-86-000

v.

Midwest Independent Transmission System Operator,
Inc.

Great Lakes Utilities
Indiana Municipal Power Agency
Missouri Joint Municipal Electric Utility Commission
Missouri River Energy Services
Prairie Power, Inc.
Southern Minnesota Municipal Power Agency
Wisconsin Public Power Inc.

Docket No. EL07-88-000

v.

Midwest Independent Transmission System Operator,
Inc.

Wabash Valley Power Association, Inc.

Docket No. EL07-92-000

v.

Midwest Independent Transmission System Operator,
Inc.

ORDER COMMENCING PAPER HEARING

(Issued August 21, 2008)

1. In this order, the Commission orders the commencement of a paper hearing established in this proceeding in an order issued on November 28, 2007¹ and provides further clarification on the scope of the paper hearing.

I. Background

2. In August 2007, Ameren Services Company and Northern Indiana Public Service Company; Great Lakes Utilities, Indiana Municipal Power Agency, Missouri Joint Municipal Electric Utility Commission, Missouri River Energy Services, Prairie Power, Inc., Southern Minnesota Municipal Power Agency, and Wisconsin Public Power Inc.; and Wabash Valley Power Association, Inc. (collectively Complainants) filed three complaints pursuant to section 206 of the Federal Power Act (FPA)² and Rule 206 of the Commission's Rules of Practice and Procedure³ against the Midwest Independent Transmission System Operator, Inc. (Midwest ISO). These complaints concern the allocation of Revenue Sufficiency Guarantee (RSG) charges to market participants under the Midwest ISO's Open Access Transmission and Energy Markets Tariff (TEMT).⁴ The Complainants alleged that the RSG rate, which is based in part on total virtual supply offers, is unjustly and unreasonably assessed on only a subset of virtual supply offers. Complainants argued that there is no justification for differentiating among virtual supply offers with regard to RSG charge allocation and that the Commission's prior orders have found that there is no basis to do so. Complainants asked that the Commission set for hearing the issue of the revisions to the TEMT necessary to remedy this alleged discrimination.

3. In the Order on RSG Complaints, the Commission granted in part and denied in part the relief requested in the complaints. The Commission found that the Midwest ISO's existing RSG cost allocation methodology may not be just and reasonable, but the RSG cost allocation methodologies Complainants proposed had not been shown to be just and reasonable. The Commission thus established a refund effective date of August 10, 2007 and set the complaints for paper hearing and investigation to review evidence and to establish a just and reasonable RSG cost allocation methodology. The Commission also held the paper hearing in abeyance pending the conclusion of a then-ongoing stakeholder

¹ *Ameren Servs. Co. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 121 FERC ¶ 61,205 (2007) (Order on RSG Complaints).

² 16 U.S.C. § 824e (2006).

³ 18 C.F.R. § 385.206 (2008).

⁴ Additional background to this proceeding is found in the Order on RSG Complaints, 121 FERC ¶ 61,205 at P 5-9.

proceeding by the Midwest ISO RSG Task Force that was seeking to identify improvements that could be made to the RSG cost allocation methodology or February 1, 2008, whichever is earlier.

4. On February 1, 2008, the Midwest ISO made an informational filing stating that it is not able to meet the February 1, 2008 deadline set in the Order on RSG Complaints because the RSG Task Force was still in negotiations. The Midwest ISO proposed to file specific tariff provisions and supporting documentation on or about March 3, 2008.

5. On March 3, 2008, the Midwest ISO filed what it refers to as “indicative” revisions to the TEMT that reflect an alternative mechanism for allocating RSG charges and costs. The Midwest ISO explains that these provisions represent a new real-time RSG cost allocation methodology that was developed based on the principles agreed upon in stakeholder discussions but that has not yet been conformed to incorporate the Midwest ISO’s new Ancillary Services Markets (ASM) market design elements. The Midwest ISO submits that the Commission should determine whether the language in its indicative revisions represents a just and reasonable basis for a subsequent section 205 filing that would replace the RSG cost allocation methodology for the ASM. The Midwest ISO states that if the Commission determines that the proposed indicative TEMT language is a just and reasonable basis for further developing provisions that would adapt the new RSG cost allocation methodology to the ASM context, it would agree to file, within approximately 60 days from that determination, ASM-specific TEMT provisions embodying this suggested new allocation methodology. Within that period, the Midwest ISO would work with stakeholders to develop ASM-adapted TEMT language, and determine whether additional cost causation analysis is required for such purpose.

II. Notice of Filing

6. Notice of the Midwest ISO’s filing was published in the *Federal Register*, 73 Fed. Reg. 14,240 (2008), with interventions and protests due on or before March 24, 2008. Numerous comments, protests or answers were filed. Timely motions to intervene were filed by Constellation Energy Commodities Group, Inc. and Constellation NewEnergy, Inc.; Cargill Power Markets, LLC; and Epic Merchant Energy, LP and SESCO Enterprises LLC. Timely notices of intervention were filed by the Organization of MISO States, Inc. and the Public Service Commission of Wisconsin. The Illinois Commerce Commission (Illinois Commission) and the Midwest ISO’s Independent Market Monitor (IMM) filed motions to intervene out of time.

7. Pursuant to Rule 214 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2008), the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. We will grant the motions to intervene out of time filed by the Illinois Commission and the IMM.

III. Commission Determination

8. When the Commission established a paper hearing in the Order on RSG Complaints, it held that process in abeyance in light of a then-ongoing stakeholder proceeding that might have resolved the issues raised by the Complainants. The Midwest ISO has informed us that this resolution did not occur by the date specified, i.e., February 1, 2008, but it has nevertheless submitted TEMT revisions that it states reflect an alternative mechanism for allocating RSG charges and costs. The Midwest ISO seeks Commission approval of those TEMT revisions. We decline to act on that request, as it is inconsistent with the current procedural posture of this complaint proceeding.

9. Under section 206(b) of the FPA, the burden of proof in this proceeding rests with the Complainants.⁵ It therefore is the Complainants' responsibility to demonstrate, on the basis of substantial evidence, both that the rate in effect is unjust and unreasonable and that their proposed alternative rate is just and reasonable. While we appreciate the Midwest ISO's efforts in developing new approaches to allocating RSG costs, it is not the Midwest ISO's responsibility to propose and justify a new cost allocation. The Midwest ISO's indicative proposal is procedurally inconsistent with the current posture of this proceeding because the Midwest ISO is not the complainant but rather the party to which the complaints are directed. We can rule on the complaints only on the basis of submissions made by the Complainants in which they undertake to meet the burdens that the statute places upon them. A new proposal by the Midwest ISO cannot form an alternative basis, and for this reason we will not evaluate the merits of the Midwest ISO's indicative revisions to the TEMT or address the mechanism through which the Midwest ISO's proposal allocates costs to various cost categories.

10. We found in the RSG Complaint Order that a paper hearing is the most appropriate means for the Complainants to state their positions and to provide explanations, analysis and other materials to support those positions.⁶ A paper hearing will also afford an adequate opportunity for parties opposed to the Complainants' position to challenge the complaints. We do not consider a trial-type evidentiary hearing suitable to this issue. The only party with data that can illuminate the issue of what the rate should properly be, the Midwest ISO, has provided additional data and analysis in its March 3, 2008 filing and has made that information available to all parties. Considering that there are no issues of material fact, we find that no purpose would be served with the cross-examination of witnesses.

⁵ *E.g., New York v. FERC*, 642 F.2d 1335, 1345 (D.C. Cir 1980).

⁶ Order on RSG Complaints, 121 FERC ¶ 61,205 at P 84.

11. We set the following dates for the paper hearing schedule:

Filing of Briefs by Complainants: September 22, 2008

Filing of Reply Briefs: October 20, 2008

12. With respect to the scope of the paper hearing, we note the following. In order for a section 206 complaint to succeed, the existing rate must be shown to be unjust and unreasonable, and an alternative, just and reasonable rate must be adopted instead. In order to determine what that alternative rate should be, we expect parties to provide evidence bearing on the appropriate cost allocation for the RSG charge. A basis of a just and reasonable cost allocation is cost causation. Therefore, we will permit Complainants and other parties to include cost causation evidence in the paper hearing process. With respect to market impacts, we will not require Complainants and other parties to offer evidence, in the form of information or estimates, on what the market impact of the proposed cost allocation may be in the Midwest ISO energy market or on the benefits of virtual supply offers. While we clarify that parties can raise such concerns and offer relevant information into the record, the primary task of the section 206 proceeding, as stated in the Order on RSG Complaints, is to determine whether the existing rate is unjust and unreasonable and if so, what would be a just and reasonable rate.

13. Since our concern in this order is solely with matters of procedure and related issues pertinent to implementing the paper hearing process, we will not address here the various substantive arguments the parties have raised in response to the Midwest ISO's indicative proposal. The parties are free to restate those arguments as they see fit in the course of the paper hearing.

The Commission orders:

(A) The Commission hereby directs commencement of the paper hearing instituted in the Order on RSG Complaints 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 by the Federal Power Act, particularly sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R., Chapter 1), a paper hearing shall be held as discussed in the body of the order. The Commission directs Complainants to file briefs on the issues set for paper hearing within 30 days of the issuance of this order. Reply briefs are due 50 days from the issuance of this order. Each party's presentation should separately state the facts and arguments advanced by the party and include any and all exhibits, affidavits, and/or prepared testimony upon which

the party relies. The statement of facts must include citations to the supporting exhibits, affidavits and/or prepared testimony. All materials must be verified and subscribed as set forth in 18 C.F.R. § 385.2005 (2008).

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.