

125 FERC ¶ 61,163
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

E.ON U.S. LLC

Docket No. EL07-100-001

v.

Midwest Independent Transmission System Operator,
Inc.

ORDER ON REHEARING

(Issued November 10, 2008)

1. On November 28, 2007, the Commission issued an order denying the relief requested by E.ON U.S. LLC (E.ON) in its September 17, 2007 complaint against the Midwest Independent Transmission System Operator, Inc. (Midwest ISO). That complaint concerned the allocation of Revenue Sufficiency Guarantee (RSG) charges to market participants under the Midwest ISO's Open Access Transmission and Energy Markets Tariff (tariff).¹ This order addresses a request for clarification and/or rehearing of the E.ON Complaint Order. For the reasons discussed below, we deny the request for clarification and/or rehearing.

I. Background

A. On-Going Proceedings in Docket No. ER04-691

2. The Midwest ISO's tariff charges market participants withdrawing energy in the real-time energy market a real-time Revenue Sufficiency Guarantee charge based on their virtual supply offers and real-time load, injection, export and import deviations.² The

¹ *E.ON U.S. LLC v. Midwest Indep. Transmission Sys. Operator, Inc.*, 121 FERC ¶ 61,206 (2007) (E.ON Complaint Order).

² See section 40.3.3.a.ii of the Midwest ISO tariff.

purpose of the Revenue Sufficiency Guarantee charge is to ensure that any generator scheduled or dispatched by the Midwest ISO after the close of the day-ahead energy market – either through the Reliability Assessment Commitment or the real-time energy market – will receive no less than its offer price for start-up, no-load and incremental energy. Revenue Sufficiency Guarantee credits are paid to units scheduled in the Reliability Assessment Commitment or in the real-time market that do not earn sufficient real-time energy revenues to cover start-up and no-load costs.

3. On April 25, 2006, the Commission issued an order rejecting the Midwest ISO's proposal to, among other things, remove references to virtual supply from the tariff provisions related to calculating Revenue Sufficiency Guarantee charges.³ The Commission further found that because the Midwest ISO had not been including virtual supply offers in its Revenue Sufficiency Guarantee calculations, it had violated its tariff and must make appropriate refunds.⁴ However, the requests for rehearing of the Initial Order persuaded the Commission to change course and exercise its equitable discretion not to require refunds for the Midwest ISO's failure to include virtual supply offers in its calculation of Revenue Sufficiency Guarantee charges.⁵

4. On March 15, 2007, the Commission issued two orders regarding the Midwest ISO's Revenue Sufficiency Guarantee charges, the Second Rehearing Order and the Compliance Order.⁶ In the Second Rehearing Order, the Commission reiterated that “the Midwest ISO's tariff requires allocation of Revenue Sufficiency Guarantee costs to virtual supply offers, and . . . the Midwest ISO violated its tariff by failing to do so. There no longer seems to be any dispute that this is how the tariff should properly be read.”⁷ The Commission then revisited the issue of whether to exercise its discretion to require refunds, but based on a balancing of equities, reaffirmed its prior decision not to impose refunds.⁸ In the Compliance Order, the Commission found that the Midwest ISO

³ *Midwest Indep. Transmission Sys. Operator, Inc.*, 115 FERC ¶ 61,108, at P 48-49 (Initial Order), *order on reh'g*, 117 FERC ¶ 61,113 (2006) (First Rehearing Order), *order on reh'g*, 118 FERC ¶ 61,212 (Second Rehearing Order), *order on reh'g*, 121 FERC ¶ 61,131 (2007) (Third Rehearing Order).

⁴ Initial Order, 115 FERC ¶ 61,108 at P 26.

⁵ First Rehearing Order, 117 FERC ¶ 61,113 at P 92-96.

⁶ *Midwest Indep. Transmission Sys. Operator, Inc.*, 118 FERC ¶ 61,213 (2007) (Compliance Order), *order on reh'g*, Third Rehearing Order, 121 FERC ¶ 61,131.

⁷ Second Rehearing Order, 118 FERC ¶ 61,212 at P 88 (internal citation omitted).

⁸ *Id.* P 88-98.

failed to analyze the relationship between virtual supply offers and Revenue Sufficiency Guarantee cost incurrence. The Commission, therefore, rejected the Midwest ISO's proposal to allocate costs based on net virtual offers, i.e., virtual offers minus virtual bids, and clarified that the currently-effective tariff, which allocates Revenue Sufficiency Guarantee costs to virtual supply offers, remains in effect.⁹ On November 5, 2007, the Commission denied rehearing of the Second Rehearing Order and Compliance Order and conditionally accepted a further compliance filing.¹⁰

B. Prior Revenue Sufficiency Guarantee Complaints

5. In August and September 2007, several entities filed complaints challenging the justness and reasonableness of the Midwest ISO's existing cost allocation for Revenue Sufficiency Guarantee charges (collectively, Prior Revenue Sufficiency Guarantee Complaints).¹¹ The Commission issued an order granting in part and denying in part the relief requested in the Prior Revenue Sufficiency Guarantee Complaints, finding that the Midwest ISO's existing cost allocation methodology may not be just and reasonable. The Commission established a refund effective date of August 10, 2007 and paper hearing procedures to review evidence and to establish a just and reasonable Revenue Sufficiency Guarantee cost allocation methodology. The Commission held the paper hearing in abeyance pending the conclusion of the ongoing activities of the Revenue Sufficiency Guarantee Task Force – a group of Midwest ISO stakeholders that has been working to

⁹ Compliance Order, 118 FERC ¶ 61,213 at P 92-93.

¹⁰ Third Rehearing Order, 121 FERC ¶ 61,131; *Midwest Indep. Transmission Sys. Operator, Inc.*, 121 FERC ¶ 61,132 (2007) (Second Compliance Order). An order on requests for rehearing and compliance as to the Second Compliance Order was issued November 7, 2008, in Docket Nos. ER04-691-088 and ER04-691-089. *Midwest Indep. Transmission Sys. Operator, Inc.*, 125 FERC ¶ 61,156 (2008).

¹¹ In each of those proceedings, complainants filed a complaint under section 206 of the Federal Power Act (FPA), 16 U.S.C. § 824e (2000), against the Midwest ISO with respect to the allocation of Revenue Sufficiency Guarantee charges to market participants under the Midwest ISO's tariff. Docket No. EL07-86-000 involves a complaint by Ameren Services Company, on behalf of certain of its affiliates, and Northern Indiana Public Service Company (collectively, Ameren/NIPSCO). Docket No. EL07-88-000 involves a complaint by Great Lakes Utilities, Indiana Municipal Power Agency, Midwest Municipal Transmission Group, Missouri Joint Municipal Electric Utility Commission, Missouri River Energy Services, Prairie Power, Inc., Southern Minnesota Municipal Power Agency, and Wisconsin Public Power Inc. (collectively, the Midwest TDUs). Docket No. EL07-92-000 involves a complaint by Wabash Valley Power Association, Inc. (Wabash).

identify improvements to the Revenue Sufficiency Guarantee cost allocation methodology – or February 1, 2008, whichever is earlier. The Commission consolidated the three Prior Revenue Sufficiency Guarantee Complaints because they raise common issues of law and fact, but denied E.ON's request to consolidate the instant Complaint with the Prior Revenue Sufficiency Guarantee Complaints.¹²

C. Revenue Sufficiency Guarantee Task Force

6. Beginning in November 2005, the Revenue Sufficiency Guarantee Task Force sought improvements that could be made to the Revenue Sufficiency Guarantee cost allocation methodology. On February 1, 2008, the Midwest ISO filed an informational filing describing the stakeholder proceedings and the resulting consensus proposal.

D. E.ON Complaint

7. E.ON's September 17, 2007 complaint alleged that the Midwest ISO was erroneously resettling the hourly Revenue Sufficiency Guarantee rate for the period April 1, 2005 through April 24, 2006, even though the Commission did not order refunds for that period. E.ON also objected to the Midwest ISO's recalculation of the hourly Revenue Sufficiency Guarantee rate for this time period to include megawatt-hours of cleared day-ahead virtual supply, which it alleged caused, among other things, an under-recovery of Revenue Sufficiency Guarantee costs and an increase in second-pass Revenue Neutrality Uplift charges. E.ON asked the Commission to direct the Midwest ISO to: (i) correct its erroneous resettlement process; (ii) rerun the resettlements; and (iii) refund amounts disproportionately allocated to market participants by the erroneous initial resettlements. The Commission denied the relief that E.ON requested, finding that the Midwest ISO had correctly implemented the Revenue Sufficiency Guarantee charge and rate according to the terms of the currently-effective tariff.

8. E.ON's complaint also alleged that the Midwest ISO was erroneously resettling the hourly Revenue Sufficiency Guarantee rate for the period beginning on April 25, 2006 because it was not assessing the recalculated Revenue Sufficiency Guarantee rate to all cleared day-ahead virtual supply transactions. E.ON stated that the Midwest ISO's failure to charge Revenue Sufficiency Guarantee costs to all cleared day-ahead virtual supply transactions resulted in net additional charges to E.ON due to the revenue shortfall that is being recovered through the second-pass Revenue Neutrality Uplift charge. The Commission also denied E.ON's requested relief on this point, finding that the tariff and Commission prior orders restricted the allocation of Revenue Sufficiency Guarantee

¹² *Ameren Servs. Co. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 121 FERC ¶ 61,205 (2007) (Order on Complaints). An order on requests for clarification and/or rehearing of the Order on Complaints is being issued concurrently.

charges to market participants withdrawing energy, and the proper definition of energy in the real-time market is physical energy.

II. Requests for Clarification and/or Rehearing

9. As further described below, Indianapolis Power & Light Company (Indianapolis Power & Light) filed a timely request for clarification and/or rehearing of the E.ON Complaint Order.

10. On December 18, 2007, Otter Tail Power Company (Otter Tail) filed a motion for leave to intervene out of time and request for clarification and/or rehearing. On January 17, 2008, Otter Tail filed a motion for leave to answer and answer to Indianapolis Power & Light's request for clarification and/or rehearing.

III. Discussion

A. Procedural Matters

11. When late intervention is sought after the issuance of a dispositive order, the prejudice to parties and the burden upon the Commission of granting the late intervention may be substantial. Thus, movants bear a higher burden to demonstrate good cause for granting such late intervention. Otter Tail has not met this higher burden of justifying its late intervention.¹³

12. In light of our decision to deny Otter Tail's late motion to intervene, we will dismiss Otter Tail's request for rehearing. Because Otter Tail is not a party to this proceeding, it lacks standing to seek rehearing of the E.ON Complaint Order under the Federal Power Act and the Commission's regulations.¹⁴

13. Moreover, even if we were to accept Otter Tail's motion to intervene out of time, Rule 713(d)(1) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d)(1) (2008), prohibits answers to requests for rehearing.

B. Request for Clarification and/or Rehearing

14. Indianapolis Power & Light argues that it is necessary to harmonize the E.ON Complaint Order with the other Revenue Sufficiency Guarantee-related orders, including

¹³ See, e.g., *Midwest Indep. Transmission Sys. Operator, Inc.*, 102 FERC ¶ 61,250, at P 7 (2003).

¹⁴ See 16 U.S.C. § 825(a) (2000 & Supp V 2005); 18 C.F.R. § 385.713(b) (2007); *Southern Co. Servs., Inc.*, 92 FERC ¶ 61,167 (2000).

the Order on Complaints. It requests the Commission to clarify that a determination of the Revenue Sufficiency Guarantee rate must be based on the entities that will be charged the Revenue Sufficiency Guarantee costs and that it does not include virtual supply offers by entities that do not physically withdraw energy that day. Indianapolis Power & Light argues that the Midwest ISO has included a large class of billing determinants that cannot be charged, which creates a substantial uplift problem.¹⁵ The Commission should clarify that no mismatch was intended and that the original calculations and billings can remain in place. Indianapolis Power & Light argues that the Commission alternatively could clarify that the E.ON Complaint Order contemplated adding back into the denominator (for the April 2005 - April 2006 time period) only the virtual supply offers for entities that actually withdrew energy that day.

15. Indianapolis Power & Light maintains that the Second Compliance Order issued on November 5, 2007 articulated the principle that costs must be allocated only to entities responsible for the expense and stated that “the [Revenue Sufficiency Guarantee] rate denominator is the aggregate of the amounts for market participants withdrawing energy on that day, since they are entities being assessed the [Revenue Sufficiency Guarantee] charge.” Indianapolis Power & Light states that the Commission reiterated this point in the Order on Complaints. But according to Indianapolis Power & Light, the Commission appears in the E.ON Complaint Order to imply that there is a mismatch in the Revenue Sufficiency Guarantee charge.

16. Indianapolis Power & Light maintains that the Midwest ISO has misinterpreted the Commission’s Revenue Sufficiency Guarantee orders. The Midwest ISO recalculated the Revenue Sufficiency Guarantee rate by adding into the denominator not just the virtual supply offers of market participants making actual energy withdrawals that same day, but also virtual supply offers of entities that did not make physical withdrawals of energy. According to Indianapolis Power & Light, this created a situation where the Revenue Sufficiency Guarantee rate recovers less than half of the Revenue Sufficiency Guarantee costs.

17. Indianapolis Power & Light submits that the Commission should request a remand of the pending court appeal and require the Midwest ISO to charge the true as-filed rate beginning with the commencement of market operations. If the Commission does not do this, the Midwest ISO should be required to leave the rate that was also originally charged to the other entities in place rather than creating an unrecoverable rate that would need to be made up by general uplift charges to all load serving entities. At a minimum,

¹⁵ Indianapolis Power & Light raises the same arguments concerning a mismatch in its request for rehearing of the Order on Complaints, its request for rehearing of the Second Compliance Order, and its protest of the Midwest ISO’s December 5, 2007 compliance filing in response to the Second Compliance Order.

the Commission must ensure that the Revenue Sufficiency Guarantee rate calculation includes only the virtual supply offers that actually withdrew energy on a given day and not all virtual supply offers.

18. Indianapolis Power & Light argues that the Commission should direct the Midwest ISO to recalculate the Revenue Sufficiency Guarantee rate based on three distinct time periods. From the commencement of the Midwest ISO market on April 1, 2005 until April 24, 2006 the Revenue Sufficiency Guarantee rate should include all market participants making a withdrawal of energy except any virtual supply offers – in essence based on the Commission’s determination to forego refunds. The Commission should also order the Midwest ISO to forego adding any virtual supply offers to the denominator. At a minimum, the Commission should clarify that it never intended that all virtual supply offers be included in the denominator. Second, for the period from April 2006 to August 2007, the Revenue Sufficiency Guarantee rate should include all market participants withdrawing energy in the operating day, including entities that accepted virtual supply offers and also withdrew energy in the operating day. Finally, for the period beginning on August 10, 2007, the Revenue Sufficiency Guarantee rate should be determined in accordance with the new rate produced by the proceedings ordered in the Order on Complaints.

C. Commission Determination

19. We deny Indianapolis Power & Light’s request for clarification. Indianapolis Power & Light does not make any arguments that would warrant clarification and/or rehearing of the Commission’s findings in the original Revenue Sufficiency Guarantee proceeding. In the concurrently-issued order on rehearing and compliance in Docket Nos. ER04-691-088 and ER04-691-089, and the concurrently-issued order on rehearing of the Order on Complaints, the Commission provides a further discussion of what are the applicable tariff provisions and whether refunds/resettlements are warranted. We note that the issues raised by Indianapolis Power & Light in this proceeding are discussed in detail in those orders.

The Commission orders:

The request for clarification and/or rehearing of the E.ON Complaint Order is hereby denied, as discussed in the body of this order.

By the Commission. Commissioner Moeller not participating.

(S E A L)

Kimberly D. Bose,
Secretary.