

127 FERC ¶ 61,015
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Midwest Independent Transmission
System Operator, Inc.

Docket No. ER09-561-000

Midwest Independent Transmission
System Operator, Inc.

Docket No. ER09-654-000

ORDER ACCEPTING AND SUSPENDING PROPOSED TERMINATION OF
AGREEMENTS, SUBJECT TO A FURTHER COMMISSION ORDER

(Issued April 3, 2009)

1. Midwest Independent Transmission System Operator, Inc. (Midwest ISO) requests to terminate two Market Participant Agreements (Agreements) pursuant to the Federal Power Act and section 7.8 of Midwest ISO's Open Access Transmission, Energy and Operating Reserves Market Tariff (Tariff).¹ The Agreements for which Midwest ISO requests termination are between it and Olde Towne Energy Associates, LLC (Olde Towne) and between it and JJR Power, LLC (JJR Power). As discussed below, we accept the proposed terminations, and suspend them for five months, to become effective August 23, 2009 (Docket No. ER09-561-000) and September 6, 2009 (Docket No. ER09-654-000), subject to refund and subject to a further Commission order.

I. Background

A. Credit Requirements for Market Participants

2. Midwest ISO and Olde Towne entered into an agreement dated July 21, 2005, to grant Olde Towne market participant status under the Tariff. Midwest ISO and JJR Power entered into an agreement dated January 29, 2007 to grant JJR Power market

¹ See FERC Electric Tariff, Fourth Revised Vol. No. 1.

participant status under the Tariff. Pursuant to the Tariff and the Agreements, Midwest ISO provided services to Olde Towne and JJR Power, including access to the markets operated by Midwest ISO.

3. Midwest ISO requires market participants to meet, and remain in compliance with, the credit policy set forth in Attachment L of the Tariff.² To ensure that market participants/tariff customers remain in compliance with the credit policy, Midwest ISO regularly monitors each tariff customer's use of services and associated credit obligations.³ Midwest ISO monitors and manages a market participant's creditworthiness by reference to its Total Potential Exposure⁴ and Total Credit Limit.⁵ Midwest ISO's credit policy requires market participants to maintain their Total Potential Exposure at an amount that is equal to or less than its Total Credit Limit at all times.⁶

4. In addition, when a market participant's Total Potential Exposure equals or exceeds ninety percent of its Total Credit Limit, Midwest ISO is required to promptly notify the market participant in writing.⁷ In the event a tariff customer's Total Potential Exposure exceeds its Total Credit Limit, the market participant has two business days from receipt of written notification of the occurrence of such event to reduce its Total Potential Exposure by (i) paying invoiced amounts to reduce the tariff customer's Total Potential Exposure and/or (ii) providing financial security in an amount sufficient to increase the tariff customer's Total Credit Limit as required by the credit policy.⁸

² The credit policy outlined in Attachment L of the Tariff (beginning at Sheet No. 2466) refers to tariff customers, which include transmission customers, market participants and coordination customers.

³ Attachment L of Tariff, sections II.E and II.F.

⁴ Total Potential Exposure is defined as the cumulative financial obligation for credit monitoring purposes.

⁵ Total Credit Limit is defined as the sum of its Unsecured Credit Allowance (i.e., amount of granted credit not backed by collateral) and any provided financial security (i.e., posted collateral).

⁶ Attachment L of Tariff, section II.E.

⁷ *Id.*

⁸ *Id.* at section II.F, IV.B.

B. Revenue Sufficiency Guarantee Proceedings

5. On November 10, 2008,⁹ the Commission issued an order on a paper hearing in Docket Nos. EL07-86-000, *et al.* that, among other things, found that the allocation of the Midwest ISO Tariff's Revenue Sufficiency Guarantee charge¹⁰ was unduly discriminatory, unjust and unreasonable.¹¹ The Commission ordered refunds and also that the Tariff be revised to remove language that referenced physical energy withdrawals. The Commission noted that the language to be removed had caused certain market participants that generated Revenue Sufficiency Guarantee costs to be exempt from the charges, and that these costs had instead been allocated to other market participants.¹²

6. On December 10, 2008, Midwest ISO submitted its compliance filing in response to the directives of the November 10 Order (December 10 Compliance Filing). Several parties filed protests and comments regarding the December 10 Compliance Filing and, on January 23, 2009, several parties jointly filed an Emergency Motion and Request for Stay in that proceeding.

II. The Filings

A. Docket No. ER09-561-000

7. On January 6, 2009, Midwest ISO settled Revenue Sufficiency Guarantee charges of Olde Towne (applicable to the operating days of September 23, 2008, and November 12, 2008, based on the December 10 Compliance Filing), which resulted in Olde Towne's Total Potential Exposure exceeding its Total Credit Limit. On January 7, 2009, Midwest ISO notified Olde Towne that it was required to provide additional

⁹ *Ameren Services Co., v. Midwest Independent Transmission System Operator, Inc.*, 125 FERC ¶ 61,161 (2008) (November 10 Order).

¹⁰ The Revenue Sufficiency Guarantee charge recovers start-up, no-load and incremental costs of generators that are not recovered in the locational marginal price. *See* November 10 Order, 125 FERC ¶ 61,161 at P 11.

¹¹ According to the Commission, the evidence indicated that there was no cost-causation basis for charging certain market participants Revenue Sufficiency Guarantee charges because they withdraw energy on a day, while exempting other market participants engaged in the same activities from the same charge because they are not withdrawing energy that day. *See* November 10 Order, 125 FERC ¶ 61,161 at P 39.

¹² *See* November 10 Order, 125 FERC ¶ 61,161 at P 141-42.

financial assurances within two business days, i.e., by January 9, 2009, or it would be considered in default.

8. On January 12, 2009, Midwest ISO filed a Notice of Suspension of Services with the Commission pursuant to section 7.14(a)(2) of the Tariff. On that same day, Midwest ISO also sent a Notification of Suspension of Services and Termination of Market Participant Agreement (Olde Towne Notice) to Olde Towne. The Notice stated that Olde Towne failed to cure a Total Potential Exposure violation and, as a result, Midwest ISO was suspending all services under its service agreements, Market Participant Agreement and other agreements on January 13, 2009, pursuant to section 7.14(a)(2) of the Tariff. In addition, the Notice stated that Midwest ISO would file to terminate Olde Towne's Market Participant Agreement.

9. On January 21, 2009, as supplemented on February 4, 2009¹³ and February 12, 2009,¹⁴ Midwest ISO requested Commission permission to terminate Olde Towne's Market Participant Agreement effective January 22, 2009. Midwest ISO requests waiver of the Commission's 60-day prior notice requirement to accommodate its requested effective date. Midwest ISO also requests privileged and confidential treatment regarding Olde Towne's Total Potential Exposure, Total Credit Limit, and past due amounts.

B. Docket No. ER09-654-000

10. On January 6, 2009, Midwest ISO began settling Revenue Sufficiency Guarantee charges of JJR Power (applicable to the period beginning September 23, 2008) that contributed to its Total Potential Exposure exceeding its Total Credit Limit. On Friday, January 23, 2009, Midwest ISO delivered to JJR Power a written notice requiring it to provide additional financial assurances within two business days, i.e., by Tuesday, January 27, 2009, or it would be considered in default.

11. On January 28, 2009, Midwest ISO filed a Notice of Suspension of Services with the Commission pursuant to section 7.14(a)(2) of the Tariff. On that same day, Midwest ISO also sent a Notification of Suspension of Services and Termination of Market Participant Agreement (JJR Power Notice) to JJR Power. The Notice stated that JJR Power failed to cure a Total Potential Exposure violation and, as a result, Midwest ISO

¹³ The February 4, 2009 filing provided notice that Olde Towne was again in default for failure to pay invoices when due.

¹⁴ The February 12, 2009 filing retracted a request made in Midwest ISO's January 21, 2009 filing for Commission guidance on the limits and timing of disclosures of information with regard to defaulting market participants.

was suspending all services under its service agreements, Market Participant Agreement and other agreements on January 29, 2009, pursuant to section 7.14(a)(2) of the Tariff. In addition, the Notice stated that Midwest ISO would file to terminate JJR Power's Market Participant Agreement.¹⁵

12. On February 4, 2009, Midwest ISO filed its request for Commission approval to terminate the Agreement with JJR Power effective February 5, 2009.¹⁶ Midwest ISO requests waiver of the Commission's 60-day prior notice requirement to accommodate its requested effective date. Midwest ISO also requests privileged and confidential treatment regarding the amounts of JJR Power's Total Potential Exposure and Total Credit Limit.

III. Notices of Filings and Responsive Pleadings

13. Notices of Midwest ISO's filings for Docket No. ER09-561-000 were published in the *Federal Register*, 74 Fed. Reg. 6151, 7882 and 8525 (2009), with interventions and protests due on or before February 11, 2009, February 25, 2009 and March 5, 2009 respectively. Notice of Midwest ISO's filing for Docket No. ER09-654-000 was published in the *Federal Register*, 74 Fed. Reg. 8525 (2009), with interventions and protests due on or before February 25, 2009.

14. Timely, unopposed motions to intervene, without comments, were filed by American Municipal Power-Ohio, Inc. in both dockets and by Duke Energy Corporation on behalf of its affiliates¹⁷ in Docket No. ER09-561-000. Olde Towne filed a timely motion to intervene and protest in Docket No. ER09-561-000. JJR Power filed a timely motion to intervene and protest in Docket No. ER09-654-000. Midwest ISO filed answers in Docket Nos. ER09-561-000 and ER09-654-000. Olde Towne and JJR Power filed responses to Midwest ISO's answer.

¹⁵ See Transmittal Letter at n 14. Midwest ISO states that it does not have any service agreements on file with JJR Power.

¹⁶ In the filing, Midwest ISO states that it expects the default to continue and amounts applicable to the default to increase each time Midwest ISO settles payment. Midwest further states that it will continue its practice of sending notice each time JJR Power is affected by a resettlement; however, given this filing to terminate the Agreement, Midwest ISO requests that the filing serve as notice that no further filings are required to report ensuing notices and defaults for JJR Power.

¹⁷ For purposes of this proceeding Duke Energy Corporation's affiliates are: Duke Energy Indiana, Inc., Duke Energy Ohio, Duke Energy Kentucky, Inc., and Duke Energy Business Services, LLC.

15. Olde Towne and JJR Power characterize the suspension notice and proposed termination as an attempt to drive a market participant out of the market based on an illegal resettlement of the market. Olde Towne and JJR Power indicate that they have discontinued trading in the Midwest ISO market and have been driven out of business and irreparably harmed.¹⁸ As described below, they request that the Commission: (1) reject the suspension notice and termination filings, or, at a minimum, direct Midwest ISO to hold them in abeyance pending the latter of an unconditional order approving the December 10 Compliance Filing in Docket No. EL07-86-000 or a final, non-appealable order on the merits therein; (2) direct Midwest ISO to restore their Total Potential Exposure to the level it was at before Midwest ISO began implementing the December 10 Compliance Filing; (3) direct Midwest ISO to correct any invoices issued to Olde Towne and JJR Power based on the December 10 Compliance Filing; and (4) restore their trading privileges and take necessary actions to return Olde Towne and JJR Power to the status quo ante.

16. Olde Towne and JJR Power argue that, even if Midwest ISO has the authority to resettle the Revenue Sufficiency Guarantee charges, which, as relevant here, could give rise to a change in their Total Potential Exposure, Midwest ISO cannot do so here because the calculated charges are wrong. For example, they point out that in the December 10 Compliance Filing, Midwest ISO proposed to exempt seven categories of physical deviations from application of the real-time Revenue Sufficiency Guarantee charges. These exemptions would have the effect of reducing the billing determinants over which Revenue Sufficiency Guarantee costs are spread and increasing the amount of Revenue Sufficiency Guarantee charges borne by those not exempted.¹⁹ They point out that these exemptions are being challenged in other dockets and that the exemptions affect the resettlements.²⁰

17. Olde Towne and JJR Power also assert that the November 10 Order is subject to pending rehearing requests that, in part, challenge how these charges are calculated and that a recently issued Independent Market Monitor Report raises the issue of the actual magnitude of the Revenue Sufficiency Guarantee costs. Consequently, they argue the just and reasonableness of the Revenue Sufficiency Guarantee charges has not been resolved.²¹

¹⁸ Olde Towne Protest at 8; JJR Protest at 9.

¹⁹ Olde Towne Protest at 10; JJR Power Protest at 22.

²⁰ Olde Towne Protest at 11, 19; JJR Power Protest at 22.

²¹ JJR Power Protest at 22.

18. Olde Towne and JJR Power challenge Midwest ISO's authority to implement the resettled Revenue Sufficiency Guarantee charges. They argue that Midwest ISO has no authority to implement the resettlement at issue because it is based on the November 10 Order, which is subject to pending rehearing requests.²² According to Olde Towne and JJR Power, resettlement of real-time Revenue Sufficiency Guarantee charges based on the November 10 Order – and any adjustment to market participants' Total Potential Exposure resulting there from – should be deferred until the latter of an order unconditionally approving the December 10 Compliance Filing or a final, non-appealable order in Docket No. EL07-86-000.²³

19. Olde Towne and JJR Power also argue that Midwest ISO violates section 205 of the Federal Power Act because, although Attachment L provides for adjusting a market participant's Total Potential Exposure based on invoiced amounts, it must be limited to amounts that are legally invoiced. They insist that in order to be lawful, the invoices must reflect rates and charges approved by the Commission and set forth in the Tariff.²⁴

IV. Discussion

A. Procedural Matters

20. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2008), the timely, unopposed motions to intervene serve to make the entities that filed them parties in the dockets in which the motions were filed. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2008), prohibits an answer to a protest or to an answer unless otherwise ordered by the decisional authority. We are not persuaded to accept Midwest ISO's, JJR Power's, or Olde Towne's answers and will, therefore, reject them.

B. Substantive Matters

21. Our preliminary analysis indicates that Midwest ISO's filings have not been shown to be just and reasonable, and may be unjust and unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Therefore, we will accept Midwest ISO's proposed terminations of Market Participant Agreements, suspend them for five months,²⁵ and make them effective August 23, 2009 (Docket No. ER09-561-000) and

²² Olde Towne Protest at 1; JJR Power Protest at 1.

²³ Olde Towne Protest at 3; JJR Power Protest at 19.

²⁴ Olde Towne Protest at 17; JJR Power Protest at 20.

²⁵ See *West Texas Utilities Co.*, 18 FERC ¶ 61,189 (1982).

September 6, 2009 (Docket No. ER09-654-000), subject to refund and subject to a further Commission order.

The Commission orders:

Midwest ISO's proposed terminations of the Market Participant Agreements of Olde Towne and JJR Power are hereby accepted for filing and suspended for a five-month period, to become effective August 23, 2009 (Docket No. ER09-561-000) and September 6, 2009 (Docket No. ER09-654-000), subject to refund, and subject to a further Commission order, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.