

131 FERC ¶ 61,126  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Marc Spitzer, Philip D. Moeller,  
and John R. Norris.

Midwest Independent Transmission  
System Operator, Inc.

Docket No. ER10-863-000

ORDER CONDITIONALLY ACCEPTING REVISED TRANSMISSION OWNERS  
AGREEMENT

(Issued May 10, 2010)

1. On March 11, 2010, Midwest Independent Transmission System Operator, Inc. (Midwest ISO) submitted, under section 205 of the Federal Power Act (FPA),<sup>1</sup> a revised “Agreement of Transmission Facilities Owners to Organize the Midwest Independent Transmission System Operator, Inc., a Delaware Non-Stock Corporation” (Transmission Owners Agreement) in its entirety as Midwest ISO’s Second Revised Rate Schedule FERC No. 1. In this order, we conditionally accept the revised Transmission Owners Agreement, effective May 11, 2010, as discussed below.

**I. Filing**

2. Midwest ISO states that it is revising the Transmission Owners Agreement to correct formatting and typographical errors, remove out of date provisions, make it consistent with prior Commission orders, and update references to the services and activities of Midwest ISO. Midwest ISO explains that the filing is not intended to re-open any matters previously acted on or language previously accepted by the Commission. It also explains that the filing is part of its ongoing efforts to comply with Order No. 714,<sup>2</sup> which requires the electronic submission of tariffs and rate schedules during a transition period later this year. Midwest ISO requests an effective date of May 11, 2010, which will allow it to include the revised Transmission Owners Agreement as part of Midwest ISO’s eTariff baseline filings to be submitted on July 19, 2010.

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<sup>1</sup> 16 U.S.C. § 824d (2006).

<sup>2</sup> *Electronic Tariff Filings*, Order No. 714, FERC Stats. & Regs. ¶ 31,276 (2008).

3. Midwest ISO states that while a majority of its proposed revisions are non-substantive, it is proposing a number of substantive revisions, including: (1) revisions to article I to reflect changes to the industry's reliability organizations; (2) revisions to article II, which contains provisions related to the organization and governance of Midwest ISO, to reflect Midwest ISO's tax exempt status and the evolution of Midwest ISO's markets, and to update provisions related to the start-up period of the organization; (3) the deletion of Appendix J "Revenue Distribution for Schedule 18" consistent with the Commission's decision accepting the proposed deletion of Schedule 18;<sup>3</sup> and (4) revisions to make the language of paragraphs one and six of section VII.C of Appendix E "Framework for Operational Responsibilities" consistent with the Commission's order<sup>4</sup> in Docket No. ER10-128-000.

4. In addition, Midwest ISO proposes to revise certain provisions of Appendix E to include references to reliability requirements. Specifically, Midwest ISO proposes to amend section I.B.9 so that owners and users are obligated to "execute and implement physical security controls as required by applicable [North American Electric Reliability Corporation (NERC)] standards and as more fully set out in related data link agreements between the Midwest ISO and such [o]wners and [u]sers."<sup>5</sup> Similarly, Midwest ISO proposes to revise section V.A.1 to provide that owners and users "shall be responsible for adhering to the standards applicable to the NERC functions for which they are registered."<sup>6</sup> In addition, Midwest ISO proposes to revise section V.B.2 to provide that owners and users shall "comply with the mandatory reliability requirements . . . ."<sup>7</sup>

## **II. Notice of Filing and Responsive Pleadings**

5. Notice of Midwest ISO's filing was published in the *Federal Register*, 75 Fed. Reg. 13,528 (2010), with interventions and protests due on or before April 1, 2010.

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<sup>3</sup> *Midwest Indep. Transmission Sys. Operator, Inc.*, 130 FERC ¶ 61,069 (2010).

<sup>4</sup> *Midwest Indep. Transmission Sys. Operator, Inc.*, 129 FERC ¶ 61,268 (2009).

<sup>5</sup> Midwest ISO's proposed Second Revised Rate Schedule FERC No. 1 at Original Sheet No. 121.

<sup>6</sup> *Id.* Original Sheet No. 127.

<sup>7</sup> *Id.* Original Sheet No. 128.

6. On March 18, 2010, Consumers Energy Company filed a motion to intervene. On March 31, 2010, the Illinois Commerce Commission (Illinois Commission) submitted a notice of intervention and Wisconsin Electric Power Company filed a motion to intervene.
7. On April 1, 2010, Hoosier Energy Rural Electric Cooperative, Inc. (Hoosier) filed a motion to intervene and protest, and the Midwest ISO Transmission Owners (Transmission Owners)<sup>8</sup> filed a motion to intervene and comments. On April 7, 2010, the Illinois Commission submitted a motion to file comments out of time and comments.
8. On April 16, 2010, Midwest ISO filed a motion for leave to answer and answer. On April 22, 2010, the Transmission Owners filed a motion for leave to answer and answer. On April 30, 2010, the Illinois Commission filed a motion for leave to answer and answer.
9. The Illinois Commission protests several provisions of the Transmission Owners Agreement that have previously been accepted by the Commission and that Midwest ISO is not proposing to change in this proceeding. First, the Illinois Commission argues that article III, section III.D, which provides that the Midwest ISO, its directors, officers, and employees have a duty to maximize transmission service revenues associated with transmission services and that Midwest ISO's board of directors must establish incentives for the officers, employees, and agents of Midwest ISO to meet this obligation,

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<sup>8</sup> The Midwest ISO Transmission Owners for this filing consist of: Ameren Services Company, as agent for Union Electric Company, Central Illinois Public Service Company, Central Illinois Light Co., and Illinois Power Company; American Transmission Company LLC; American Transmission Systems, Incorporated, a subsidiary of FirstEnergy Corp.; City of Columbia Water and Light Department (Columbia, MO); City Water, Light & Power (Springfield, IL); Duke Energy Corporation for Duke Energy Ohio, Inc., Duke Energy Indiana, Inc., and Duke Energy Kentucky, Inc.; Great River Energy; Hoosier Energy Rural Electric Cooperative, Inc.; Indiana Municipal Power Agency; Indianapolis Power & Light Company; International Transmission Company; ITC Midwest LLC; Michigan Electric Transmission Company, LLC; Michigan Public Power Agency; MidAmerican Energy Company; Minnesota Power (and its subsidiary Superior Water, L&P); Montana-Dakota Utilities Co.; Northern Indiana Public Service Company; Northern States Power Company, a Minnesota corporation, and Northern States Power Company, a Wisconsin corporation, subsidiaries of Xcel Energy Inc.; Northwestern Wisconsin Electric Company; Otter Tail Power Company; Southern Illinois Power Cooperative; Southern Indiana Gas & Electric Company; Southern Minnesota Municipal Power Agency; Wabash Valley Power Association, Inc.; and Wolverine Power Supply Cooperative, Inc.

compromises the independence of Midwest ISO and its board of directors by creating an improper bias in favor of the Transmission Owners. The Illinois Commission also argues that section III.D is inconsistent with article II, section I.A.2 of the Transmission Owners Agreement, which states that Midwest ISO shall be operated exclusively for the promotion of social welfare. Moreover, the Illinois Commission states that section III.D is contrary to Order No. 719<sup>9</sup> because it does not appear the board of directors can fairly balance the interests of customers and other stakeholders in light of their obligation to maximize transmission revenues.

10. The Illinois Commission asserts that it and other parties opposed this element of the Transmission Owners Agreement when it was first proposed and that the Commission accepted the provision without discussion. It also notes that since the time that the Commission accepted the Transmission Owners Agreement, Midwest ISO has gone from a proposed transmission-only independent system operator to an operating regional transmission organization under Order No. 2000.<sup>10</sup> Accordingly, the Illinois Commission recommends that the Commission use this opportunity to revise the provision so that Midwest ISO, its directors, officers, employees, and agents have a duty to “efficiently utilize the Transmission System as it exists at any given time . . . .”<sup>11</sup>

11. Second, the Illinois Commission argues that the Commission should direct Midwest ISO to revise section II.C.1 of Appendix K, which addresses a transmission owner’s right to submit filings under section 205 of the FPA. The Illinois Commission argues that section II.C.1 is internally inconsistent because it gives each transmission owner the “full and exclusive right to submit filings under FPA section 205” unless the filing “in any way affect[s] the rates charged or revenues collected in any other zone” while explicitly providing that transmission owners have the right to submit filings proposing incentive rates. According to the Illinois Commission, filings proposing incentive rates in one zone may affect the rates charged or revenues collected in other zones; therefore, individual transmission owners should not have the exclusive right to

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<sup>9</sup> *Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, 73 Fed. Reg. 64,100 (Oct. 28, 2008), FERC Stats. & Regs. ¶ 31,281 (2008), *order on Reh’g*, Order No. 719-A, FERC Stats. & Regs. ¶ 31,292, *order on reh’g*, Order No. 719-B, 129 FERC ¶ 61,252 (2009).

<sup>10</sup> *Regional Transmission Organizations*, Order No. 2000, FERC Stats. & Regs. ¶ 31,089 (1999), *order on reh’g*, Order No. 2000-A, FERC Stats. & Regs. ¶ 31,092 (2000), *aff’d sub nom. Pub. Util. Dist. No. 1 of Snohomish County, Washington v. FERC*, 272 F.3d 607 (D.C. Cir. 2001).

<sup>11</sup> Illinois Commission Protest at 5-6.

submit filings proposing incentive rates. The Illinois Commission further asserts that requiring transmission owners to seek stakeholder approval before requesting incentive rates will make it more likely that affected parties will be aware of the filing and be able to assert their interests.

12. Finally, the Illinois Commission asks that article II, section III.C.2, which sets forth voting thresholds for Midwest ISO's board of directors, be revised to require three or four regular members voting affirmatively in order to "constitute any act or decision rendered by the Board." The Illinois Commission explains that, as section III.C.2 is currently written, an act or decision of the board could be made on the affirmative vote of only two regular board members and the chief executive officer.

13. In its answer, Midwest ISO contends that the Illinois Commission's assertions respecting the obligation to maximize transmission revenues constitute a collateral attack on the Commission's order approving the language, are factually inaccurate, and are not supported. In response to the Illinois Commission's concerns about requests for incentive rates, Midwest ISO argues that it is not necessary to impose a stakeholder approval requirement because incentive rate filings are submitted to the Commission and any stakeholder has the right to intervene in those proceedings. Finally, Midwest ISO argues that the Illinois Commission's request to modify the voting requirements of the board of directors is unfounded and not supported by any actual or substantive concerns.

14. In their answer, the Transmission Owners argue that the Illinois Commission's objection to the provision regarding maximization of revenues is an impermissible collateral attack on a prior Commission finding. They further claim that the Illinois Commission's objection and proposed change to article III, section III.D are beyond the scope of this proceeding and that the Illinois Commission fails to show that the proposed change is justified. Contrary to the Illinois Commission's claim, the Transmission Owners believe that the obligation to maximize revenues is not inconsistent with Midwest ISO's independence, and actually reinforces Midwest ISO's responsibility to efficiently use the transmission system. The Transmission Owners contend that the Illinois Commission's comments on the ability of a transmission owner to request incentive rates also constitute a collateral attack on prior Commission orders and are beyond the scope of this proceeding. The Transmission Owners argue that reservation of the right to request incentive rates is consistent with precedent and that requiring stakeholder approval for incentive rights could hamper the development of transmission infrastructure.

15. In its answer, the Illinois Commission reiterates the arguments in its protest, and disagrees with Midwest ISO and the Transmission Owners that its protest constitutes a collateral attack on prior Commission orders. The Illinois Commission claims that since Midwest ISO has filed the Transmission Owners Agreement in its entirety, it is subject to review in its entirety. Further, the Illinois Commission contends that Midwest ISO has in

fact amended section III.D, the provision in the Transmission Owners' Agreement relating to maximizing transmission revenues, by deleting the word "Transmission" when referring to the Midwest ISO tariff. The Illinois Commission also notes that section III.D references Appendices B and E, which do contain numerous proposed revisions.

16. In its protest, Hoosier asks the Commission to reject Midwest ISO's proposed revisions to sections I.B.9, V.A.1, and V.B.2 of Appendix E, which add requirements related to reliability standards. While Hoosier acknowledges that owners and users of Midwest ISO's transmission system are required to comply with reliability standards approved by the Commission under section 215 of the FPA,<sup>12</sup> it argues that there is no justification for making compliance with reliability standards an independent contractual term of the Transmission Owners Agreement. It also argues that, while the proposed language in section V.B.2 explicitly references *mandatory* reliability standards, proposed language in other sections references "NERC standards" and "the standards," which could be read as imposing a contractual responsibility to comply with all standards approved by the NERC Board of Trustees, even those standards that the Commission has rejected or on which it has not yet acted.

17. Hoosier states that the risk associated with these provisions is heightened by the Commission's recently issued *Policy Statement on Penalty Guidelines*, which applies to violations of the statutes, rules, regulations, restrictions, conditions or orders overseen by the Commission.<sup>13</sup> Hoosier argues that although the Commission generally applies the *Statement of Administrative Policy on Processing Reliability Notices of Penalty*<sup>14</sup> to violations of mandatory reliability standards, Midwest ISO's proposed revisions will effectively turn all violations of reliability standards into violations of the order approving the proposed revisions; thus, owners and users of Midwest ISO's transmission system will be exposed to both the possibility of double penalties for violation of mandatory reliability standards and to the threat of penalties for failure to comply with non-mandatory standards.<sup>15</sup> Hoosier asks that the Commission reject Midwest ISO's proposed revisions related to reliability standards, or, barring that, clarify that the Commission (i) will not treat violations of reliability standards by owners and users of

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<sup>12</sup> 16 U.S.C. § 824o (2006).

<sup>13</sup> Hoosier Protest at 4 (citing *Enforcement of Statutes, Orders, Rules, and Regulations*, 130 FERC ¶ 61,220 (2010)).

<sup>14</sup> *Statement of Administrative Policy on Processing Reliability Notices of Penalty and Order Revising Statement in Order No. 672*, 123 FERC ¶ 61,046 (2008).

<sup>15</sup> Hoosier Protest at 4-5.

Midwest ISO's transmission system as violations of the Transmission Owners Agreement warranting additional or enhanced penalties, and (ii) will not impose penalties for violations of non-mandatory reliability standards on the basis that such violations constitute violations of the Transmission Owners Agreement.

18. In its answer, Midwest ISO states that it was not its intent, nor does it believe, that the proposed revisions suggest that an owner or user would be subject to any reliability standards by virtue of its status as an owner or user of the Midwest ISO transmission system. Midwest ISO states that any obligation to comply with reliability standards is a result of an organization's registered entity status with NERC. Midwest ISO further states that it does not believe that inclusion of the proposed revisions subject owners to double penalties and that the proposed revisions are the result of discussions with the Midwest ISO transmission owners about such standards.

19. In their answer, the Transmission Owners state that they agree with Hoosier's concerns. They request that the Commission clarify that it will not treat violations of reliability standards by owners and users of the transmission system as violations of the Transmission Owners Agreement warranting additional or enhanced penalties, and will not impose penalties for violations of non-mandatory NERC standards on the grounds that failure to comply with such standards is a violation of the Transmission Owners Agreement.

20. In their comments, the Transmission Owners note one typographical error that should be corrected. In particular, they state that in the word "and" should be retained in the first sentence of article IV, section I.C and that the adjacent comma should be deleted.<sup>16</sup> In its answer, Midwest ISO agrees that the error noted by the Transmission Owners should be corrected.

### **III. Discussion**

#### **A. Procedural Matters**

21. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2009), the notice of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

22. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2009), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept the answers of Midwest ISO, the Transmission

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<sup>16</sup> Transmission Owners Comments at 3.

Owners, and the Illinois Commission because they have provided information that assisted us in our decision-making process.

**B. Substantive Matters**

23. We will conditionally accept Midwest ISO's revised Transmission Owners Agreement, to be effective May 11, 2010, as requested, subject to a compliance filing as discussed below.

24. We note that the provisions in the Transmission Owners Agreement that the Illinois Commission protests were previously accepted by the Commission, and Midwest ISO is not proposing to substantively change those provisions in this proceeding. Accordingly, we view the Illinois Commission's arguments opposing article III, section III.D, article II, section III.C.2, and section II.C.1 of Appendix K as impermissible collateral attacks on the orders approving those provisions.<sup>17</sup> As the Commission has previously found, "[c]ollateral attacks on final orders and relitigation of applicable precedent by parties that were active in the earlier cases thwart the finality and repose that are essential to administrative efficiency and are strongly discouraged."<sup>18</sup> Accordingly, we will reject the Illinois Commission's arguments. Furthermore, the Illinois Commission's arguments related to Order No. 719 are outside the scope of this proceeding.

25. We disagree with Hoosier and find that Midwest ISO's inclusion of language referring to reliability standards is appropriate. However, for clarity, we will direct Midwest ISO, in the compliance filing we require below, to revise the various proposed references to reliability standards in Appendix E so that they all refer to mandatory reliability standards. This addresses Hoosier's and the Transmission Owners' concern about potential exposure to penalties for violating non-mandatory reliability standards.

26. In addition, although it is reasonable to include language in the Transmission Owners Agreement that refers to an obligation to comply with mandatory reliability standards, we find that Hoosier's and the Transmission Owners' requests for clarification on possible exposure to double penalties for violating mandatory reliability standards raise enforcement policy issues beyond the scope of this proceeding. Although the

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<sup>17</sup> See *Midwest Indep. Transmission Sys. Operator, Inc.*, 84 FERC ¶ 61,231 (1998), *order on reconsideration*, 85 FERC ¶ 61,250, *order on reh'g*, 85 FERC ¶ 61,372 (1998); *Midwest Indep. Transmission Sys. Operator, Inc.*, 110 FERC ¶ 61,380 (2005).

<sup>18</sup> *Entergy Nuclear Operations, Inc. v. Consolidated Edison Co. of New York, Inc.*, 112 FERC ¶ 61,117, at P 12 (2005).

Commission does not expect that it would increase penalties for violations of a NERC standard merely because those violations also violate an applicable tariff provision requiring compliance with NERC standards, in this proceeding we have not been presented with specific facts and asked to review or consider a penalty.<sup>19</sup> We note that, subsequent to Hoosier and the Transmission Owners filing their pleadings in this proceeding, the Commission suspended the *Policy Statement on Penalty Guidelines*, and opened it up to further public comment.<sup>20</sup> If Hoosier or the Transmission Owners have concerns about the Commission's possible imposition of penalties for violating reliability-related provisions in the Transmission Owners Agreement or any other agreement, they should raise those concerns in comments filed in that proceeding.

27. Finally, we will direct Midwest ISO, in the compliance filing we require below, to correct two minor errors in their proposed revisions to the Transmission Owners Agreement. First, as raised by the Transmission Owners in their comments and agreed to by Midwest ISO in its answer, Midwest ISO must replace the improperly deleted "and" in article IV, section I.C. Second, Midwest ISO's proposed new definition of "Balancing Authority Agreement" in article I, section I.B references an outdated version of Midwest ISO's tariff. Midwest ISO must revise the definition of Balancing Authority Agreement to reference the current version of Midwest ISO's tariff.

The Commission orders:

(A) The revised Transmission Owners Agreement is hereby conditionally accepted, effective May 11, 2010.

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<sup>19</sup> Conversely, if a company violated a mandatory reliability standard and a tariff provision that placed a different sort of obligation on the company, then based on the facts, it might be appropriate to increase a penalty where it relates to violations of two different types of obligations.

<sup>20</sup> *Enforcement of Statutes, Orders, Rules, and Regulations*, 131 FERC ¶ 61,040 (2010).

(B) Midwest ISO is hereby directed to submit a compliance filing, within 30 days of the date of this order, as discussed above.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.