

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Wisconsin Electric Power Company

Docket No. EL06-17-000

v.

Midwest Independent Transmission
System Operator, Inc.

ORDER ON COMPLAINT

(Issued January 3, 2006)

1. On November 3, 2005, Wisconsin Electric Power Company (Wisconsin Electric) filed a complaint, pursuant to section 206 of the Federal Power Act (FPA),¹ against the Midwest Independent Transmission System Operator, Inc. (Midwest ISO) regarding the allocation of Financial Transmission Rights (FTRs) by Midwest ISO for certain transmission entitlements held by Wisconsin Electric.² Wisconsin Electric's complaint alleges that Midwest ISO changed the method it used to allocate FTRs to eight Wisconsin Electric Network Resource³ generating facilities without giving proper notice to Market

¹ 16 U.S.C. §§ 824e (2000).

² Except as noted, capitalized terms are defined in Module A of the Midwest ISO's Open Access Transmission and Energy Markets Tariff (TEMT). *See Midwest Independent Transmission System Operator, Inc.*, 108 FERC ¶ 61,163 (August 6 Order), *order on reh'g*, 109 FERC ¶ 61,157 (2004).

³ Section 1.217 of the TEMT defines Network Resources in relevant part as: "Any designated Generation Resource or portion thereof . . . that is designated under the Network Integration Transmission Service provisions of Module B in this Tariff. . . ." FERC Electric Tariff, Third Revised Volume No. 1, Second Revised Sheet No. 106.

Participants and in violation of Midwest ISO's TEMT. Wisconsin Electric states that as a result of the new methodology, Midwest ISO failed to correctly allocate FTRs to Wisconsin Electric, resulting in wrongful assessment of congestion charges to Wisconsin Electric. In this order, the Commission grants Wisconsin Electric's complaint and requires Midwest ISO to provide refunds and prospective relief for certain congestion charges assessed to Wisconsin Electric.

I. Background

2. On April 1, 2005, Midwest ISO began operating energy markets under the TEMT. Among other things, the TEMT provides for the operation of Day-Ahead and Real-Time Energy Markets, the allocation of FTRs, and the administration of supplemental FTR auctions. Under the TEMT, Market Participants hold FTRs, which usually allow FTR holders to collect the congestion revenues from the Day Ahead Energy Markets, and can thus serve as a hedge against congestion charges. Pursuant to the TEMT, the existing entitlements eligible for FTR allocation are those associated with certain types of transmission service, including Network Integration Transmission Service.

3. As part of its shift to FTRs, existing holders of physical transmission rights (or "entitlements") were given priority in obtaining FTRs. Wisconsin Electric, by virtue of its having taken Network Integration Transmission Service on the Midwest ISO system, is one such company eligible to obtain FTRs.⁴

4. Beginning in 2004, the Midwest ISO conducted an initial FTR allocation process in which Market Participants, such as Wisconsin Electric, registered their existing physical transmission rights and nominated those rights to receive FTRs, and Midwest ISO allocated FTRs for the nominated rights. Market Participants were required to define and register their existing transmission entitlements by providing certain information to Midwest ISO, subject to Midwest ISO's verification.⁵ Then entitlements were nominated by Market Participants to be included in the FTR allocation process. After receiving all nominations, Midwest ISO analyzed the nominated FTRs to ensure that, in aggregate, all nominated FTRs could be accommodated (or were "simultaneously feasible") given any operational or physical constraints on the system. Nominated FTRs that were determined to be simultaneously feasible were then allocated to Market Participants.

⁴ See TEMT, section 43.2.1(a), FERC Electric Tariff Third Revised Volume No. 1, Second Revised Sheet Nos. 608-609.

⁵ *Id.*

5. From April 2005 through July 2005, the Midwest ISO conducted a second FTR allocation process which allocated FTRs for the period September 1, 2005 through May 31, 2006. We note that on May 9, 2005, part way through the second FTR allocation process, the TEMT provision governing the “Registration of Existing Entitlements” was changed (additions in italics) to state:

All . . . *Network Resources designated under Network Integration Transmission Service* under this Tariff for at least one *full Season* . . . are eligible for conversion of their existing entitlements to FTRs in the FTR allocation process[.⁶]

6. Starting in 2004 and concurrent with the initial FTR allocation process, the Midwest ISO conducted studies pursuant to Module E of the TEMT to determine the deliverability of Network Resources to Network Load. The purpose of Module E is to “[provide] requirements and standards to be met by the Transmission Provider and Market Participant to ensure access to adequate Generation Resources to meet demand on the Transmission System.”⁷ Included as part of Module E is a deliverability analysis (Deliverability Test) designed to ensure resource adequacy by measuring whether the maximum output capacity of a generating facility can be delivered to Network Load.⁸ Since the Deliverability Test had not been completed at the time of the initial FTR allocation, the deliverability analysis had not been used to define transmission entitlements in the initial round of FTR allocations.⁹

II. Wisconsin Electric Complaint

7. Wisconsin Electric’s complaint alleges that Midwest ISO violated the TEMT by capping Wisconsin Electric’s FTR eligibility based on the results of 2004 Deliverability Test data. This resulted in Wisconsin Electric being denied its full FTR entitlement and

⁶ TEMT, section 43.2.1(a), FERC Electric Tariff, Third Revised Volume No. 1, Second Substitute Second Revised Sheet No. 608. The changes were accepted in *Midwest Independent Transmission System Operator, Inc.*, 111 FERC ¶ 61,249 (2005).

⁷ TEMT, Introduction to Module E, FERC Electric Tariff, Third Revised Volume No. 1, Third Revised Sheet No. 810.

⁸ See Affidavit of Richard Doying, Exhibit 1 of Midwest ISO’s Answer to Wisconsin Electric’s Complaint, at 5.

⁹ *Id.*

exposing it to excess congestion charges.¹⁰ Wisconsin Electric states that Midwest ISO inappropriately used, and then refused to correct, outdated capacity values for eight of Wisconsin Electric's generating units at three different locations, namely the Paris, Point Beach and Pleasant Prairie sites.

8. Wisconsin Electric states that, while it was able to nominate its full FTR entitlement in the initial FTR allocation because no output caps were applied, Midwest ISO capped the maximum MW value of generating units during the registration phase of the second FTR allocation, preventing Wisconsin Electric from registering its full entitlements. Wisconsin Electric argues that the Midwest ISO did not inform Market Participants that it would be capping FTR allocations based on Deliverability Test data, and thus, Wisconsin Electric had not updated its Deliverability Test inputs. Wisconsin Electric maintains that conditioning FTR entitlements on the results of the deliverability test during Midwest ISO's second FTR allocation was inconsistent with Midwest ISO's past FTR allocation practices, inconsistent with the TEMT, and that this change in practice was made without notice to Market Participants.

9. Wisconsin Electric states that Midwest ISO officials gave a presentation which stated that "Network Resources designated under Module E by the [April 21, 2005] cut-off date will be eligible for inclusion in the FTR allocation."¹¹ On April 21, 2005, Wisconsin Electric designated the maximum output of its Network Resource facilities. Wisconsin Electric states that it did not know of any problems until June 1, 2005, when Midwest ISO notified Market Participants (including Wisconsin Electric) that it had "manipulated to a large extent" the data submitted pursuant to Module E "to fit the needs of the FTR registration process," and requested Market Participants to notify Midwest ISO if they found any discrepancies in the data. Wisconsin Electric then notified Midwest ISO personnel that it believed Midwest ISO had undercounted its Network Resources and went through a detailed discussion of the issue with Midwest ISO. While several of the output values were changed, no changes were made to the output values of three of Wisconsin Electric's Network Resources.

10. Wisconsin Electric argues that section 43.2.1(a) of the TEMT creates an FTR entitlement based on existing transmission arrangements and provides that "all" Network Resources designated under Network Integration Transmission Service are "eligible for

¹⁰ Wisconsin Electric calculates that it paid \$233,606 in overcharges for the months of September and October. *See* Affidavit of David Sims in Wisconsin Electric's Complaint (Sims Affidavit), at P 13-16 and Exhibit Q.

¹¹ *See* Exhibit F, page 6, of the Sims Affidavit.

conversion of their existing entitlements to FTRs in the FTR allocation process.”¹² Wisconsin Electric argues that section 43.2.1(a) further requires that “[d]uring the FTR registration period, Market Participants must register their existing entitlements by providing information requested by the Transmission Provider, including . . . [u]nit maximum output for designated resources under Network Integration Transmission Service.”¹³ Wisconsin Electric emphasizes that section 43.2.1 states that the Market Participant is the one that must register and argues that the Midwest ISO’s role is limited to verifying the data.¹⁴ Wisconsin Electric argues that nothing in the TEMT allows Midwest ISO to use data other than that submitted by the Market Participant, or to otherwise cap or modify the submitted data. Wisconsin Electric concludes that Midwest ISO acted inconsistently with its tariff and therefore violated the filed rate doctrine.¹⁵

11. As a remedy, Wisconsin Electric seeks refunds of wrongfully assessed congestion charges and monetary relief for any future wrongful assessments of congestion charges until the end of the allocation period, which is May 31, 2006.

12. Wisconsin Electric states that a communication from Midwest ISO on June 3, 2005, was the first notice that Wisconsin Electric received that the values would be capped at all, or that the Deliverability Test would factor into Midwest ISO’s second FTR allocation.¹⁶ Wisconsin Electric asserts that in March 2005, Midwest ISO sent out notices assuring Market Participants that Network Resources designated under Module E would be eligible for inclusion in the FTR allocation. Since all of Wisconsin Electric’s resources had been designated as Module E resources, Wisconsin Electric believed that it would have no problems registering its resources for the second FTR allocation.

13. With regard to the incorrect data contained in the Deliverability Test, Wisconsin Electric states that it reviewed the data to ensure that resources to fulfill its capacity sales to third parties were fully designated, but did not review the data for its own resources because it relied on Midwest ISO’s repeated statements that existing Network Resources could be nominated for FTRs by their present network customer without passing the

¹² Section 43.2.1(a).

¹³ *Id.*

¹⁴ Section 43.2.1(b) states that “[t]he Transmission Provider shall verify such information as consistent with the terms of the Transmission Service for which the existing entitlement is claimed.”

¹⁵ Complaint at 14, *citing Montana Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 251-52 (1951).

¹⁶ *See* Complaint at 10, *citing* Sims Affidavit, Exh. I.

Deliverability Test.¹⁷ Wisconsin Electric states that, had it been given any notice of the Deliverability Test's relationship to FTR registration, it would have notified the Midwest ISO of the errors in the test data.

14. Finally, Wisconsin Electric asserts that Midwest ISO admitted error in the use of the Deliverability Test to cap entitlement values when it issued a market notification on October 7, 2005 (October Notification). Wisconsin Electric states that the remedy offered in the October Notification, *i.e.*, registration and nomination in the monthly allocation process, only minimally rectifies its loss of FTRs. For example, Wisconsin Electric states that it has received less than 20 percent of the FTRs it nominated in the September and November monthly allocations.

III. Notice of Filing and Responsive Pleadings

15. Notice of Wisconsin Electric's complaint was published in the *Federal Register*,¹⁸ with the answer to the complaint and interventions or protests due on or before November 22, 2005. Midwest ISO filed an answer to the complaint. WPS Resources Corporation filed a timely motion to intervene.

16. On December 13, 2005, Wisconsin Electric filed a request for leave to respond and a response to Midwest ISO's answer.

A. Midwest ISO's Answer

17. In its answer, Midwest ISO asserts that it acted well within its authority under the TEMT in limiting Wisconsin Electric's entitlements.¹⁹ Midwest ISO states that the TEMT requires the use of the Module E Deliverability Test data to define Network

¹⁷ Sims Affidavit at 12, citing to three email communications from Midwest ISO on December 16, 2004, January 17, 2005 and March 2, 2005 that requested review of the Deliverability Test data and stated "Note: Existing [Designated Network Resource] generators can be nominated by their present network customer without passing the Generator Deliverability Test[.]"

¹⁸ 70 *Fed. Reg.* 68,433 (2005).

¹⁹ Midwest ISO states that its actions were also consistent with the procedures in its FTR Business Practices Manual but fails to provide a reference to the relevant provisions. We note that the relevant provision, section 4.2.1, entitled Registration of Existing Entitlements, was revised on December 7, 2005 to insert a requirement that registration of Network Resources is limited by the requirements of Module E. FTR BPM Version 6 at 4-1 to 4-8.

Resource entitlements for use in the second FTR allocation. Midwest ISO argues that this requirement derives from section 43.2.1(a) of the TEMT that provides that certain Network Resources are eligible for conversion to FTRs. Midwest ISO points to the Network Resource language in the entitlement section that was added to the tariff between the first allocation and the second FTR allocation as evidence that the Deliverability Test data would be used to limit MW values for Network Integration Transmission Service entitlements. Additionally, Midwest ISO argues that in order for resources to be designated as Network Resources they must meet the criteria described in Module B (regarding the requirement to take Network Integration Transmission Service) and Module E (regarding the deliverability requirement).²⁰ Further, Midwest ISO states that it is required to verify data submitted regarding registration of Network Resources. If the data is inconsistent with the deliverable capacity as determined from the Module E Deliverability Test, Midwest ISO states that it has the ability to cap the MW values at the deliverability capacity values, as it did with Wisconsin Electric's submission.

18. Further, Midwest ISO argues that it provided ample notice to Market Participants that the second FTR registration process would differ from the initial FTR registration process in that FTR eligibility would be based on the results of the Module E Deliverability Test. Midwest ISO explains that, with the exception of the registration process for Network Resources, it used the same process as in the initial FTR allocation for the second FTR allocation. Midwest ISO states that it notified market participants on April 5, 2005, that "Network Resource designations made under Module E requirements will be used to determine the FTR eligibility for the [second] FTR allocation."²¹ Midwest ISO asserts that this notice made clear that only the deliverable capacity from a Network Resource, as verified by Midwest ISO, would be eligible to be allocated FTRs. Midwest ISO also points to a document distributed on April 18, 2005, to show that Midwest ISO explicitly stated that the output from the Deliverability Test would be used to limit the FTR entitlements from Network Resources.²² Midwest ISO concludes that Wisconsin Electric had notice of the change in the entitlements registration process as early as April 5, 2005, but did not dispute the Module E deliverability data until early June, 2005.

19. Midwest ISO further argues that it used the best available stakeholder-verified data from the deliverability study when it substituted this data for Wisconsin Electric's submission. Midwest ISO states that Wisconsin Electric had three opportunities to

²⁰ Answer at 11, *citing* section 30 and sections 69.1.2 – 69.1.3 of the TEMT.

²¹ Answer at 4-5, *citing* Doying Affidavit, Attachment D.

²² Answer at 14, *citing* Doying Affidavit, Attachment F at 5.

review and correct the information contained in the deliverability study.²³ Midwest ISO states that “by the time the FTR registration was under way, it was too late to attempt to modify the deliverability analysis.”²⁴ Midwest ISO asserts that had Wisconsin Electric timely notified Midwest ISO that the deliverability test results used to define the FTR eligibility for its Network Resources entitlements were inaccurate, the Midwest ISO would have been able to update the deliverability results and base the FTR allocation on updated maximum deliverability output values. Midwest ISO further states that Wisconsin Electric’s failure to respond in a timely manner to the deliverability study results could have jeopardized the purposes of the Deliverability Test, i.e., reliability and system planning functions.

20. Midwest ISO argues that the facts of this complaint are similar to the facts in complaints in which the Commission has denied the requested relief. For example, Midwest ISO states that Wisconsin Electric failed to timely notify Midwest ISO of the inaccuracy of the delivery study data just as Quest failed to notify the Midwest ISO of inaccurate Load Zone designations.²⁵ Midwest ISO argues that like the decision in *SIGECO*, the Commission should deny Wisconsin Electric’s complaint because Wisconsin Electric was on notice through the TEMT provision, Midwest ISO’s notices, and Midwest ISO’s presentations that its FTR eligibility would be based on the Deliverability Test results.

21. Midwest ISO also argues that the facts of *Alliant Energy Corp. Serv. v. Midwest Independent Transmission System Operator, Inc. (Alliant)*, are distinguishable from the circumstances in this complaint.²⁶ Midwest ISO states that the Commission found that

²³ Arness Affidavit, Attachment A (Midwest ISO references three communications soliciting feedback on the deliverability study, the last of which allows a final chance to comment on the study by March 9, 2005.)

²⁴ Doying Affidavit at 8.

²⁵ *Quest Energy, LLC v. Midwest Independent Transmission System Operator, Inc.*, 111 FERC ¶ 61,298, *reh’g denied*, 113 FERC ¶ 61,121 (2005). Midwest ISO also cites *Southern Indiana Gas and Electric Co. v. Midwest Independent Transmission System Operator, Inc.*, 110 FERC ¶ 61,109 at P 18 (2005) (*SIGECO*) for the proposition that Market Participants are put on notice of changes to FTR allocation policies through Commission orders and the TEMT.

²⁶ 111 FERC ¶ 61,499 (2005) (requiring Midwest ISO “to refund to Alliant the congestion charges incurred over the transmission path in question” after Midwest ISO improperly failed to allow Alliant to nominate its full amount of FTR entitlements.)

Midwest ISO failed to allow Alliant to define FTRs as consistent with Alliant's underlying service, but that here Midwest ISO allowed Wisconsin Electric to define FTRs and then Midwest ISO changed the entitlements so that they were consistent with the Deliverability Test. Additionally, Midwest ISO states that here the inaccurate data is Wisconsin Electric's fault not the fault of Midwest ISO.

22. Finally, Midwest ISO argues that its October Notification is not an admission that it inappropriately used the generation output levels included in the Deliverability Test, but rather an offer of relief if a Market Participant believed the output levels were inaccurate. Midwest ISO states that it offered this relief because: (1) "any Market Participant dispute of data used in the Deliverability Test must undergo an evaluation and validation process;" and (2) Midwest ISO cannot reopen the FTR registration process after FTR registration is complete. Further, Midwest ISO states that any relief granted to Wisconsin Electric should be limited to and be based on the amount of FTRs that Wisconsin Electric would have received considering both upward and downward adjustments for all in the maximum capacity values of Wisconsin Electric's units.

IV. Discussion

A. Procedural Matters

23. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,²⁷ the timely, unopposed motion to intervene serves to make WPS Resources Corporation a party to this proceeding. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure²⁸ prohibits an answer to an answer unless otherwise ordered by the decisional authority. We are not persuaded to accept Wisconsin Electric's response and will, therefore, reject it.

B. Substantive Matters

24. The primary issue in this case is whether the language of the TEMT allows the Midwest ISO to use the data from its Module E Deliverability Test to define Network Integration Transmission Service entitlements. We find that the TEMT does not permit this, and that, therefore, Midwest ISO violated its filed rate when it used the Module E Deliverability Test as the basis for reducing Wisconsin Electric's FTR entitlements.

25. When the second annual FTR entitlement registration process opened in March 2005, section 43.2.1(a) of the TEMT provided that all Network Integration Transmission

²⁷ 18 C.F.R. § 385.214 (2005).

²⁸ 18 C.F.R. § 385.213(a)(2) (2005).

Service was eligible for conversion to FTRs.²⁹ The TEMT states that “[a]ll Market Participants that have existing entitlements and are eligible to nominate and hold FTRs”, and lays out the process by which the Market Participant nominates and registers its entitlements. Section 34.2.1(a) specifies that “[d]uring the FTR registration period, Market Participants must register their existing entitlements by providing information requested by the Transmission Provider, including . . . Unit maximum output for designated resources under Network Integration Transmission Service.” There is nothing in section 34.2.1(a) that allows Midwest ISO to impose additional conditions on the data submitted by Market Participants. Here, Wisconsin Electric properly nominated and registered its entitlements, and provided “unit maximum output” for each of its Network Resource facilities on April 21, 2005. As the TEMT is written, Midwest ISO’s role under 34.2.1(b) is only to ensure the accuracy and completeness of the proffered information. If Midwest ISO wishes to impose further conditions on its acceptance of a Market Participants submittal, such as a Deliverability Test, it must state those conditions in its tariff.

26. We also note that the TEMT defines Network Resource as “[a]ny designated Generation Resource or portion thereof . . . that is designated under the Network Integration Transmission Service provisions of Module B in this Tariff. . . .” Again, there is no reference to Module E’s deliverability requirements. Midwest ISO argues that the only reason it did not include the Deliverability Test results in the first round of FTR allocations was that the data was not available at that time. However, there is nothing in the TEMT that even hints at this reading.

27. Thus, we find that since Wisconsin Electric properly designated its resources, *all* of the capacity of its Network Resources should have been eligible for conversion into FTRs in the second FTR allocation. We find that Midwest ISO, in verifying the capacity of the resources, wrongly capped Wisconsin Electric’s maximum output using the Deliverability Test data of Module E, and therefore violated section 34.2.1(a) of the TEMT.

28. Because we conclude that Midwest ISO’s TEMT did not allow for use of the Deliverability Test data to define Network Integration Transmission Service entitlements, we will not decide whether timely notice was given by Midwest ISO of its intent to

²⁹ We note that Midwest ISO, in its answer, refers to language in the TEMT not in effect at the time registration was initiated. It was not until May 9, 2005, well after the deadline for confirming entitlements had passed, that the TEMT was modified to specify that all “Network Resources designated under” Network Integration Transmission Service were eligible for conversion.

change the second FTR allocation process in this way. We also reject Midwest ISO's argument that its "notification" of Market Participants somehow allows it to engage in practices that are not permitted by its tariff.³⁰

29. We do not find the cases cited by Midwest ISO persuasive. In *Quest*, the Midwest ISO reviewed and altered information that Quest then verified as correct. Quest then filed a complaint stating that the information that it had verified was incorrect. Here, the issue is not whether Wisconsin Electric failed to inform Midwest ISO that the deliverability study data was incorrect, but whether Midwest ISO had the power to use the deliverability data to define Wisconsin Electric's entitlements at all. Additionally, the complaint does not concern whether, under the threat of loss of all FTRs, Wisconsin Electric verified the Midwest ISO's change to its entitlements.

30. Wisconsin Electric seeks refunds and other monetary compensation for the congestion costs it has been wrongfully assessed and for future congestion charge assessments for those FTRs it was denied due to the Midwest ISO's decision to cap its entitlements. Since we find that Midwest ISO violated its filed rate, the Commission has the authority to order refunds.³¹ Here, the FTR entitlements were for the period of September 1, 2005 through May 31, 2006. Because we cannot reallocate existing FTR allocations during the period at issue, we are requiring refunds for the period from September 1, 2005 through May 31, 2006. Thus, we direct Midwest ISO to provide refunds for any congestion costs directly incurred by Wisconsin Electric's Pleasant Prairie, Point Beach and Paris resources due to the denial of FTRs for that period, consistent with the method proposed by Wisconsin Electric.³²

³⁰ We also note that Midwest ISO's "notification" to Market Participants was ambiguous, and capable of being read to support Wisconsin Electric's position as easily as it can be read to support Midwest ISO's position.

³¹ *DTE Energy Trading, Inc. v. Midwest Independent Transmission System Operator, Inc.*, 111 FERC ¶ 61,062 at P 28 (2005) (explaining that the Commission may order refunds when a public utility has misapplied a formula rate or has charged rates contrary to the filed rate).

³² We note that Wisconsin Electric did not request, and we are not ordering, any refunds associated with congestion revenues that are in excess of the congestion costs actually incurred by the Pleasant Prairie, Point Beach and Paris resources.

31. Refunds of excess congestion charges incurred by Wisconsin Electric between September 1, 2005 and the date of issuance of this order, plus interest,³³ shall be made within 30 days of the issuance of this order. Refunds for the period between the date of issuance of this order through May 31, 2006, plus interest, shall be made on or before June 30, 2006.

The Commission orders:

(A) Wisconsin Electric's complaint is hereby granted, as discussed in the body of this order.

(B) Midwest ISO is hereby directed to refund to Wisconsin Electric all excess congestion charges that Wisconsin Electric has incurred between September 1, 2005 and the date of this order, plus interest, within 30 days of the date of this order, as discussed in the body of this order.

(C) Midwest ISO is hereby directed to refund to Wisconsin Electric all excess congestion charges that Wisconsin Electric will incur between the date of this order through May 31, 2006, plus interest, on or before June 30, 2006, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

³³ Interest should be calculated pursuant to 18 C.F.R. § 35.19a (2005).