

120 FERC ¶ 61,184
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.

Midwest ISO Transmission Owners

Docket No. EL07-72-000

v.

Midwest Independent Transmission System
Operator, Inc.

ORDER DISMISSING COMPLAINT

(Issued August 24, 2007)

1. This order dismisses a complaint claiming that the Midwest Independent Transmission System Operator, Inc. (Midwest ISO) violated the terms of its Open Access Transmission and Energy Markets Tariff (TEMT)¹ by regionally allocating costs associated with new reliability facilities and Construction Work in Progress (CWIP) costs associated with those facilities.

I. Background

2. In a number of recent orders, the Commission has addressed the regional allocation of transmission projects in the Midwest ISO through the Regional Expansion Criteria and Benefits (RECB) provisions of the TEMT.² Through these provisions, the Midwest ISO is authorized to classify transmission projects and regionally allocate costs

¹ Midwest ISO's FERC Electric Tariff, Third Revised Vol. No. 1.

² See *Midwest Independent Transmission System Operator, Inc.*, 114 FERC ¶ 61,106 (2006), *order on technical conference, reh'g and compliance*, 117 FERC ¶ 61,241 (2006), *order on reh'g*, 118 FERC ¶ 61,208 (2007); *Midwest Independent Transmission System Operator, Inc.*, 118 FERC ¶ 61,209 (2007), *order on reh'g*, 120 FERC ¶ 61,080 (2007).

associated with classified projects. Costs associated with each project are calculated by reference to the Attachment O (Rate Formulae) of the relevant transmission provider(s), which also are reviewed by the Commission. The Attachment O for American Transmission Company LLC (American Transmission), at issue in this proceeding, was approved by the Commission as part of a settlement in May 2004.³

3. In April 2007, the Midwest ISO began billing its transmission customers through the RECB provisions for the costs of certain American Transmission reliability upgrades not yet in service. Those invoices were disputed by certain of the Midwest ISO's customers.

II. The Complaint

4. On June 14, 2007, a group of transmission-owning members of the Midwest ISO (Transmission Owners)⁴ filed the instant complaint against the Midwest ISO alleging that the Midwest ISO violated the terms of its TEMT. The dispute focuses on Attachments FF and GG and Schedule 26 of the TEMT (collectively, the RECB provisions). Attachment FF (Transmission Expansion Planning Protocol) describes the process used by the Midwest ISO in the consideration and development of the Midwest ISO Transmission Expansion Plan (MTEP) projects, which fall into three categories: Baseline Reliability Projects, new Transmission Access Projects, and Regionally Beneficial Projects. Attachment GG determines the charges for relevant Network Upgrades identified in the MTEP based on the Attachment O of the applicable transmission owner.

³ See *American Transmission Company LLC*, 105 FERC ¶ 61,388 (2003); *American Transmission Company, LLC*, 107 FERC ¶ 61,117 (2004) (collectively, the Incentives Orders).

⁴ The Transmission Owners consist of: Ameren Services Company, as agent for Union Electric Company d/b/a AmerenUE, Central Illinois Public Service Company d/b/a AmerenCIPS, Central Illinois Light Co. d/b/a AmerenCILCO, and Illinois Power Company d/b/a AmerenIP; American Transmission Systems, Incorporated, a subsidiary of FirstEnergy Corp.; City Water, Light & Power (Springfield, IL); Duke Energy Shared Services for Duke Energy Ohio, Inc., Duke Energy Indiana, Inc., and Duke Energy Kentucky, Inc.; Hoosier Energy Rural Electric Cooperative, Inc.; Indiana Municipal Power Agency; Indianapolis Power & Light Company; Michigan Public Power Agency; Minnesota Power (and its subsidiary Superior Water, L&P); Montana-Dakota Utilities Co.; Northern Indiana Public Service Company; Northwestern Wisconsin Electric Company; Otter Tail Power Company; Southern Illinois Power Cooperative; Southern Indiana Gas & Electric Company (d/b/a Vectren Energy Delivery of Indiana); Southern Minnesota Municipal Power Agency; Wabash Valley Power Association, Inc.; and Wolverine Power Supply Cooperative, Inc.

Schedule 26 (Network Upgrade Charge from Transmission Expansion Plan) then implements the formula rate calculated under Attachment GG.

5. The Transmission Owners argue the RECB provisions do not allow the Midwest ISO to allocate costs associated with new reliability projects before they go into service. The Transmission Owners present three principal arguments in support of their complaint. First, the Transmission Owners argue that the plain language of the TEMT establishes that cost allocation for Network Upgrades will be based on facilities that have gone into service. Transmission Owner's state that the definition of Network Upgrades includes only facilities that are "integrated with and support" the system, arguing that facilities that are not in service cannot be integrated with or support the Midwest ISO's transmission system. The Transmission Owners therefore conclude that the RECB provisions' reference to Network Upgrades,⁵ and specifically the description of Network Upgrade Charge in section 2(a) of Attachment GG as including investment for Network Upgrades "put into service," provide for allocation of costs for new reliability projects only after those projects are placed in service.

6. Second, the Transmission Owners argue that the TEMT does not contain enough detail to allow for forward-looking cost recovery. The Transmission Owners contend that the Commission requires that "data inputs and formula allocations be clearly specified so that they cannot be revised at the company's discretion"⁶ and that the importance of transparency in energy markets has been emphasized by the Commission and Congress.⁷ The Transmission Owners argue the RECB provisions contain no specific language regarding the inclusion of projected facility costs. While the Transmission Owners acknowledge that Attachment GG calculates the Network Upgrade Charge by reference to plant investment determined in accordance with Attachment O, and that American Transmission's Attachment O allows for recovery of CWIP and projected costs, the Transmission Owners argue that it is unclear from the language of Attachment GG whether the reference to Attachment O is to the standard Attachment O, Attachment O-ATC, Attachment O-ATSI-American Transmission Systems, Incorporated, Attachment O-ITC, or Attachment O-METC. The Transmission Owners

⁵ As examples, the Transmission Owners provide two references to Network Upgrades in the RECB provisions: (1) section III.A.2 of Attachment FF; and (2) section 2(a) of Attachment GG.

⁶ Complaint at 14 (*quoting Wisconsin Public Service Corporation*, 103 FERC & 61,116, at P13 (2003)).

⁷ Complaint at 15 (*citing* 16 U.S.C. § 824t; *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, 72 Fed. Reg. 12,266 (March 15, 2007), FERC Stats. & Regs. ¶ 31,241, at P 22 (2007); *California Independent System Operator Corp.*, 116 FERC ¶ 61,274, at P 3 (2006)).

argue that this lack of clarity fails to meet Congress' objective of transparency and that the Midwest ISO's allocation of costs for new reliability facilities before those facilities go into service is unauthorized.

7. Third, the Transmission Owners argue that the RECB provisions of the TEMT do not meet the standard for the recovery of CWIP costs in particular, as articulated by the Commission in Order No. 679.⁸ In their view, the Commission allows for recovery of CWIP costs only when specifically proposed, and the RECB provisions do not contain any language specifically allowing recovery of CWIP costs associated with reliability projects. The Transmission Owners acknowledge that American Transmission has been authorized to provide for recovery of CWIP in its Attachment O, but argue that authorization applies to American Transmission's own zonal rates, not regional allocations through the RECB provisions.⁹ The Transmission Owners further acknowledge that section 3(g) of Attachment GG references the right of the transmission owner or ITC "to file with the Commission individually and unilaterally to recover the cost of a Network Upgrade in a manner other than that specified in Attachment GG,"¹⁰ but contend that such filing would have to be made subsequent to the effectiveness of Attachment GG. Since no such filing has been made, the Transmission Owners argue that the RECB provisions of the TEMT do not allow for the allocation of American Transmission's CWIP costs.

8. Although the Transmission Owners maintain that the existing tariff language in Attachment GG does not allow the Midwest ISO to regionally allocate costs for projects that are not yet in service, they state that they are not conceptually opposed to the recovery of CWIP or projected costs for transmission projects that are not yet in service. The Transmission Owners state that this complaint is aimed at resolving ambiguous tariff language to avoid larger and more contentious refund proceedings in the future.

⁸ *Promoting Transmission Investment Through Pricing Reform*, Order No. 679, FERC Stats. & Regs. Preambles ¶ 31,222, at P 115-22, *order on reh'g*, Order No. 679-A, FERC Stats. & Regs. ¶ 31,236 (2006), *order on reh'g*, 119 FERC ¶ 61,062 (2007); *see also* 18 C.F.R. § 35.25 (specifying elements for CWIP); *Commonwealth Edison Co.*, 119 FERC ¶ 61,238, at P 85-86 (2007) (articulating requirements for CWIP inclusion).

⁹ Complaint at 18 (*citing* the Incentives Orders).

¹⁰ Section 3(g) of Attachment GG provides for "the right of a ITC and/or Transmission Owner under Section 205 of the Federal Power Act and consistent with the ISO Agreement to file with the Commission individually and unilaterally to recover the cost of a Network Upgrade in a manner other than specified in this Attachment GG, including, but not limited to recover rate incentives not specified herein and to recover the cost of Network Upgrades through its pricing zone rates under Schedules 7, 8 and 9 as calculated pursuant to Attachment O."

Furthermore, the Transmission Owners argue that uncertainty as to tariff implementation and the possibility of future refunds will impede construction of and investment in transmission.

9. The Transmission Owners request that the Commission: (1) find that the Midwest ISO has violated the TEMT in allocating costs associated with new reliability facilities before they go into service; (2) order the Midwest ISO to discontinue these unauthorized practices and to work with stakeholders to develop revised tariff language that clearly addresses the cost allocation issues to prevent any future misunderstandings and that also addresses these issues on a broader basis so that all areas on the Midwest ISO are treated equitably with regard to regional allocations; and (3) order the Midwest ISO to refund the monies collected in violation of the TEMT.

III. Notice of Filings and Responsive Pleadings

10. Notice of the Transmission Owners' complaint was published in the *Federal Register*, 72 Fed. Reg. 35,046 (2007), with interventions and answers due on or before July 5, 2007. Motions to intervene were filed by: Great River Energy (Great River); Consumers Energy Company (Consumers Energy); the Coalition of Midwest Transmission Customers (Coalition); International Transmission Company d/b/a ITCTransmission and Michigan Electric Transmission Company (jointly, International Transmission and METC); American Transmission Company LLC (American Transmission); and Wisconsin Electric Power Company (WEPCO). On July 5, 2007, International Transmission and METC jointly filed an Answer; American Transmission filed comments opposing the complaint; and WEPCO filed comments opposing the Complaint. On July 9, 2007, Xcel Energy Services, Inc. (Xcel) filed a Motion to Intervene Out-of-Time on behalf of its utility operating company affiliates Northern States Power Company, a Minnesota corporation (NSP), and Northern States Power Company, a Wisconsin corporation (NSPW) (jointly the NSP Companies). On July 13, 2007, the Illinois Commerce Commission (ICC) filed a Motion to Intervene Out-of-Time.

11. The Midwest ISO filed an answer contending that it acted in accordance with its tariff provisions and disputing the Transmission Owners' interpretation of the definition of a Network Upgrade and the relevant sections of Attachment GG. With regard to the definition of Network Upgrade, the Midwest ISO argues that definition relates to the physical characteristics of those facilities, not how they should be treated in Attachment GG for purposes of cost recovery. The Midwest ISO cites other sections of the TEMT, such as Attachment FF and Attachments X and R (governing generator interconnections), that refer to Network Upgrades as projects that may not have been built yet or otherwise placed in service.

12. The Midwest ISO does not dispute that section 2(a) of Attachment GG directs the annual revenue requirement for each transmission owner to be calculated based on the investment in Network Upgrades put into service during the calendar year and the

associated carrying charge, added to the cumulative annual revenue requirements attributable to prior years. The Midwest ISO argues, however, that section 3(g) of Attachment GG provides for alternative recovery mechanisms as approved by the Commission. The Midwest ISO argues that American Transmission has already received approval from the Commission to recover CWIP in the Incentives Orders and that limiting section 3(g) to incentive programs approved subsequent to the adoption of Attachment GG would arbitrarily restrict the rights of parties to receive incentives that have already been approved. In the Midwest ISO's view, the Commission clearly contemplated that the CWIP costs at issue here should be collected within the TEMT when it conditioned American Transmission's rate recovery on the inclusion of its projects in the MTEP and American Transmission's status as a Midwest ISO member.

13. The Midwest ISO argues that the transmission cost allocation provisions of Attachment GG, including section 3(g), are sufficiently clear to allow American Transmission to recover its project costs. The Midwest ISO contends that the Incentives Orders specifically allowed for inclusion of CWIP and projected costs in American Transmission's rate base and approved revisions to American Transmission's Attachment O formula, which are now included in the TEMT. Attachment GG, the Midwest ISO states, uses the Attachment O formula to calculate Schedule 26 charges. The Midwest ISO argues that, in approving the RECB provisions, the Commission already has found that these cost recovery provisions, including reliance on Attachment O, are sufficiently specific.

14. American Transmission also responded in opposition to the complaint, arguing that the plain language of Attachments FF and GG and Schedule 26 of the TEMT, and its Attachment O rate formula, permits the Midwest ISO to collect CWIP and forecasted costs associated with MTEP upgrades. American Transmission contends that the Transmission Owners misrepresent the purpose of the RECB methodology, which American Transmission argues merely allocates a portion of a previously-approved revenue requirement to the regional customers who, by definition, derive benefit from the construction of the Baseline Reliability Project. American Transmission argues that there is nothing in the Commission-approved RECB allocation process that requires previously-approved zonal cost inputs to be re-approved prior to inclusion in the Attachment GG formula and collection under Schedule 26.

15. American Transmission further contends that the RECB provisions in the TEMT contain sufficient detail regarding the calculation of costs for each transmission owner's Baseline Reliability Projects based on each transmission owner's Attachment O rate formula. American Transmission states that the Commission has approved different variations of the Attachment O rate formula for several transmission owners in the Midwest ISO region and, specifically, the use of forward-looking cost inputs with a true-up mechanism in American Transmission's Attachment O. American Transmission

argues that the Transmission Owners incorrectly assert that the RECB provisions do not include details regarding how forecast costs will be calculated and allocated.

16. International Transmission and METC take no position with respect to the issues related to CWIP that are implicated by the complaint, explaining that their company-specific Attachment O formulae do not provide for the inclusion of CWIP in the calculation of annual transmission revenue requirements. International Transmission and METC state that they have been authorized by the Commission to use forward-looking test periods when calculating transmission revenue requirements under their company-specific Attachment O formulae and argue that the use of a forward looking test period with a true-up ensures that they are able to recover their actual transmission revenue requirements, which protects them against the under-recovery of costs and protects their customers from the over-recovery of costs. International Transmission and METC argue that any action taken by the Commission or the Midwest ISO, as a result of this proceeding, should not jeopardize the ability of International Transmission and METC to continue recovering their actual net revenue requirements in this manner.

17. To the extent the Commission finds that the Midwest ISO lacks the authority to allocate and recover costs for transmission facilities that are not yet in service under the RECB provisions, International Transmission and METC suggest that the Midwest ISO simply defer allocating and collecting costs until new transmission facilities are actually placed in service. If the Commission instead elects to conduct further proceedings, they argue it should establish a refund effective date and permit the Midwest ISO to continue collecting Schedule 26 charges assessed under the RECB provisions on a subject-to-refund basis until the issues raised by the complaint are resolved.

18. On July 13, 2007, the Transmission Owners filed an answer to the Midwest ISO's answer largely repeating the arguments made in the complaint. The Transmission Owners argue that the language of Attachment GG does not clearly support allocating forward-looking and CWIP costs and that the Midwest ISO's reliance on other portions of the TEMT is misplaced. The Transmission Owners contend that section 3(g) of Attachment GG only establishes that there may be another manner for allocating costs, but does not identify what that mechanism would be. The Transmission Owners reiterate that they are not conceptually opposed to the inclusion of forward-looking costs or CWIP for new reliability projects and are not attacking the Commission's RECB orders. Rather, the Transmission Owners argue that the current language in the TEMT is not sufficiently clear to permit the allocation of such costs.

19. On July 27, 2007, the Midwest ISO filed a Supplemental Answer out-of-time. The Midwest ISO argues that an Order on Rehearing and Compliance Filing issued in Docket Nos. ER06-18-007 and -008 on July 23, 2007¹¹ supports the Midwest ISO's reading of

¹¹ *Midwest Independent Transmission System Operator, Inc.*, 120 FERC ¶ 61,080 (2007) (July 23 Order).

the TEMT. The Midwest ISO contends that the compliance filing addressed in that order contained a direct reference to the inclusion of CWIP for Regionally Beneficial Projects, providing that “to the extent that the Commission approves the collection of costs in rates for CWIP for a constructing [t]ransmission [o]wner, costs will be allocated and collected prior to completion of the project.”¹² The Midwest ISO notes that the Commission stated that acceptance of that tariff language “does not change any existing rate treatment.”¹³ The Midwest ISO argues that this statement makes clear that the Midwest ISO was already authorized to include FERC-approved CWIP costs prior to the completion of the Regionally Beneficial Project, a conclusion which applies with equal force to Baseline Reliability Projects.

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 (2007), the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Pursuant to Rule 214(d) of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2007), the Commission will grant Xcel’s and the ICC’s late-filed motions to intervene given their interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

21. Rule 213(a)(2) of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2007), prohibits an answer unless otherwise ordered by the decisional authority. We will accept the Transmission Owners’ answer because it has provided information that assisted us in our decision-making process. We also accept the Midwest ISO’s Supplemental Answer.

B. Analysis

22. The Transmission Owners have submitted a complaint related to the Midwest ISO’s allocation of costs for transmission projects classified as Baseline Reliability Projects prior to those projects being in service. The Transmission Owners acknowledge, however, that it is coincidental that the transmission projects in question are Baseline Reliability Projects and that the larger issue is whether the interaction of various provisions of the tariff permit the Midwest ISO to allocate projected and CWIP costs for any Network Upgrade.¹⁴ The Transmission Owners submit that a plain reading of the

¹² See July 23 Order at P 59.

¹³ *Id.*

¹⁴ Complaint at 1, n.2.

relevant tariff provisions does not permit the Midwest ISO to recover the costs of Network Upgrades before those projects are in service. We disagree with that interpretation of the tariff and, therefore, deny the complaint.

23. The Transmission Owners first argue that, because the definition of Network Upgrade refers to a project as “integrated with and support[ing]” the transmission system, any use of the defined term Network Upgrade in the tariff must reference a project that is already in service. We disagree and find that, within the context of planning and cost allocation, the use of the term Network Upgrade can refer to facilities that are both in service as well as those that, once placed in service, will be integrated with and support the Midwest ISO transmission system. The term is used throughout Attachment FF to refer to projects that are in the planning stages and, thus, are not yet in service.¹⁵ Attachment GG then cross-references the same use of the term for purposes of cost allocation, stating that the designations of “Network Upgrades which form the basis of the NUC [Network Upgrade Charge]” are the “same as those made for the relevant Network Upgrades in the MTEP.”¹⁶ Both tariff provisions therefore contemplate planned, as well as constructed, facilities as falling within the definition of Network Upgrade, contrary to the restricted interpretation advocated by the Transmission Owners.

24. We also disagree that Attachment GG is not sufficiently clear or specific to allow the Midwest ISO to allocate Network Upgrade costs, including CWIP in particular, prior to projects being put into service. The Midwest ISO does not dispute that section 2(a) of Attachment GG limits the annual revenue requirement for each transmission owner to the end of year investment in Network Upgrades put into service during the calendar year and the associated carrying charge, added to the cumulative annual revenue requirements for Network Upgrades put into service in prior years. As the Midwest ISO points out, however, section 3(g) of Attachment GG allows any transmission owner to file under section 205 of the Federal Power Act to recover network upgrade costs in a manner other than that specified in Attachment GG, including incentive rates not specified in Attachment GG.¹⁷ We find that this provision applies both to prospective rate filings, as well as the incentive rate treatment authorized in the Incentives Orders.

¹⁵ For example, Baseline Reliability Projects are defined as those Network Upgrades identified in the base case as required to ensure the transmission system remains in compliance with the Electric Reliability Organization (ERO) standards. *See* Midwest ISO Tariff, Attachment FF, section II.A.1, First Revised Sheet No. 1836. Under the Transmission Owner’s interpretation of Network Upgrade, the only Baseline Reliability Projects that could be included in the MTEP base case would be those already constructed and in service.

¹⁶ *See* Midwest ISO Tariff Attachment GG, section 2(a), Original Sheet No. 1878.

¹⁷ *See* Midwest ISO Tariff Attachment GG, section 3(g), Original Sheet No. 1881.

25. In the Incentives Orders, the Commission authorized American Transmission to modify its Attachment O rate formula to allow, among other things, for use of CWIP and recovery of pre-certification costs in the current year associated with new reliability projects. American Transmission did so, specifically listing CWIP in its Attachment O rate base as line item 2b.¹⁸ The Midwest ISO then took account of that modification in Attachment GG by cross-referencing the relevant line item in the “Gross Transmission Plant” identified for American Transmission in Table 1 of Attachment GG.¹⁹ Through this cross-reference, the rate formula for calculating the Network Upgrade Charge stated in Table 1²⁰ appropriately – and clearly – incorporates CWIP costs for American Transmission along with the rest of its plant investment. The data inputs and formula allocations being used by the Midwest ISO to allocate American Transmission’s costs, including CWIP costs in particular, are therefore sufficiently specific to satisfy the requirements of FPA section 205.

26. We acknowledge that the sentence in section 2(a) of Attachment GG relied upon by the Transmission Owners, restricting recovery to Network Upgrades put into service in the prior year, creates ambiguity when viewed in isolation from other relevant portions of Attachment GG. However, a more complete reading of Attachment GG, including section 3(g) and the attached Table 1, authorize the Midwest ISO to include American Transmission’s costs in the Network Upgrade Charge. We do not believe it is relevant, for these purposes, that the Commission authorized American Transmission to recover CWIP prior to the effectiveness of section 3(g) of Attachment GG. There is only one cost of service that has been approved for American Transmission within the Midwest ISO tariff.

27. The Commission found that it was appropriate for American Transmission to recover CWIP and projected costs in its rate base in the Incentives Orders and the most reasonable interpretation of the TEMT is to allow for allocation of those costs under the RECB provisions. The Transmission Owners neither offer a reason for why the TEMT would provide for regional cost sharing for some, but not all, of a project’s cost, nor how it would be consistent with the RECB order for the Commission to interpret the TEMT in

¹⁸ See Midwest ISO Tariff Attachment O – ATCLLC, Substitute Fourth Revised Sheet No. 1342.

¹⁹ See Midwest ISO Tariff Attachment GG, Table 1, Original Sheet No. 1885. Although the Transmission Owners are correct that section 2(a) refers to Attachment O generically, the rate formula and cross-references in Table 1 specifically identify the Attachment O for specific transmission providers to be used in calculation of the Network Upgrade Charge.

²⁰ See Midwest ISO Tariff Attachment GG, Table 1, Original Sheet Nos. 1883-84.

the manner the Transmission Owners suggest. The Transmission Owners' contrary interpretation of the tariff is rejected.

The Commission orders:

The Transmission Owners' complaint is dismissed for the reasons discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.