

124 FERC ¶ 61,074
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 Independent Transmission System Operator, Inc. Docket No. ER07-1372-008

ORDER CONDITIONALLY ACCEPTING AMENDED BALANCING AUTHORITY
AGREEMENT AND REQUIRING COMPLIANCE FILING

(Issued July 21, 2008)

1. In an order issued February 25, 2008, the Commission accepted the Midwest Independent Transmission System Operator, Inc.'s (Midwest ISO) proposed ancillary services market (ASM), as modified.¹ The Commission stated that the Midwest ISO should conclude Balancing Authority Agreement negotiations, which were ongoing when the February 25 Order was issued, 90 days prior to the start of the ASM. The Commission also required the Midwest ISO to submit a completed Balancing Authority Agreement prior to market start. On May 23, 2008, the Midwest ISO submitted amendments to its Open Access Transmission and Energy Markets Tariff (TEMT or tariff) to incorporate its amended Balancing Authority Agreement. In this order, we conditionally accept the Midwest ISO's amended Balancing Authority Agreement, subject to a further compliance filing, as discussed below.

I. Background

A. History of this Proceeding

2. When the Commission approved the start of the Midwest ISO energy markets, it expressed concern with regard to short-term reliability and how the Midwest ISO would retain independent control of the system despite the ability of the 24 Balancing

¹ *Midwest Indep. Transmission Sys. Operator, Inc.*, 122 FERC ¶ 61,172 (2008) (February 25 Order).

Authorities to re-dispatch their generation or to reconfigure transmission to resolve constraints. Accordingly, the Commission required the Midwest ISO to establish a dialogue with stakeholders on consolidation of the Balancing Authority functions for the express purpose of achieving a significant reduction in the number of Balancing Authorities and the eventual consolidation of most Balancing Authority functions into the Midwest ISO.²

3. Subsequently, the Commission rejected without prejudice the Midwest ISO's initial ASM proposal and provided guidance to better enable the Midwest ISO to prepare and re-file a complete proposal.³ The Commission explained that the filing did not include: (1) a market power analysis supporting the proposed ASM; or (2) a readiness plan to ensure reliability during the transition from the current system for providing regulation and operating reserves, which is managed by individual Balancing Authorities, to a centralized ASM managed by the Midwest ISO.

4. On September 14, 2007, as amended on September 19, 2007, the Midwest ISO filed its revised ASM proposal. The Midwest ISO proposed to determine operating reserve requirements and procure operating reserves from all qualified resources, in place of the current system of local management and procurement of reserves by the 24 Balancing Authorities. The Midwest ISO also proposed to transfer and consolidate Balancing Authority responsibility in the Midwest ISO so that the Midwest ISO may become the North American Electric Reliability Council (NERC)-certified Balancing Authority for the entire Midwest ISO Balancing Authority Area. The Midwest ISO stated that it would conclude Balancing Authority consolidation negotiations and file the amended Balancing Authority Agreement at least 90 days prior to market start.

B. February 25 Order

5. In the February 25 Order, the Commission accepted the Midwest ISO's revised ASM proposal, as modified, and ordered compliance filings. The Commission found that Balancing Authority consolidation will allow for more centralized and efficient management of ancillary services. The Commission clarified that the Midwest ISO should conclude Balancing Authority Agreement negotiations 90 days prior to market start and submit a completed Balancing Authority Agreement prior to or along with the other certification requirements prior to market start in order to meet the proposed start date for the ASM.

² See *Midwest Indep. Transmission Sys. Operator, Inc.*, 107 FERC ¶ 61,191, at P 124 (2004).

³ *Midwest Indep. Transmission Sys. Operator, Inc.*, 119 FERC ¶ 61,311, *reh'g denied*, 120 FERC ¶ 61,202 (2007) (Guidance Order).

C. The Midwest ISO's Amended Balancing Authority Agreement

6. On May 23, 2008, in Docket No. ER07-1372-008, the Midwest ISO submitted its amended Balancing Authority Agreement. The Midwest ISO states that the amended Balancing Authority Agreement transfers key responsibilities from the existing Balancing Authorities (Local Balancing Authorities) to the Midwest ISO in order to enable the Midwest ISO to operate as the sole Balancing Authority in the ASM. The Midwest ISO submits that the amendment of the existing Balancing Authority Agreement⁴ is necessary to reflect the establishment of the ASM and the new roles and responsibilities of the Midwest ISO and the Local Balancing Authorities under the ASM. The Midwest ISO notes that 20 out of the 22 Local Balancing Authorities voted in favor of the amended Balancing Authority Agreement.

II. Notices and Responsive Pleadings

7. Notice of the Midwest ISO's May 23, 2008 filing was published in the *Federal Register*, 73 Fed. Reg. 33,071 (2008), with interventions and protests due on or before June 13, 2008. Comments were filed by the Organization of Midwest ISO States (OMS) and International Transmission Company (ITC). On June 30, 2008, the Midwest ISO filed an answer.

III. Discussion

A. Procedural Matters

8. 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 to a protest or an answer unless otherwise ordered by the decisional authority. We will accept the answer of the Midwest ISO because it has provided information that assisted us in our decision-making process.

⁴ The existing Balancing Authority Agreement is the "Agreement Between the Midwest ISO and Midwest ISO Balancing Authorities Relating to Implementation of the TEMT." This agreement was the agreement in effect at the start of the energy markets and is the agreement that the amended Balancing Authority Agreement supersedes.

B. Substantive Matters**1. Standard of Review****a. Midwest ISO Amended Balancing Authority Agreement**

9. Midwest ISO proposes amendments to the standard of review provision in its existing Balancing Authority Agreement.⁵ The revised standard of review provision states:

the standard of review for changes or conditions to this [a]mended [a]greement, whether proposed by a [p]arty, a non-[p]arty, or the Commission acting sua sponte shall be the “public interest” standard of review set forth in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956) and *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) (the “*Mobile-Sierra*” standard).⁶

b. Comment

10. OMS argues that the Midwest ISO’s proposed standard of review provision improperly binds third-parties to the *Mobile-Sierra* “public interest” standard of review in violation of the recent United States Court of Appeals for the D.C. Circuit decision in *Maine PUC v. FERC*.⁷ OMS states that the *Maine* decision made clear that contracting parties cannot bind third parties to the *Mobile-Sierra* “public interest” standard of review. OMS therefore requests that the Commission direct the Midwest ISO to strike the words “non-[p]arty or the Commission” from revised section 14.3 of the amended Balancing Authority Agreement.

c. Commission Determination

11. In light of *Maine*, the Commission may not accept the revised standard of review provision as currently written with regard to third parties in the amended Balancing Authority Agreement.⁸ As such, the standard of review provision in the amended

⁵ Midwest ISO, First Revised Rate Schedule FERC No. 3 at revised section 14.3.

⁶ *Id.*

⁷ 520 F.3d 464 (D.C. Cir. 2008) (*Maine*).

⁸ *Id.* at 477-78.

Balancing Authority Agreement is accepted conditioned on the Midwest ISO revising the standard of review applicable to third parties consistent with the Commission's decision in *Duke Energy Carolinas, LLC*.⁹ The Midwest ISO should, within 30 days of the date of this order, file a revised standard of review provision consistent with this precedent.

2. Modifications or Conditions

a. Midwest ISO Amended Balancing Authority Agreement

12. Revised section 14.2 of the amended Balancing Authority Agreement states that, except as provided in revised section 14.4, there will be no other modifications or conditions to the amended Balancing Authority Agreement “absent the agreement of the parties.”¹⁰ Revised section 14.4 provides for modifications or conditions to the agreement only by at least a three-fourths affirmative vote of the Local Balancing Authorities.¹¹

b. Comment

13. OMS argues that the phrase “absent the agreement of the parties” in section 14.2 requires clarification. OMS asserts that, as stated, this phrase appears to provide an alternate route to modification of the agreement than that found in section 14.4. OMS contends that if the phrase is intended to require one hundred percent agreement of the parties under some circumstances, then these circumstances are not made clear in the amended Balancing Authority Agreement. On the other hand, OMS argues that if the phrase is intended to require a three-fourths or greater affirmative vote of the Local Balancing Authorities, including a one hundred percent affirmative vote, then the language is redundant to section 14.4.

c. Commission Determination

14. We agree with OMS that the “absent the agreement of the parties” language in section 14.2 is ambiguous. We require the Midwest ISO to clarify this language in a compliance filing to be submitted within 30 days of the date of this order.

⁹ 123 FERC ¶ 61,201, at P 10 & n.10 (2008).

¹⁰ Midwest ISO, First Revised Rate Schedule FERC No. 3 at revised section 14.2.

¹¹ *Id.* at revised section 14.4.

3. Cost Issues

a. Midwest ISO Amended Balancing Authority Agreement

15. The cost reimbursement section in the amended Balancing Authority Agreement states that the Midwest ISO will directly reimburse Local Balancing Authorities for reasonable costs incurred to implement the amended Balancing Authority Agreement.¹² This section also states that such cost reimbursement shall be limited to the signatories to the existing Balancing Authority Agreement, or their successors and assignees, and that cost recovery by additional signatories will be addressed in a separate agreement.¹³

16. The cost incurrence limits section in the amended Balancing Authority Agreement prohibits the Midwest ISO from knowingly taking action under the amended Balancing Authority Agreement that would cause a Local Balancing Authority to face costs related to fulfilling its responsibilities under the amended Balancing Authority Agreement that are not recoverable pursuant to the tariff provision to be implemented as provided in Schedule 24 of the tariff or otherwise reimbursed by the Midwest ISO.¹⁴

b. Comment

17. OMS notes that the Midwest ISO does not explain why the cost reimbursement section establishes different conditions for parties that are signatories to the amended Balancing Authority Agreement who are also signatories to the existing Balancing Authority Agreement and parties that sign the amended Balancing Authority Agreement but were not signatories to the existing Balancing Authority Agreement. OMS asserts that the Commission should direct the Midwest ISO to explain the purpose and intent of this section and to require modifications if necessary.

18. OMS asserts that it is unclear what costs are being referred to in the cost incurrence limits section. OMS expresses concern that this section's limitation on the Midwest ISO's authority to take action improperly restrains the Midwest ISO's ability to protect the reliability of the grid. OMS requests that the Commission direct the Midwest ISO to explain the purpose and intent of this section and to require modifications if necessary.

¹² *Id.* at Original Sheet No. 14, revised section 8.2.

¹³ *Id.*

¹⁴ *Id.* at revised section 8.4.

c. Answer

19. The Midwest ISO clarifies that the cost reimbursement section applies to signatories of the existing Balancing Authority Agreement, as submitted to the Commission in this filing, and that there is only one agreement to which amendments are being proposed. Any Local Balancing Authority that has signed, or is eligible to sign and does so in the future, will be treated on the same basis as those Local Balancing Authorities that executed the agreement as first written.

20. The Midwest ISO states that the costs referred to in the cost incurrence limits section are listed in Schedule 24 and that the reference to this section in the amended Balancing Authority Agreement is sufficient.

d. Commission Determination

21. We accept the Midwest ISO's clarification of the cost reimbursement section.

22. With respect to the cost incurrence limits section, we do not consider this provision as improperly restraining the Midwest ISO's ability to protect the reliability of the grid. The provision states that the Midwest ISO will not take actions which would cause a Local Balancing Authority to incur costs that are not recoverable in Schedule 24. We note that the costs eligible for recovery in Schedule 24 include any costs that result from the performance of obligations imposed by the tariff on Local Balancing Authorities. We interpret these costs to include costs for actions Local Balancing Authorities must take at the direction of the Midwest ISO to maintain reliability in the Midwest ISO Balancing Authority Area. We base our interpretation on the requirement in the amended Balancing Authority Agreement that each Local Balancing Authority shall comply with the directives of the Reliability Coordinator in accordance with NERC standards, including emergency procedures.¹⁵ Since the costs of reliability compliance are recovered in Schedule 24 and the limitation on the Midwest ISO actions is restricted to costs not recovered in that schedule, we do not expect this provision will limit the Midwest ISO's ability to manage reliability with the assistance of the Local Balancing Authorities.

¹⁵ *Id.* at Original Sheet No. 10, revised section 4.7.2.

The Commission orders:

Midwest ISO's amended Balancing Authority Agreement is hereby conditionally accepted effective September 9, 2008, subject to a further compliance filing, as discussed in the body of this order.

By the Commission. Commissioners Kelly and Wellinghoff dissenting in part with a joint separate statement attached.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

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FEDERAL ENERGY REGULATORY COMMISSION

Midwest Independent Transmission System
Operator, Inc.

ER07-1372-008

(Issued July 21, 2008)

KELLY and WELLINGHOFF, Commissioners, dissenting in part:

The proposed standard of review in the amended Balancing Authority Agreement would have the Commission apply the “public interest” standard of review when it considers changes or conditions to the agreement that may be sought by any of the parties, a non-party, or the Commission acting *sua sponte*.

The majority finds that, in light of the U.S. Court of Appeals for the District of Columbia Circuit’s (D.C. Circuit) decision in *Maine Public Utilities Commission v. FERC*,¹ the Commission may not accept the amended Balancing Authority Agreement’s proposed standard of review. The majority, however, accepts the standard of review provision in the agreement, conditioned upon the parties revising the standard of review provision consistent with the Commission’s decision in *Duke Energy Carolinas, LLC*.²

We continue to disagree with the majority’s characterization of the D.C. Circuit’s holding in *Maine PUC* as to the applicability of the “public interest” standard. For the reasons set forth in our dissents in *Duke Energy Carolinas, LLC* and *Westar Energy, Inc.*,³ we respectfully dissent in part.

Suede G. Kelly
Commissioner

Jon Wellinghoff
Commissioner

¹ 520 F.3d 464 (D.C. Cir. 2008) (*Maine PUC*).

² 123 FERC ¶ 61,201 (2008).

³ 123 FERC ¶ 61,252 (2008).