129 FERC ¶ 61,221
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Midwest Independent Transmission System Operator, Inc.	Docket No. ER10-73-000
Midwest Independent Transmission System Operator, Inc.	Docket No. ER10-74-000
Dairyland Power Cooperative v. Midwest Independent Transmission System Operator, Inc.	Docket No. EL10-9-000

ORDER ON TARIFF REVISIONS AND COMPLAINT

(Issued December 15, 2009)

1. On October 16, 2009, pursuant to section 205 of the Federal Power Act (FPA),[1] Midwest Independent Transmission System Operator, Inc. (Midwest ISO) filed proposed revisions to section 38.8.3(A) of its Open Access Transmission, Energy, and Operating Reserve Markets Tariff (Tariff). The proposed revisions would eliminate the possibility for grandfathered agreements (GFAs) between new transmission owners and their affiliates, owner-members, and other transmission owners to be carved out of Midwest ISO's Energy and Operating Reserve Markets.[2] The proposed revisions would apply to GFAs added to Attachment P of the Midwest ISO Tariff, which lists the currently effective GFAs, on or after November 1, 2009. Separately, Midwest ISO filed revisions

[1] 16 U.S.C. § 824e (2006).

[2] The phrase "carved out" refers to a specific type of treatment of GFAs which are carved-out of Midwest ISO's energy and operating reserve markets. Carved-out GFAs are not subject to the Tariff's scheduling and settlement requirements, and are financially exempt from many energy and operating reserve market charges. The treatment of GFAs is outlined in section 38.8 of the Tariff (Tariff Sheet Nos. 656-74).

to Attachment P of its Tariff to reflect the proposed classifications for the existing GFAs of Dairyland Power Cooperative (Dairyland).

2. On October 30, 2009 Dairyland filed a complaint against Midwest ISO, requesting, essentially, that Midwest ISO's proposed tariff language governing carved-out GFA status not apply to 30 Dairyland GFAs for which Dairyland requested carved-out treatment. Dairyland asks the Commission to order the Midwest ISO to add to Attachment P each GFA that qualifies for carved-out treatment under the Tariff provisions approved and in effect as of the date of its complaint.

3. In this order, we accept in part and reject in part Midwest ISO's proposed tariff revisions to limit the eligibility for carved-out treatment going forward, reject Midwest ISO's proposal to remove existing GFAs from Attachment P, and deny the relief requested in Dairyland's complaint.

I. Background

A. GFAs

4. As part of its application to implement energy markets under its Open Access Transmission and Energy Markets Tariff (TEMT), Midwest ISO proposed tariff provisions to address transmission service provided under certain existing long-term contracts that were executed before September 16, 1998[3] (generally classified as GFAs). The Commission issued several orders addressing the treatment of GFAs under the TEMT.[4] Subsequently, the Commission accepted Midwest ISO's proposal to replace the TEMT with the Tariff,[5] which continues to include the GFA provisions that the Commission previously accepted in the GFA Orders. Midwest ISO lists the GFAs in Attachment P to the Tariff.

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[3] September 16, 1998, is the date upon which the Commission granted Midwest ISO status as an independent system operator.

[4] *Midwest Indep. Transmission Sys. Operator, Inc.*, 108 FERC ¶ 61,236 (2004), *order on reh'g*, 111 FERC ¶ 61,042, *order on reh'g*, 112 FERC ¶ 61,311 (2005) (collectively, GFA Orders), *aff'd sub nom. Wisconsin Public Power, Inc. v. FERC*, 493 F.3d 239 (D.C. Cir. 2007). *See also Midwest Indep. Transmission Sys. Operator, Inc.*, 121 FERC ¶ 61,166 (2007) (allowing Midwest ISO to continue the same GFA treatment after the initial six-year transition period ended).

[5] *Midwest Indep. Transmission Sys. Operator, Inc.*, 122 FERC ¶ 61,172 (2008).

5. Section 38.8.3(A) of the Tariff delineates the treatment of GFAs that are added to Attachment P after September 16, 2004.[6] Pursuant to this section, parties may choose to have a GFA carved out of the Energy and Operating Reserve Markets if that GFA: (1) is subject to the *Mobile-Sierra* public interest standard of review;[7] (2) is silent on the applicable standard of review; or (3) is providing for transmission service by an entity that is not a public utility. Carved-out GFAs are not subject to the Tariff scheduling and settlement requirements and are financially exempt from many energy market charges (e.g., congestion charges and loss charges).

B. Dairyland

6. Dairyland is a not-for-profit generation and transmission electric cooperative that is owned by, and provides the wholesale power requirements for, 25 separate distribution cooperatives in southern Minnesota, western Wisconsin, northern Iowa, and northern Illinois. Dairyland also provides wholesale power requirements for 16 municipal utilities in Wisconsin, Minnesota, and Iowa. Dairyland does not provide retail electric service directly to any customers, but its member cooperatives provide service to more than 251,000 retail electric customers in a 9,000 square mile area. Dairyland owns or has under contract generating units totaling approximately 1,192 MW, and owns approximately 3,144 miles of transmission lines.

7. Relevant to these proceedings, Dairyland recently announced its intent to join Midwest ISO as a transmission owner, with the goal of integrating its facilities into Midwest ISO on June 1, 2010. On September 3, 2009, Dairyland submitted a conditional application to become a transmission owner and communicated with Midwest ISO concerning the GFA status of certain contracts. Specifically, Dairyland, which is not a public utility, requested that Midwest ISO grant carved-out status to 30 of Dairyland's existing agreements, which comprise approximately 700 MW (about 79 percent of Dairyland's peak load), and add those GFAs to Attachment P of the Tariff. On October 5, 2009, Dairyland withdrew all conditions to its membership in Midwest ISO and executed the Midwest ISO Transmission Owners Agreement. On that same day, Midwest ISO communicated via letter to Dairyland that it would grant carved-out GFA status for only one of Dairyland's existing agreements.[8]

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[6] September 16, 2004, is the date of the Commission order which approved Midwest ISO's approved treatment of GFAs under the TEMT.

[7] *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956); *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956).

[8] Dairyland Complaint at 13-14. The agreement for which Midwest ISO stated that it would provide carved-out status is GFA No. 484, a Shared Transmission

(continued…)

II. Description of the Filings

A. Midwest ISO's Proposal to Limit Carved-Out GFAs – Docket No. ER10-73-000

8. On October 16, 2009, in Docket No. ER10-73-000, Midwest ISO proposed changes to its Tariff that would eliminate, going forward, the availability of the carved-out GFA option for new transmission owners whose GFA is with an affiliate, owner-member company, and/or other transmission owner. Under the Midwest ISO proposal, carved-out GFA treatment will not be available for such GFAs added to Attachment P on or after November 1, 2009.[9] Instead, pursuant to the proposed tariff language, the agreements must be fully converted to service under the Tariff. (As addressed later, while the proposed tariff language states that conversion to service under the Tariff is required, Midwest ISO's transmittal letter contains contradictory statements that Options A and C will also be available.) Specifically, Midwest ISO proposes to add the following language to section 38.8.3(A) of the Tariff:

> Notwithstanding the foregoing, carved-out treatment under this paragraph b shall not be available to Grandfathered Agreements added to Attachment P of the Tariff effective on or after November 1, 2009, that involve service to an Affiliate or an owner-member of the Transmission Owner or to an entity that itself is a Transmission Owner. Any such agreements between Transmission Owners shall be fully converted to service under the Tariff for the internal loads of the affected Transmission Owners.

9. Midwest ISO states that the proposed revisions are consistent with the Commission's guidance with respect to carved-out GFAs, and consistent with the Commission's expectation that the amount of load served under carved-out GFAs, and the resulting cost shift to Tariff customers, would decline over time.[10] Midwest ISO

Agreement between Dairyland and Western Wisconsin Municipal Power Group, dated April 8, 1985.

[9] While the revised tariff language would exclude carved-out treatment only for GFAs between the new transmission owner and another transmission owner which are added to Attachment P on or after November 1, 2009, Midwest ISO's action in de-listing certain of Dairyland's existing GFAs in its proposal in Docket No. ER10-74-000 indicates that it intends its proposal to apply to such GFAs between the new transmission owner and other transmission owners that were added to Attachment P prior to November 1, 2009, as well.

[10] *See* Midwest ISO GFA Amendment Filing at 5-6.

argues that allowing new transmission owners to obtain carved-out status for a large percentage of GFAs places an unfair burden on existing members to subsidize the congestion costs of utilities that have voluntarily elected to avail themselves of the benefit of Midwest ISO's markets. According to Midwest ISO, by negotiating with prospective members to ensure that carved-out load remains small and manageable, Midwest ISO has been able to meet that expectation. Midwest ISO argues, however, that Dairyland's membership application tests its ability to preserve this balance, and notes that Dairyland has requested carved-out GFA status for over 70 percent of its load, including contracts with its retail cooperative members. Midwest ISO contends that it has received expressions of membership interest from other prospective transmission owners that may have GFA profiles similar to Dairyland. Midwest ISO argues that its proposed Tariff changes are necessary because the Tariff is not explicit on Midwest ISO's ability to limit the addition of carved-out GFAs.

10. Midwest ISO requests waiver of the 60-day prior notice requirement to permit an effective date of October 17, 2009, one day after filing, for its proposed tariff revisions.

B. Classification of Dairyland's GFAs – Docket No. ER10-74-000

11. On the same day Midwest ISO filed the proposed Tariff changes, it also filed, in Docket No. ER10-74-000, amendments to Attachment P to reflect its proposed classifications of Dairyland's agreements, effective June 1, 2010. Midwest ISO proposes adding one Dairyland agreement to Attachment P as a carved-out GFA and deleting five Dairyland GFAs that were previously listed on Attachment P.[11] Because Midwest ISO is proposing that its new GFA provisions take effect prior to Dairyland's integration into Midwest ISO on June 1, 2010, Midwest ISO contends that it determined which of Dairyland's existing agreements qualify for GFA status by using its proposed new standards.

12. According to Midwest ISO, the percentage of proposed carved-out GFAs, which comprise 80 MW (approximately 9 percent of Dairyland's total load), is consistent with

[11] Specifically, Midwest ISO proposes to add GFA No. 484, a Shared Transmission Agreement between Dairyland and Western Wisconsin Municipal Power Group dated April 8, 1985, and to remove GFA Nos. 20 and 41 (an August 19, 1966 Interconnection and Interchange Agreement and a November 15, 1978 General Transmission Facilities Installation Agreement with Interstate Power Company); GFA No. 290 (a May 30, 1985 Phase Angle Regulating Transformer Cost Sharing Agreement with Minnesota Power Inc.); 293 (a September 16, 1983 Interconnection and Facility Use Agreement with Northwestern Wisconsin Electric Company (Northwestern Wisconsin)); and GFA No. 467 (a June 16, 1982 Shared Transmission Agreement with Southern Minnesota Municipal Power Agency (SMMPA)).

the Commission's previous GFA orders in which the Commission allowed carve-outs only to the extent they constitute a small and gradually diminishing portion of Midwest ISO's total load.[12]

C. Dairyland's Complaint – Docket No. EL10-9-000

13. In response to Midwest ISO's proposed tariff changes limiting the availability of carved-out status for new transmission owners, and its proposed amendment to Attachment P, Dairyland filed a complaint in Docket No. EL10-9-000. Dairyland argues that it should be subject to the Tariff as it existed when Dairyland made its commitment to join Midwest ISO, and that it should therefore receive carved-out GFA status for all 30 of its GFAs that meet the requirements of the currently-approved Tariff. Dairyland asserts that, throughout integration discussions with Midwest ISO, it understood that its GFAs would be fully subject to the terms of the Tariff on file at the time of the discussions, in accordance with the filed rate doctrine. Dairyland further argues that there is no support for Midwest ISO's assertion that an increase in carved-out load would impair reliable operation of the Midwest ISO system. Accordingly, Dairyland requests that the Commission require Midwest ISO to include in Attachment P, effective October 31, 2009, the GFAs that Midwest ISO has proposed to delete (namely, GFA Nos. 20, 41, 290, 293 and 467), along with 25 Member All-Requirements Contracts under which Dairyland sells and delivers energy to member entities.

14. Dairyland alleges that once a potential transmission owner has committed to integrating its facilities into Midwest ISO, Midwest ISO makes certain filings on behalf of that new owner that ensures that the transmission owner can complete its integration in a timely way. Dairyland contends that, pursuant to Commission orders, parties who wish to modify GFA information should submit the requisite requests to Midwest ISO, which will then file the changes with the Commission. Dairyland states that the version of Attachment P that Midwest ISO filed in Docket No. ER10-74-000 was unilaterally proposed by Midwest ISO, and that the filing violated Midwest ISO's tariff obligation to include Dairyland's GFAs. Dairyland describes the 30 GFAs that it seeks to include in Attachment P, and provides arguments that each qualify for carved-out status.

15. Next, Dairyland argues that while Midwest ISO's communications with Dairyland offer policy reasons for denying Dairyland carved-out GFA status, implementing such policy choices requires changing the Tariff. Dairyland contends that its complaint addresses the issue of whether its GFAs meet the filed tariff requirements for carved-out GFAs and, accordingly, should be included in Attachment P. It further argues that the

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[12] Midwest ISO Attachment P Filing at 3-4 (citing *Midwest Indep. Transmission Sys. Operator, Inc*., 108 FERC ¶ 61,236, at P 143 (2004) ("September 16, 2004 Order"), *order on reh'g*, 111 FERC ¶ 61,042 (2005); *Midwest Indep. Transmission Sys. Operator, Inc*., 121 FERC ¶ 61,166, at P 70, 45, 48 (2007)).

question of whether Midwest ISO complied with its tariff should be judged based on the tariff that existed when Dairyland submitted its GFAs, not a new tariff proposal that Midwest ISO seeks to implement through prospective tariff changes.

16. Finally, Dairyland contends that Midwest ISO told it that a GFA that was previously carved out because a counterparty was not a Midwest ISO transmission owner could no longer be carved out once the counterparty became a transmission owner. Dairyland points out that the new Tariff language does not prohibit carved-out GFAs involving two Midwest ISO transmission owners; nor does the definition of a GFA mention any exception where both entities are transmission owners. Dairyland provides specific examples of GFAs presently listed on Attachment P that are between two transmission owners. Furthermore, Dairyland claims that its Member All-Requirements Contracts qualify as GFAs even though they were extended after September 16, 1998, i.e., the cut-off date for receiving grandfathered status. Dairyland maintains that the Tariff's definition of GFA does not state that an extension of the term of the GFA renders it ineligible for GFA treatment; nor has Midwest ISO previously pointed to any case law to support such an assertion.

17. Finally, Dairyland moves to consolidate its complaint with Midwest ISO's rate filings in Docket Nos. ER10-73-000 and ER10-74-000. It argues that consolidation will further administrative efficiency, and because common issues of law and fact are involved.

III. Notice of Filings and Responsive Pleadings

A. Midwest ISO's Proposal to Limit Carved-Out GFAs – Docket No. ER10-73-000

18. Notice of Midwest ISO's filing in Docket No. ER10-73-000 was published in the *Federal Register*, 74 FR 54984 (2009), with interventions and protests due on or before November 6, 2009.

19. Timely motions to intervene were filed by American Municipal Power, Inc. (AMP); Consumers Energy Company (Consumers); Duke Energy Corporation (Duke Energy); Exelon Corporation; ITC Holdings Corp. (ITC); Jo-Carroll Energy, Inc. (Jo-Carroll); Northwestern Wisconsin; SMMPA; Western Area Power Administration (WAPA); and Wisconsin Electric Power Company (Wisconsin Electric). The National Rural Electric Cooperative Association (NRECA) filed a motion to intervene out-of-time.

20. Timely motions to intervene and comments were filed by Great River Energy (Great River); Hoosier Energy Rural Electric Cooperative, Inc. and Southern Illinois Power Cooperative (collectively, Hoosier and Southern Illinois); and the Midwest ISO

Transmission Owners (Midwest ISO TOs).[13] Timely motions to intervene and protests were filed by Central Iowa Power Cooperative; Corn Belt Power Cooperative; Dairyland; EPIC Merchant Energy Midwest L.P., SESCO Enterprises LLC, Jump Power, LLC, and Big Bog Energy LP (collectively, Financial Marketers); and Minnkota Power Cooperative, Inc. (Minnkota). A timely joint motion to intervene and protest was filed by Basin Electric Power Cooperative (Basin Electric) and Associated Electric Cooperative, Inc. (Associated Electric). Answers were filed by Midwest ISO, MidAmerican, and Basin Electric.

B. Classification of Dairyland's GFAs – Docket No. ER10-74-000

21. Notice of Midwest ISO's filing in Docket No. ER10-74-000 was published in the *Federal Register*, 74 FR 56603 (2009), with interventions and protests due on or before November 6, 2009.

22. Timely motions to intervene were filed by AMP; American Transmission Company, LLC; Associated Electric; Basin Electric; Consumers; Duke Energy; Great River; ITC; Jo-Carroll; Midwest ISO TOs; Michigan Public Power Agency; Michigan South Central Power Agency; Northwestern Wisconsin; SMMPA; WAPA; Western Wisconsin Municipal Power Group; and Wisconsin Electric. NRECA filed a motion to intervene out-of-time. A timely motion to intervene and comments were filed by Hoosier and Southern Illinois. Timely motions to intervene and protest were filed by Dairyland and Financial Marketers. Answers were filed by Midwest ISO and MidAmerican.

C. Dairyland's Complaint – Docket No. EL10-9-000

23. Notice of Dairyland's complaint was published in the *Federal Register*, 74 FR 57668-69 (2009), with interventions and protests due on or before November 19, 2009.

24. Timely motions to intervene were filed by AMP; Consumers; Duke Energy; ITC; Jo-Carroll; Midwest ISO TOs; Northwestern Wisconsin; and SMMPA. A timely motion

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[13] For the purpose of these filings, the Midwest ISO Transmission Owners include: American Transmission Systems, Incorporated, a subsidiary of FirstEnergy Corp.; City of Columbia Water and Light Department (Columbia, Missouri); City Water, Light & Power (Springfield, Illinois); Indiana Municipal Power Agency; Indianapolis Power & Light Company; MidAmerican Energy Company (MidAmerican); 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.; Otter Tail Power Company; Wabash Valley Power Association, Inc.; and Wolverine Power Supply Cooperative, Inc.

to intervene and comments were filed by Hoosier and Southern Illinois. Timely motions to intervene and protest were filed by Great River, and Financial Marketers. Answers were filed by Midwest ISO and Dairyland.

IV. Discussion

A. Procedural Matters

25. 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. We will grant NRECA's unopposed, late-filed motions to intervene in Docket Nos. EL10-73-000 and EL10-74-000, given its interests in these proceedings, the early stage of the proceedings, and the lack of undue prejudice or delay.

26. 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 filed herein because they have provided information that assisted us in our decision-making process.

27. We will deny Dairyland's motion to formally consolidate these three proceedings. We need not take this step in order to consider the common issues of fact and law at the same time.

B. Substantive Matters

1. Comments and Protests Regarding Tariff Revisions

28. In response to Midwest ISO's proposed tariff changes limiting the availability of carved-out status for new transmission owners, and its proposed amendment to Attachment P, Dairyland argues that there is no support for Midwest ISO's contention that an increase in carved-out load would impair reliable operation of the Midwest ISO system or unfairly shift costs to other Midwest ISO members. It also states that the proposal to remove the carved-out GFA option constitutes a request to modify terms and conditions of the GFAs, and that GFAs, as protected under *Mobile-Sierra*, can only be modified if required by the public interest. Further, Dairyland argues that Midwest ISO itself proposed to continue the carved-out GFA option after the transition period. It notes that Midwest ISO's quarterly GFA reports continue to cite efficient commitment and dispatch of generation and a generally high level of day-ahead scheduling accuracy.

29. Dairyland requests that the Commission reject Midwest ISO's proposed amendment as unjust and unreasonable, or, in the alternative, deny waiver of the notice requirement and set the proposed amendment for hearing. In support of its position, Dairyland argues that the Commission ordered Midwest ISO to carve out GFAs where

the transmission provider is a non-jurisdictional entity or where the contract is silent on the standard of review. Dairyland further contends that the currently-approved Tariff provides for such treatment. According to Dairyland, Midwest ISO recently stated that GFAs should continue to be carved out.[14] Dairyland states that none of the quarterly reports indicated problems that suggested that carved-out treatment needs to be restricted; in fact, in the most recent quarterly report filed on October 30, 2009, Midwest ISO reported "continued overall improvement and a general high level of day-ahead scheduling accuracy relating to Carved-Out GFAs in the Midwest ISO's Region."[15]

30. Dairyland contends that the proposed tariff amendment is unduly discriminatory and treats similarly situated parties differently based on an arbitrary date. In addition, Dairyland argues that the United States Court of Appeals for the District of Columbia Circuit has found that not granting carved-out status to non-jurisdictional GFAs abrogates them, which the Commission does not have authority to do.[16] Dairyland further argues that, in not adhering to its filed tariff and in not amending Attachment P to include Dairyland's GFAs, Midwest ISO violated the filed rate doctrine. Finally, Dairyland argues that Midwest ISO's proposed Tariff amendment provides no basis for its proposal to delete four GFAs from the current Attachment P.

31. Numerous additional protests and comments were filed in Docket No. ER10-73-000, mostly by non-member cooperatives, raising arguments similar to Dairyland's. Financial Marketers argue that none of Dairyland's GFAs should be classified as carved-out because carving out such GFAs would result in Revenue Sufficiency Guarantee costs attributable to those GFAs being shifted to financial marketers and other participants conducting virtual transactions in the Midwest ISO markets.

2. <u>Answers to Protests</u>

32. In its answer to Dairyland's protest in Docket No. ER10-73-000, Midwest ISO argues that *Mobile-Sierra* is not implicated because no contract will be unilaterally abrogated or modified by the proposed amendment; rather, the amendment applies to new transmission owners and involves two prospective exceptions to the continued availability of the carved-out GFA option. In response to arguments that its proposed amendment is discriminatory or inconsistent with previous GFA orders, Midwest ISO

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[14] Dairyland Protest in Docket No. ER10-73-000 at 10.

[15] October 2009 Quarterly GFA Report at 4.

[16] Dairyland Protest at 31-32, Docket No. EL10-73-000 (citing *Wisconsin Public Power, Inc. v. FERC*, 493 F.3d 239, 273 (D.C. Cir. 2007)).

contends that Dairyland, as a new member to Midwest ISO, is not subject to any forced transition and is free to decide whether to subject itself to Midwest ISO's market rules.

33. Midwest ISO further argues that carved-out GFAs were a temporary and limited exception to non-discriminatory treatment, and were possible due to the small number of megawatts involved. Midwest ISO adds that the number of GFAs receiving carved-out status was expected to shrink over time. According to Midwest ISO, carve-outs have a negative impact on efficiency and reliability, and cause cost shifts. Midwest ISO further notes that most of the parties protesting the proposed change are not transmission owners, adding that these parties would not be harmed by the proposed amendment to Tariff section 38.8.3(A).

34. Basin Electric and Associated Electric urge the Commission to reject Midwest's ISO's assertion that its proposal would not implicate the *Mobile-Sierra* doctrine because contracts will be unilaterally modified by the proposed revisions.

35. MidAmerican states that some parties noted that Midwest ISO accepted a number of carved-out GFAs in conjunction with MidAmerican's recent integration as a transmission-owning member. MidAmerican clarifies, in its answer, that Midwest ISO performed a significant review of all of MidAmerican's GFAs, and any carved-out GFA service that MidAmerican was using to supply load within the Midwest ISO market was, at Midwest ISO's direction, converted to standard service under the Tariff; thus, the GFA treatment afforded MidAmerican is identical to the treatment it would have received if the proposed tariff changes were in place at the time of MidAmerican's integration. MidAmerican believes such treatment is just and reasonable.

3. **<u>Midwest ISO's Answer to Dairyland's Complaint</u>**

36. In its answer to Dairyland's complaint in Docket No. EL10-9-000, Midwest ISO contends that it acted appropriately in limiting the size of Dairyland's carve-outs based on representations Dairyland made, prior to signing the Transmission Owners Agreement, that it intended to grandfather only a small percentage of its load involving "third party" agreements with municipal or non-Dairyland utilities. Midwest ISO contends that, in connection with its application for membership, Dairyland withdrew and waived any condition pertaining to the full invocation of its eligibility for carved-out treatment. In addition, Midwest ISO argues that Dairyland's agreements with its owner-members lost their eligibility for grandfathered status when they were amended in 2004 to extend their terms. Midwest ISO avers that the most reasonable interpretation of the Tariff's definition of GFAs is that its identification of September 16, 1998, as a cut-off date for grandfathering status precludes the further grandfathering of GFAs through amendments that extend fixed termination dates. Midwest ISO cites a Commission order finding that the amendment of a preexisting transmission agreement has the effect of

subjecting that agreement to the Tariff.[17] Midwest ISO further contends that Dairyland's arguments about the filed rate doctrine are unavailing because, by the time Dairyland fully integrates, the filed rate would include the carve-out limitations (if accepted by the Commission).

4. Dairyland's Answer

37. In its answer, Dairyland argues that, contrary to Midwest ISO's assertion that Dairyland "did not regard the narrowing of the scope of the GFA carve-outs as a deal-breaker with respect to integration into the Midwest ISO," Dairyland never waived a legal right to challenge Midwest ISO's decision with respect to its eligibility for carved-out GFA treatment under the Tariff.[18] Dairyland further contends that Midwest ISO's answer does not sufficiently rebut the position that new transmission owners should be provided the same protection as existing transmission owners, and adds that if carved-out GFA status would not impair any utility's ability to do business, or would not impose an excessive burden on other utilities, then new transmission owners should not be denied carved-out status for GFAs that would otherwise qualify for such treatment under the Tariff.

38. Dairyland argues that its all-requirements contracts merit carved-out status, regardless of whether those contracts were amended after September 16, 1998. Dairyland contends that amendments to GFAs do not imperil their status as carved-out GFAs. According to Dairyland, the Commission has, in the past, permitted pre-Order No. 888 transmission service agreements to be amended without requiring conversion to service under an open-access transmission tariff.[19]

5. Commission Determination

a. Proposal to Limit Carved-Out GFA Option – ER10-73-000

39. We accept, subject to modification, the portion of Midwest ISO's proposed revisions to Tariff section 38.8.3(A) that eliminates the availability of carved-out GFA status for existing agreements between a new transmission owner and its affiliates and/or owner-members. We note that this change will be prospective in nature, and that it does not implicate the Commission's prior findings regarding GFAs. Those findings were premised on the fact that the start-up of Midwest ISO's energy markets would affect the GFAs of *existing* transmission owner members of Midwest ISO – for example, by imposing scheduling and settlement requirements to which GFAs had never been subject.

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[17] *See* Midwest ISO November 19, 2009 Answer at 11 (citing *Interstate Power Co.*, 112 FERC ¶ 61,048, at P 4 (2005)).

[18] *See* Dairyland Dec. 4, 2009 Answer at 4-5.

[19] *See id*. at 11-13.

40. By contrast, Dairyland is a *prospective* transmission owner. Unlike the transmission-owning members who were already part of Midwest ISO at the time of energy market start-up, Dairyland can analyze the costs of converting its GFAs to tariff service prior to integration, and weigh those costs against the benefits of Midwest ISO membership. We further note that the GFAs at issue are, in essence, contracts between the prospective member and itself, which the prospective member can modify to avoid any trapped costs that might otherwise result. In particular, if a transmission owner must pay costs associated with the energy market to fulfill its obligations under a GFA, but the GFA does not provide for a pass-through of those costs, the transmission owner cannot recover its costs and those costs will become essentially "trapped." The decision to modify any of its existing contracts is entirely at the discretion of the prospective member; the Commission is not directing or coercing any potential Midwest ISO member to modify its existing contracts.[20] We therefore disagree with Dairyland that the *Mobile-Sierra* doctrine requires that its contracts be carved out, and that Midwest ISO's change to the tariff provisions governing GFA treatment amounts to undue discrimination based on an arbitrary date.

41. We find that our acceptance of Midwest ISO's proposed tariff language is also consistent with prior Commission findings regarding GFAs. When the carved-out GFA option was originally accepted, and when the Commission allowed it to continue after the transition period, the Commission envisioned that the amount of load attributable to these GFAs would decrease over time.[21] Up until now, that has been the case. However, if Dairyland is permitted to elect carved-out status for all of its existing contracts with its owner-members, this will reverse the trend. As noted above, Dairyland's proposed additions to the carve-out total approximately 700 MW – more than 10 percent of the 6,786 MW currently carved out of the Midwest ISO markets.[22]

42. Although we accept Midwest ISO's proposal to limit availability of carved-out treatment for agreements between the new transmission owner and an affiliate or owner-member, that are not already included in Attachment P, we reject Midwest ISO's proposal to eliminate the availability of carve-out GFA status for existing agreements

[20] In contrast, in the GFA proceedings, the Commission had to decide whether to abrogate the *existing* GFAs of existing transmission-owning members to accommodate the start-up of Midwest ISO's energy markets.

[21] *See Midwest Indep. Transmission Sys. Operator, Inc.*, 121 FERC ¶ 61,166, at P 70 (2007).

[22] The amount of carved-out GFAs is based on the GFA listing in Midwest ISO's October 30, 2009 informational filing in Docket Nos. ER04-691-000, ER04-106-000, EL04-104-000, and ER07-532-000.

between a prospective new member and another transmission owner. Unlike existing agreements between a prospective member and its affiliates or owner-members, which are not currently listed in Attachment P, many existing agreements between prospective members and existing transmission owners are already listed in Attachment P. (For instance, in the case of Dairyland, Midwest ISO is proposing to delete five GFAs that are currently listed in Attachment P.) In addition, Midwest ISO's proposed tariff language, as written, would not allow it to make such deletions. The proposed language would apply to GFAs between transmission owners "added to Attachment P of the Tariff effective on or after November 1, 2009," but it does not address agreements between transmission owners that are already listed in Attachment P.

43. We also note that Midwest ISO specifically states in its transmittal letter that GFA Options A and C, and full Tariff conversion, will continue to be available to GFAs that were otherwise previously eligible for carved-out treatment,[23] but its proposed tariff language does not include this option.[24] As such, we direct Midwest ISO to revise its proposed tariff sheets within 30 days of the date of this order to make Option A and Option C GFA treatment available for existing agreements with affiliates and member-owners.

44. In addition, the prospective member cannot unilaterally modify existing agreements with transmission owners. In that respect, those agreements are similar to agreements between the prospective member and unaffiliated non-members, which would still qualify for carved-out treatment under Midwest ISO's proposal. A transmission owner could, for example, refuse to allow modification of a GFA that is already listed in Attachment P. In that case, if the prospective member still wanted to join Midwest ISO, it would face the possibility of trapped costs, since it would have to cover any additional costs associated with converting the GFA to service under the Tariff while still having to provide service under the terms of the GFA. Midwest ISO has not addressed the trapped cost issue, or explained why it is appropriate to treat contracts between the prospective

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[23] *See* Midwest ISO GFA Amendment Filing at 4.

[24] Under Option A, the GFA Responsible Entity – a designated contract party financially responsible for energy market activities associated with the GFA – nominates and holds financial transmission rights in order to transact under the GFA. Midwest ISO assesses congestion charges and the cost of losses for all transactions under the GFA. Under Option C, the GFA Responsible Entity does not nominate or hold financial transmission rights for the GFA transactions but must pay the costs of congestion for all GFA transactions. Pursuant to section 38.8.3 of the currently effective Tariff, these options are made available to market participant applicants that are party to GFAs and intend to maintain service under such GFAs.

member and a transmission owner differently than contracts between the prospective member and unaffiliated non-members. Therefore, we reject this provision, without prejudice to Midwest ISO re-filing it with appropriate explanation and/or changes. Midwest ISO is directed to file, within 30 days of the date of this order, revised tariff language reflecting the removal of language that precludes the carved-out option for GFAs between a prospective new transmission owning member of Midwest ISO and any other transmission owner.

45. Although we accept in part the revised tariff language in section 38.8.3(A), we deny Midwest ISO's request for waiver of the 60-day prior notice requirement for failure to demonstrate good cause, and make these tariff changes effective December 16, 2009.[25]

b. Proposal To Classify Dairyland's GFAs – ER10-74-000

46. Regarding Midwest ISO's proposed classification of Dairyland's GFAs, we acknowledge that there appears to have been some miscommunication between Midwest ISO and Dairyland regarding the GFAs that would receive carved-out status. Dairyland claims that Midwest ISO knew that Dairyland intended to carve out its member-owner load, but Midwest ISO states that Dairyland instead indicated that it intended to request carve-out status only for a small number of existing agreements with third parties.

47. Despite the misunderstanding, we find that the new tariff changes accepted herein should apply to Dairyland's GFAs upon integration into Midwest ISO. Although Dairyland states that it relied on the Tariff language in effect when it unconditionally agreed to join Midwest ISO on October 5, 2009, Dairyland admits that a Midwest ISO staff member told Dairyland on September 29, 2009, that Midwest ISO did not intend to grant carved-out status to Dairyland's existing member-owner agreements. Dairyland could have waited to sign the Transmission Owners Agreement until the GFA issue was resolved, but it did not. In addition, in a letter to Midwest ISO dated October 13, 2009, Dairyland acknowledged that there was an ongoing dispute regarding the carved-out status of certain existing agreements, but stated that it was waiving any conditions to Dairyland's membership application and, as a signatory to the Transmission Owners Agreement, indicated that is had no conditions precedent to becoming a transmission owning member. Furthermore, in the October 13, 2009 letter, Dairyland also stated that it "looks forward to approval of Dairyland's application by the Midwest ISO Board at its October 15, 2009 meeting." In response to that request, the Midwest ISO Board approved Dairyland's unconditional membership application at its October 15, 2009 meeting.

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[25] This action is consistent with *Central Hudson Gas & Elec. Corp.*, 60 FERC ¶ 61,106, *reh'g denied*, 61 FERC ¶ 61,089 (1992) because Midwest ISO has not demonstrated good cause to waive the 60-day prior notice requirement.

48. Dairyland's membership in Midwest ISO will not take effect until June 1, 2010 and Midwest ISO's proposed changes will become effective on December 16, 2009. The proposed tariff provision would therefore apply to all GFAs that have not been accepted by the Commission for inclusion in Attachment P as carved-out agreements by that date. Dairyland admits that the listing in Attachment P of any of its GFAs that are not already included there would take effect June 1, 2010. Therefore, the new tariff provisions in effect on December 16, 2009 would apply to Dairyland's GFAs.

49. While the timing of the Midwest ISO's filings and Dairyland's signing the Transmission Owner Agreements is awkward, we note that Midwest ISO is not precluded from proposing such changes to its Tariff simply because Dairyland will become a member at some point in the future. For example, there is no provision in the Transmission Owners Agreement that specifically addresses the availability of carved-out status for GFAs or otherwise provides assurance that Tariff provisions will not change between the date a new member signs the Transmission Owners Agreement and the date such membership takes effect. Also, as noted above, applying the tariff changes to Dairyland's existing agreements does not implicate prior Commission findings. Questions about standard of review for the GFAs do not apply here, since the Commission is not requiring or coercing any changes and the new member has the ability to amend the agreements that are affected because they are with affiliates. As noted above, Dairyland was aware of Midwest ISO's position regarding treatment of its GFAs before it made its final decision to join Midwest ISO. That decision to join Midwest ISO was entirely voluntary, and if it chose not to join, it would not have to change any contracts. Nor does Dairyland argue that it cannot modify its contracts with its members to pass through costs it incurs for settlements in the Midwest ISO markets. In addition, as explained above, we reject Midwest ISO's proposal to not allow carved-out status for agreements between a prospective member and existing transmission owners listed on Attachment P, as well as Midwest ISO's proposal to delete certain GFAs already listed in Attachment P. Therefore, GFAs that the Commission already addressed in prior proceedings will not be affected.

50. We also find Midwest ISO's proposal to make carved-out treatment unavailable for existing service to an owner-member of a transmission owner is appropriate because it is similar to how bundled retail load is treated under the Midwest ISO Tariff. The sales that a generation and transmission cooperative such as Dairyland makes to its owner-members are wholesale sales, but the purpose of those wholesale sales (and, in fact, the purpose of the generation and transmission cooperative itself) is to provide for the owner-member's sales to its bundled retail load. Unlike a full requirements sale to an unaffiliated third party, where the third party would have no say in whether Dairyland joined Midwest ISO, the wholesale requirements sales Dairyland seeks to carve-out are to member-owners without whose approval Dairyland would not be able to join the Midwest ISO.

51. Because of this similarity, the proper comparison for how existing sales to owner-members are treated once Dairyland joins Midwest ISO is not to how Midwest ISO treats existing sales between a transmission owner and an unaffiliated third-party, but rather how Midwest ISO treats bundled retail sales. A transmission owner that serves bundled retail load must take service under the Midwest ISO Tariff to serve that load,[26] which is *not* carved-out of the energy market. The service a transmission owner takes to serve bundled retail load is subject to all the energy market rules and charges.[27] Indeed, MidAmerican, the most recent new member of Midwest ISO, notes in its answer that it is taking service under the Midwest ISO Tariff (i.e., it does not receive carved-out treatment) for its entire bundled retail load located within the Midwest ISO footprint.

c. <u>Complaint – EL10-9-000</u>

52. Based on our determination that Dairyland's GFAs would be subject to the new tariff language proposed by Midwest ISO in Docket No. ER10-73-000, we deny the relief requested in Dairyland's complaint. Dairyland does not persuade us that Midwest ISO's alleged failure to file the Attachment P tariff sheets that Dairyland provided it is actually a tariff violation. The complaint does not indicate which section of the tariff requires such a filing, and we observe that Midwest ISO was not, in any case, required to file a tariff amendment until 60 days prior to Dairyland's planned integration into Midwest

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[26] Midwest ISO must be the sole provider of transmission service over its system and, therefore, transmission owners must take service under the Midwest ISO Tariff to serve their bundled retail load. The terms and conditions of the underlying agreements for service to bundled retail customers are not modified, but the transmission owner takes service under the Tariff for the service that it in-turn uses to service its bundled retail load. *See Midwest Indep. Transmission Sys. Operator, Inc.*, Opinion No. 453, 97 FERC ¶ 61,033, at 61,170-71 (2001), *order on reh'g*, Opinion No. 453-A, 98 FERC ¶ 61,141 (2002), *order on remand*, 102 FERC ¶ 61,192 (2003), *reh'g denied*, 104 FERC ¶ 61,012 (2003), *aff'd sub nom. Midwest ISO Transmission Owners, et al*. v. *FERC*, 373 F.3d 1361 (D.C. Cir. 2004). The terms and conditions of the underlying agreements for service to bundled retail customers are not modified, but the transmission owner takes service under the Tariff for the service that it in-turn uses to service its bundled retail load.

[27] Although transmission service for bundled retail load is fully within the energy markets, the service is treated similarly to service under an Option A GFA in that it is not subject to transmission service charges under Schedule 9 (Network Integration Transmission Service) of the Midwest ISO Tariff. As discussed earlier, we are requiring Midwest ISO to offer Option A for GFAs that cover service to a generation and transmission cooperative's owner-members.

ISO.[28] We do not find error in Midwest ISO's decision to file the Attachment P it hoped to make effective at the time of Dairyland's integration. We note, however, that Midwest ISO is required to reinstate those GFAs which were previously included in Attachment P, but which Midwest ISO proposed to remove in these proceedings.

The Commission orders:

(A) Midwest ISO's filling in Docket No. ER10-73-000 is hereby accepted in part and rejected in part, effective December 16, 2009, subject to Midwest ISO making a compliance filing within 30 days of the date of this order to correct inconsistencies with the filed tariff language, as discussed in the body of this order.

(B) Midwest ISO's filing in Docket No. ER10-74-000 is hereby rejected. Midwest ISO is ordered to submit revised tariff sheets under Attachment P reflecting the reinstatement of the GFAs that were previously listed on Attachment P prior to November 1, 2009, to be effective June 1, 2010.

(C) The relief requested in Dairyland's complaint is hereby denied as it relates to applying the currently effective tariff language in determining carved-out GFA status. Dairyland's thirty GFA contracts will be classified as described in this order.

(D) Dairyland's motion to consolidate the instant proceedings is hereby denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

[28] *See* 18 C.F.R. § 35.3(a)(1) (2009).