130 FERC ¶ 61,027
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Midwest Independent Transmission System Operator, Inc. — Docket No. ER10-279-000

ORDER ACCEPTING TARIFF REVISIONS FOR FILING, SUBJECT TO CONDITION, AND DIRECTING COMPLIANCE FILING

(Issued January 11, 2010)

1. On November 16, 2009, Midwest Independent Transmission System Operator, Inc. (Midwest ISO) proposed revisions to its Open Access Transmission, Energy and Operating Reserve Markets Tariff (Tariff),[1] in order to: (1) provide an alternative to the use of counter-flows for the restoration of long-term firm transmission rights (LTTRs)[2] by limiting market participants' ability to terminate an LTTR each year, as further explained below; and (2) by way of exception, to allow the termination of counter-flow obligations based on the expiration of associated power purchase agreements. As discussed below, the Commission accepts Midwest ISO's proposed Tariff revisions for filing, subject to Midwest ISO making a compliance filing.

I. Background

2. In a 2003 declaratory order, the Commission provided guidance regarding the development of Midwest ISO's previous tariff (the TEMT), which envisioned the establishment of energy markets utilizing locational marginal pricing and financial transmission rights (FTRs). The Commission stated, among other things, that FTRs

[1] Midwest ISO, FERC Electric Tariff, Fourth Revised Volume No. 1.

[2] LTTRs are defined as "[Auction Revenue Rights (ARRs)] allocated in Stage 1A of the Annual ARR Allocation process. LTTRs carry annual rollover rights lasting ten (10) years or more." Midwest ISO Tariff at section 1.368. ARRs, in turn, are defined as "[a] Market Participant's entitlements to a share of the revenues generated in the annual FTR Auction." *Id.* section 1.30.

should be allocated based on historic uses of Midwest ISO's transmission system, instead of allowing market participants great latitude to nominate the most valuable rights that may be unrelated to such historic usage.[3]

3. In 2004, the Commission conditionally accepted Midwest ISO's TEMT, including the proposed use of counter-flow FTRs as a transitional restoration method to ensure the availability of other FTRs that otherwise could be rendered infeasible if certain market participants refrain from making FTR nominations for their baseload capacity. The Commission also extended the transition period for the counter-flow method to five years to provide market participants experience with locational marginal pricing and FTRs, as well as to allow time for regional transmission planning and expansion under the new market design.[4]

4. Consistent with the Energy Policy Act of 2005 (EPAct 2005),[5] Order No. 681[6] required independent transmission organizations that oversee organized electricity markets to make LTTRs that satisfy seven guidelines available to all transmission customers. In response to Order No. 681, in 2007, Midwest ISO proposed revisions to the TEMT to provide for LTTRs, in the form of Stage 1A ARRs.

5. Pursuant to its Tariff,[7] Midwest ISO initially allocates ARRs to market participants based on the market participant's firm historical usage of the transmission network and consistent with Midwest ISO's determination that the ARRs are

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[3] *Midwest Indep. Trans. Sys. Operator, Inc.*, 102 FERC ¶ 61,196, at P 65 (2003).

[4] *Midwest Indep. Trans. Sys. Operator, Inc.*, 108 FERC ¶ 61,163, at P 156, 189, *order on reh'g*, 109 FERC ¶ 61,157 (2004), *order on reh'g*, 111 FERC ¶ 61,043, *reh'g denied*, 112 FERC ¶ 61,086 (2005), *aff'd sub nom. Wisconsin Public Power, Inc. v. FERC*, 493 F.3d 239 (D.C. Cir. 2007).

[5] Pub. L. No. 109-58, 119 Stat. 594, 958 (2005). Section 217(b)(4) of EPAct 2005 directed the Commission to use its authority to facilitate transmission planning and expansion to meet the reasonable needs of load-serving entities with respect to meeting their service obligations and securing LTTRs for long-term supply arrangements made, or planned, to meet such obligations.

[6] *Long-Term Firm Transmission Rights in Organized Electricity Markets*, Order No. 681, FERC Stats. & Regs. ¶ 31,226, *order on reh'g*, Order No. 681-A, 117 FERC ¶ 61,201 (2006).

[7] Midwest ISO, FERC Electric Tariff, Fourth Revised Volume No. 1.

simultaneously feasible. Market participants may then convert their ARRs into LTTRs by nominating such LTTRs with equivalent specifications or they can choose to receive the revenues associated with its ARR from the annual auction of LTTRs.[8]

6. As relevant here, Midwest ISO's existing market rules include a process whereby Midwest ISO may assign counter-flow ARRs[9] to a market participant, based on a market participant's historical usage of the transmission system, even when the market participant did not convert its ARRs to LTTRs consistent with its historical transmission usage. The reason for the restoration process and a description of the process were described by the Commission in its May 17, 2007 order addressing Midwest ISO's Order No. 681 compliance filing:

> A major component of the Midwest ISO LTTR proposal under guideline (5) is meeting the reasonable needs of [load-serving entities]. When the Midwest ISO markets were being proposed, a market participant issue was that when initially allocating FTRs (on an annual basis), there was not always sufficient transmission transfer capability based on submitted FTR nominations to allow certain [load-serving entities] to acquire sufficient FTRs to meet congestion coverage for their baseload if other [load-serving entities] did not also nominate FTRs with their historical generators as source points. A key reason for this was that the historical Midwest power flow pattern that the FTR nominations were attempting to replicate relied on "counter-flow," essentially the effect that transmission transfer capability is increased when injections and withdrawals net each other out over a particular transmission facility. However, some FTRs that provide counter-flow result in net negative payment obligations, although these are typically offset by positive congestion payments.[[10]] Thus, some [load-serving entities] did not want

[8] *See* Tariff section 44 (Annual FTR Auctions).

[9] Midwest ISO proposes the following change to the definition of Counter-flow ARR in section 1.104 of its Tariff as follows: "ARR allocated during the LTTR Restoration and Termination Stage of an Annual ARR Allocation based on a Counter-flow ARR Entitlement."

[10] In a footnote, the Commission added that:

> An FTR is specified from a source point to a sink point. To illustrate the financial aspects of a counter-flow obligation, assume that the holder of the FTR is operating a generator at the source point and has load at the sink point. If the [locational marginal price (LMP)] at the source point is lower than the LMP at the sink point, then the holder of the FTR is getting paid positive revenues from the FTR, but owes the difference in the LMPs in congestion costs. On the other hand,

(continued…)

> to nominate FTRs that would result in such payments, so as to increase their energy market revenues. However, by not nominating such counter-flow FTRs, they would reduce the set of FTRs available for others. As part of its decision to start the Midwest ISO market with sufficient safe-guards, the Commission approved a five-year "safe-guard" to require [load-serving entities] in the Midwest ISO to take assigned counter-flow FTRs if those counter-flows were needed to provide another [load-serving entity] with its historical baseload FTRs (i.e., from its network resources to its network load). [Footnote omitted.] This was called "restoration." At the end of this five-year period, the assignment of such counter-flow FTRs was to terminate and the Midwest ISO [load-serving entities] were encouraged to build transmission capacity and take other steps to ensure that their FTR coverage would remain sufficient after the safeguard phase.
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> In complying with guideline (5), the Midwest ISO has proposed to continue its assignment of counter-flow transmission rights, although now as point-to-point ARRs and with some different rules than before, so as to provide [load-serving entities] that seek LTTRs with their reasonable needs. That is, without such counter-flow ARRs, some [load-serving entities] would not be able to acquire baseload congestion hedges.[[11]]

7. The Commission conditionally accepted Midwest ISO's LTTR compliance filing and directed Midwest ISO to, among other things, submit within six months, and annually thereafter, a report on the status of discussions with stakeholders regarding ARR restoration and counter-flow in relation to the need for transmission planning and expansion. The Commission also "strongly encourage[d]" Midwest ISO to discuss with stakeholders, and to develop, alternative solutions to be proposed when the counter-flow

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> if the LMP at the source point is higher than the LMP at the sink point, then the holder of the FTR is in a "counter-flow" situation and owes the difference between the two prices. At the same time, the generator at the source point is getting an LMP payment that is higher than the LMP at the sink point, and this congestion payment offsets the FTR obligation. Thus, as long as the holder of the counter-flow FTR has a generator at the source point, it is hedged against counter-flow FTR obligations.

119 FERC ¶ 61,143 at P 92, n.34.

[11] *Midwest Indep. Trans. Sys. Operator, Inc.*, 119 FERC ¶ 61,143, at P 92-93 (LTTR Initial Order), *order on reh'g*, 121 FERC ¶ 61,063 (2007) (LTTR Rehearing Order).

transition period ends in April 2010.[12] The instant filing is the result of those stakeholder discussions.

II. The Proposed Tariff Revisions

A. LTTR Termination Procedures as Alternative to Counter-flow Assignment

8. Midwest ISO proposes to replace the Tariff's current method for dealing with proposed terminations of LTTRs. Currently, LTTR holders must re-nominate LTTRs each year if they want the LTTRs to continue for ten years or more. Where the LTTR holder chooses not to re-nominate an LTTR, and where such choice negatively impacts the ability of another market participant to receive congestion coverage for its baseload resource, Midwest ISO may assign counter-flow ARRs to the first market participant. Under the proposal, LTTR holders that do not want to continue holding their LTTRs would be required to request termination of the LTTRs. Such termination requests shall be processed by Midwest ISO, and shall be subject to the requirements of simultaneous feasibility tests. Midwest ISO states that the goal of the simultaneous feasibility test requirement is to limit the excessive cost shifts that result from full flexibility to forgo LTTRs. Midwest ISO states that this precaution against infeasibility is consistent with the full funding requirement of Order No. 681.

9. Midwest ISO states that the Tariff currently uses an "opt in" approach to the long-term nature of an LTTR, i.e., an LTTR holder must re-nominate a one-year LTTR each year if it wants the LTTR to continue for ten years or more. By contrast, under the instant filing, Midwest ISO proposes an "opt out" framework under which an LTTR holder is deemed to have made a long-term commitment to hold the LTTR, and can disengage from such a commitment only by making a termination request that would be subject to simultaneous feasibility tests.[13] Otherwise stated, the Tariff currently focuses on after-the-fact restoration of curtailed candidate LTTRs[14] through the use of counter-

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[12] LTTR Initial Order, 119 FERC ¶ 61,163 at P 148-49.

[13] Simultaneous Feasibility Test is defined as "[a] test for a state in which each set of injections and withdrawals associated with receipt point-to-delivery point FTRs and power transfers associated with FTRs would not exceed any thermal, voltage, or stability limits within the [t]ransmission [p]rovider [r]egion under normal operating conditions or for monitored contingencies." Midwest ISO Tariff at section 1.614.

[14] Candidate ARRs are "ARR nominations submitted by [m]arket [p]articipants to be considered throughout the [a]nnual ARR [a]llocation process." *Id*. section 1.63.

flow ARRs, whereas the instant proposal preserves market participants' long-term commitment to their LTTRs, unless termination is requested and granted, subject to the requirements of simultaneous feasibility.[15] Termination requests shall be processed by Midwest ISO after Stage 1A of the next annual ARR allocation period is concluded and before the nominations for Stage 1B are accepted.

10. As a transitional matter, LTTRs granted in Stage 1A of the 2008-2009 annual ARR allocation period and not re-nominated in Stage 1A of the 2009-2010 annual ARR allocation period shall be deemed to have been requested for termination in the latter period. In the 2010-2011 and ensuing annual ARR allocations, requests to terminate LTTRs shall be governed by the new rules. The number of megawatts of Baseload Resource Source Set entitlements not nominated in a current Stage 1A may also be submitted through new or incremental nominations in Stage 1A of the next annual ARR allocation period. In the case of a termination request that is not granted, the associated LTTR would expire after ten years, if termination requests are made in ten consecutive annual ARR allocation periods with the exception of LTTRs associated with the retirement of underlying generator resources.

11. Midwest ISO also notes that the assignment of counter-flow ARRs could still occur in a limited manner during the Year 1 ARR allocation of a market participant coming into the Midwest ISO footprint under a new transmission owner integration process. From the market participant's next annual ARR allocation period (i.e., year 2) onwards, the market participant's involvement in any further restoration of LTTRs shall be governed by the proposed termination procedure here. To the extent that candidate LTTRs are not fully restored through this process, infeasible ARRs will be provided for the unrestored portions.

12. Midwest ISO states that, given its shift in focus from restoration to preservation, and to optimize the restoration of LTTRs to the extent that counter-flows will still be utilized in connection with the Year 1 ARR allocations of new market participants, Midwest ISO is dropping the restoration eligibility requirement of a historical capacity or scheduling factor of at least 70 percent. That is, a market participant no longer needs to have a minimum capacity or scheduling factor to be eligible for restoration of its LTTRs.

B. LTTR Termination Based on Expiration of Purchase Power Agreements

13. Midwest ISO proposes to revise section 43.6.4 of the Tariff to allow load-serving entities to request the termination of Year 1 counter-flow ARRs based on the expiration

[15] Midwest ISO Transmittal Letter at 7.

of underlying power purchase agreements.[16] Midwest ISO states that, while the Commission previously did not allow termination on the basis of contract expiration, it is appropriate to permit such termination in the context of the proposed use of the proposed termination procedure in lieu of the restoration process.[17] Specifically, Midwest ISO states that the termination of LTTRs on that basis is consistent with the instant filing's proposal to minimize and reduce Midwest ISO's reliance on counter-flows as the primary method for restoring LTTRs.

14. Under Midwest ISO's proposal, a request to terminate a reserved source point[18] and its associated counter-flow ARR, based on expiration of a power purchase agreement must involve either an agreement that has already expired, or one that is scheduled or expected to expire within five years from the date of the request – with certain exceptions.[19]

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[16] This proposed exemption is in addition to an existing exemption for retiring generation resources.

[17] *Id*. at 10 (citing *Midwest Indep. Trans. Sys. Operator, Inc.*, 123 FERC ¶ 61,178, at P 21 (2008)).

[18] Reserved source point(s) are defined as resources historically used by a market participant to serve load in an ARR zone. Midwest ISO Tariff at section 1.576, ARR Zone(s) are geographic areas defined for the purpose of allocating ARRs based upon locations where a market participant serves load. *Id.* section 1.27.

[19] The five-year notice requirement is subject to some transitional exceptions for power purchase agreement expirations occurring before the 2016 annual ARR allocation period. Where such expirations occurred before, or are scheduled or expected to occur during, the 2010 annual ARR period, the relevant market participants shall be allowed to request termination of the affected reserved source points and their associated LTTRs. Subsequent to the 2010 annual ARR allocation period, where power purchase agreements expire before, or are scheduled or expected to expire during, any of the annual ARR allocation periods from 2011 through 2015, the relevant market participants shall also be allowed to request the termination of the affected reserved source points and their associated LTTRs. In addition, even for contract expirations occurring during or after the 2016 annual ARR allocation period, the five-year notice for termination requests may be waived by Midwest ISO, and the relevant reserved source point may be terminated in the next full season, where the expiration was caused by the associated generation resource's having been rendered immediately and permanently inoperable due to a catastrophic failure. Midwest ISO Transmittal Letter at 10-11.

15. Absent the making or granting of any termination requests, reserved source points and associated counter-flow ARRs pertaining to power purchase agreements shall be deemed to continue to be effective in the next annual ARR allocation periods. Midwest ISO further states that the proposed tariff revisions regarding the expiration of power purchase agreement also include parallel revisions to the Tariff language relating to the retirement of generation resources, since unit retirement and contract expiration will now be similarly deemed adequate grounds to terminate reserved source points and associated counter-flow ARRs. Midwest ISO states that it shall provide the implementing details and timelines for the proposed LTTR termination procedure in the appropriate business practices manual(s).

C. Proposed Effective Dates and Request to End Annual Status Reports

16. Midwest ISO requests waiver of the 60-day prior notice requirement to permit an effective date of November 30, 2009, with regard to the termination of counter-flow ARRs based on the expiration of power purchase agreements. It explains that this effective date is necessary so that registration activities it has initiated (i.e., to request and collect contract information for processing the termination of reserved source points) will be consistent with the proposed Tariff revisions relating to contract expirations, and it would have time to review and implement in the ARR registration process any termination requests based on such expirations.

17. Midwest ISO requests an effective date of March 1, 2010, for the proposed LTTR termination procedure. It states that this procedure needs to be implemented in the 2011-2012 annual ARR allocation process, and should be in place as the replacement for the current restoration method by the time the transition period for the counter-flow approach to LTTR restoration expires on April 1, 2010.[20]

18. In addition, Midwest ISO requests that the instant filing constitute its final compliance with the Commission's requirements of annual reports on the status of Midwest ISO's efforts to find a replacement for the use of counter-flows as a means to restore curtailed candidate ARRs.

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[20] Midwest ISO states that the proposed alternative restoration method needs to be implemented in the 2010-2011 annual ARR allocation process, and should be in place by the time the transition period for the counter-flow approach to LTTR restoration expires on April 1, 2010.

III. Notice of Filing and Responsive Pleadings

19. Notice of Midwest ISO's filing was published in the *Federal Register*, 74 Fed. Reg. 61669 (2009), with motions to intervene and protests due on or before December 7, 2009. Timely motions to intervene were filed by: MidAmerican Energy Company; American Municipal Power, Inc.; Indianapolis Power & Light Company; Consumers Energy Company; Ameren Services Company; Wisconsin Electric Power Company; Xcel Energy Services, Inc.; WPPI Energy; and Constellation Energy Commodities Group, Inc. A timely motion to intervene and protest was filed by Madison Gas & Electric Company (MGE). On December 23, 2009, Midwest ISO filed an answer. On January 7, 2010, MGE filed a response to Midwest ISO's answer.

20. With respect to the proposed termination procedures in section 43.6.4 of the Tariff concerning retiring generation resources and expiring power purchase agreements, MGEs states that proposed section 43.6.4 appears to apply to all expiring power purchase agreements and retiring generation resources, and all ARRs and LTTRs associated with those resources. However, MGE states that proposed sections 43.6.4.1, 43.6.4.2, and 43.6.3 – which describe specific procedures for retirements and expirations occurring in three different timeframes – appear to be limited to generation resources and power purchase agreements for which Year 1 counter-flow ARRs have been assigned to the market participant. MGE contends that the plain language of section 43.6.4, standing alone, does not restrict the five-year notice of termination right in this manner and that Midwest ISO's transmittal letter likewise suggests that the provision is not intended to be limited only to Year 1 counter-flow ARRs.[21]

21. MGE opposes the restriction of such procedures to Year 1 counter-flow ARRs that have been assigned to the market participant. Out of an abundance of caution and because the proposed Tariff language is arguably ambiguous, MGE requests that Midwest ISO be directed to clarify that the termination provisions of section 43.6.4 are available for all retiring generation resources and expiring long-term power purchase agreements, not only those generation resources and power purchase agreements for which Midwest ISO assigned Year 1 counter-flow ARRs to the market participant. MGE argues that this requested clarification is also required by the LTTR Rehearing Order. MGE states that Midwest ISO's proposal replaces the existing language of section 43.6.4, which was filed after the LTTR Rehearing Order and complied with the Commission's directive by allowing termination of all counter-flow obligations upon retirement of a generation resource. According to MGE, the new provision properly treats retiring

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[21] MGE December 7, 2009 Protest at 4 (*citing* Midwest ISO Transmittal Letter at 10).

generation resources and expiring power purchase agreements comparably, but if it is interpreted so that it is limited only to retiring generation resources and expiring power purchase agreements that were assigned Year 1 counter-flow ARRs by Midwest ISO, then the proposal actually expands the use of counter-flow obligations in the Midwest ISO, and the Tariff will no longer meet the express requirements of the LTTR Rehearing Order.[22]

22. MGE also argues that the proposed expedited termination procedures in sections 43.6.4.1 and 43.6.4.2 of the Tariff for generation resources and power purchase agreements that retire or expire before 2016 should be made available to all such resources and power purchase agreements, not just those for which Midwest ISO assigned Year 1 counter-flow ARRs. According to MGE, the proposed restriction erroneously forces market participants to continue to accept costly LTTR and ARR obligations, long after the long-term resources that are the basis for those obligations no longer exist. With respect to most generation resources that retire between now and 2016, MGE contends that Midwest ISO's proposed tariff language appears to eliminate the existing right to terminate all counter-flow obligations upon retirement. Instead, for those generation resources, the proposed new tariff language appears to allow Midwest ISO to assign continuing counter-flow obligations long after the generation resource is gone, by forcing the market participant to continue to accept LTTRs that the market participant neither wants nor needs, unhedged by any underlying resources. MGE argues that such a result directly conflicts with the LTTR Rehearing Order.[23] MGE further contends that because retirement/expiration of the resource will have occurred before an additional five years has passed, it is unclear from the proposed Tariff language whether the soon-to-retire generation resources and expired/soon-to-retire power purchase agreements would be eligible to use even the five-year notice-of-termination of section 43.6.4.

23. MGE argues that allowing expedited termination only for resources that have been assigned Year 1 counter-flow ARRs improperly penalizes market participants who have previously requested and used LTTRs to hedge the generation resources and long-term power purchase agreements the market participant relied on to serve its load. MGE adds that forcing such market participants to continue to accept unwanted and potentially costly LTTRs after the underlying resource has retired or expired is unjust, unreasonable, unduly discriminatory against market participants that chose to exercise rights to obtain LTTRs as provided under the Tariff, and inconsistent with FPA section 217(b)(4)[24] and

[22] MGE December 7, 2009 Protest at 5-6.

[23] *Id*. at 7-8 (citing LTTR Rehearing Order, 121 FERC ¶ 61,063 at P 22).

[24] 16 U.S.C. § 824q(b)(4) (2006).

Order No. 681. MGE contends that Midwest ISO's proposal would force a load-serving entity to choose between giving up its right to seek LTTRs to hedge existing long-term resources and potential future counter-flow obligations that could impose significant costs for years, unhedged by any generation because the underlying resources have retired or expired.[25]

24. In response to MGE, Midwest ISO stresses that the stakeholders that voted in favor of the proposed revisions to section 43.6.4 of the Tariff clearly regarded that provision as limited to counter-flow ARRs and that its proposed Tariff revisions reflect that intent. To the extent that the proposed revision of section 43.6.4 does not expressly limit its termination provisions to Year 1 counter-flow ARRs/LTTRs, Midwest ISO states that it undertakes, on compliance, to supplement the initial reference to "RSP" (reserved source point) in proposed section 43.6.4 by adding the language: "that has associated Year 1 Counter[-]flow ARRs, and."

25. Midwest ISO acknowledges that section 43.6.4 of the existing Tariff does not distinguish between LTTRs and counter-flow ARRs, and that the Commission's prior orders can be construed as requiring the termination of both LTTRs and counter-flow ARRs upon the retirement of associated resources. However, Midwest ISO explains that its proposal seeks to limit section 43.6.4 to the termination of counter-flow ARRs, and to allow such termination based on the expiration of underlying power purchase agreements, in light of its parallel proposal regarding a procedure for making requests to terminate LTTRs.

26. Further, Midwest ISO argues that, consistent with an LTTR's long-term commitment as defined based on historical usage, it would be reasonable to treat both the expiration of power purchase agreements, and the retirement of resources, as warranting only the termination of counter-flow ARRs, but not the termination of LTTRs, in light of the voluntary nature of the nominations that lead to the allocation of LTTRs. Midwest ISO states that, unlike market participants that are assigned counter-flow ARRs relating to ARR entitlements they did not nominate, market participants that nominate ARR entitlements, and are granted LTTRs, based on power purchase agreements with known expiration dates, or resources with scheduled or otherwise foreseeable retirement dates, should bear the responsibility of having voluntarily made such nominations despite any impending contract expirations or resource retirements. Since LTTRs are intended to be long-term in nature, market participants making nominations based on power purchase agreements or resources should be deemed to make their nominations based on projections that, based on historical usage, such agreements or resources would support

[25] MGE December 7, 2009 Protest at 9-10.

the long-term nature of their LTTR commitments.[26] According to Midwest ISO, if market participants instead make nominations, and receive LTTRs, based on soon-to-expire power purchase agreements or soon-to-retire resources, allowing the LTTRs to be automatically or easily terminated based on such contract expirations or resource retirements could cause the infeasibility of more LTTRs, thereby increasing rather than minimizing cost shifts due to the uplifts resulting from infeasible ARRs.[27]

27. Midwest ISO further argues that prior Commission orders, including the LTTR Rehearing Order, predominantly focused on counter-flow ARRs. It contends that the Commission's earlier orders pertaining to the termination of assigned counter-flow ARRs/LTTRs due to resource retirement therefore do not necessarily warrant the continued recognition of such retirement, or contract expiration, as a basis for the automatic termination of allocated LTTRs, i.e., those voluntarily obtained through nominations. Midwest ISO also states that the only counter-flow ARRs that have so far been assigned in the Midwest ISO markets were those assigned in the inaugural annual ARR allocation. Having been assigned in Year 1 – i.e., in the first year when market participants that were assigned those counter-flow ARRs participated in an annual ARR allocation – such ARRs parallel the instant filing's concept of Year 1 counter-flow ARRs, according to Midwest ISO.

28. MGE responds that, in the most recent annual ARR allocation, it was, for the first time, involuntarily assigned counter-flow obligations with respect to LTTRs that it nominated in 2008-2009, but did not renominate during the 2009-2010 annual ARR allocation. MGE asserts that the proposed treatment of retiring generation resources and expiring long-term power purchase agreements will have a chilling effect on the use of LTTRs for the exact purpose for which the LTTRs were created.

IV. Discussion

A. Procedural Matters

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

30. 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 or answer unless otherwise

[26] Midwest ISO December 23, 2009 Answer at 5-6.

[27] *Id*. at 6.

ordered by the decisional authority. We will accept Midwest ISO's and MGE's answers because they have provided information that assisted us in our decision-making process.

B. Substantive Matters

31. We find Midwest ISO's proposed Tariff revisions to be an improvement over the existing tariff because they focus on the proactive preservation of LTTRs rather than restoring previously curtailed candidate LTTRs by assigning counter-flow ARRs. The proposed Tariff revisions will require LTTR holders that do not want to continue holding their LTTRs to request their termination instead of not nominating the LTTRs from one year to the next. We find that the proposal is consistent with the long-term commitment represented by an LTTR.[28] We further find that, because the proposal precludes LTTR terminations that would lead to infeasible results under Midwest ISO's simultaneous feasibility test, the proposal reduces the need for the assignment of counter-flow ARRs.

32. We reject MGE's request to require Midwest ISO to clarify that the five-year notice of termination provision for retiring generation resources and expiring long-term power purchase agreements contained in section 43.6.4 is applicable to all such generation resources and power purchase agreements, and is not limited to those for which the Midwest ISO assigned Year 1 counter-flow ARRs. We find that MGE misconstrues the intent of the LTTR Rehearing Order. In that order, the Commission responded to requests for clarification pertaining to the termination of *assigned* counter-flow ARRs/LTTRs due to resource retirement. The Commission explained that it found "the Midwest ISO's proposal to continue assessing counter-flow obligations after the generation source has been retired to be unreasonable since holders of counter-flow ARRs no longer have the ability to hedge congestion by producing energy."[29] Midwest ISO's proposed tariff revisions in section 43.6.4, as further revised per our direction below, will properly limit termination of a reserved source point only to market participants assigned Year 1 counter-flow ARRs.

33. We are persuaded by Midwest ISO's argument that, if market participants are allowed to make nominations and receive LTTRs based on soon-to-expire power purchase agreements or soon-to-retire resources, allowing the LTTRs to be automatically or easily terminated based on such contract expirations or resource retirements could cause the infeasibility of more LTTRs, thereby increasing rather than minimizing cost

[28] We find that MGE has not supported its assertion that Midwest ISO's proposal would have a chilling effect on the use of LTTRs for the exact purpose for which LTTRs were created.

[29] LTTR Rehearing Order, 121 FERC ¶ 61,063 at P 22.

shifts due to the uplifts resulting from infeasible ARRs.[30] MGE does not dispute Midwest ISO's assertions that cost shifts would result in such a situation. Our finding here is not inconsistent with the Commission's previous findings concerning Midwest ISO's compliance with Order No. 681 that addressed Midwest ISO's restoration process and the assignment of counter-flow ARRs.[31]

34. Indeed our acceptance of Midwest ISO's proposal here is consistent with our earlier direction to Midwest ISO to develop alternative solutions to the restoration process with stakeholders, to be proposed when the transition period for using counter-flow as a method for restoring candidate LTTRs ends in April 2010.[32] We note Midwest ISO's answer that the majority of stakeholders that voted in favor of the proposed revisions to section 43.6.4 of the tariff clearly regarded that provision (and its subsections) as limited to counter-flow ARRs as evidenced by the specificity regarding Year 1 counter-flow ARRs in the proposed subsections of this provision.[33]

35. Midwest ISO proposes to change the termination provision for counter-flow ARRs to permit termination based on the expiration of a purchased power agreement, instead of merely for the retirement of a generation resource. We have previously noted our expectation that, for long-term supply contracts, a continuing counter-flow obligation is appropriate.[34] However, this expectation was predicated on the notion that alternative

[30] *See* Midwest ISO December 23, 2009 Answer at 6.

[31] LTTR Initial Order, 119 FERC ¶ 61,143, at PP 147-149 (discussing history of restoration process); LTTR Rehearing Order, 121 FERC ¶ 61,063 at P 22. *See also* Midwest Independent Transmission System Operator, Inc., 121 FERC ¶ 61,062 at P 80 (2007) (finding unreasonable Midwest ISO's proposal to continue assessing counter-flow obligations after a generation source is retired), *order on reh'g*, 123 FERC ¶ 61,178 at P 21 (2008) (LTTR Compliance Rehearing Order).

[32] LTTR Initial Order, 119 FERC ¶ 61,143 at P 147-49.

[33] Midwest ISO December 23, 2009 Answer at 4.

[34] In the LTTR Compliance Rehearing Order, the Commission stated that:

> The counter-flow obligation is based on the difference between clearing prices at the delivery point and the receipt point, and it follows that this obligation applies to market participants that participate in the energy market between these two points. Once a generator is retired, transactions between these two points cease, and congestion revenues cease. In this circumstance, the Commission has determined that it is reasonable that counter-flow obligations consequently cease.

(continued…)

transactions could continue after the termination of the contract and therefore market participants could continue to receive the benefits of congestion revenues. Since the Compliance Rehearing Order, Midwest ISO and its stakeholders have gained experience with what circumstances may necessitate automatic terminations under the tariff (i.e., termination that is not subject to a simultaneous feasibility test) and we will permit Midwest ISO and its stakeholders to include expirations of purchase power agreements as a reason to permit market participants to terminate their counter-flow ARRs.

36. Accordingly, we will conditionally accept Midwest ISO's proposed tariff revisions, effective on November 30, 2009, with regard to the termination of counter-flow ARRs based on the expiration of power purchase agreements,[35] and on March 1, 2010, with regard to the proposed alternative restoration method, subject to the compliance filing ordered below. We will direct Midwest ISO to make a compliance filing within 30 days of the date of this order to clarify, in Tariff section 43.6.4, that termination shall be limited to market participants with Year 1 counter-flow ARRs.[36] In addition, Midwest ISO should correct the typographical error in First Revised Sheet No. 1228 ("LLTR" instead of LTTR).

> The same outcomes are *not necessarily true* for the termination of long-term supply contracts, since alternative transactions can potentially continue after the termination of the contract and therefore market participants can continue to receive the benefits of congestion revenues. Thus, in that context, a continuing counter-flow obligation is appropriate. [emphasis added]

123 FERC ¶ 61,178 at P 21.

[35] We find that good cause exists to grant waiver of the 60-day notice requirement and allow the revisions with regard to the termination of counter-flow ARRs based on the expiration of power purchase agreements to become effective on November 30, 2009. *See Central Hudson Gas and Electric Corp.*, 60 FERC ¶ 61,106 (1992) *reh'g denied*, 61 FERC ¶ 61,089 (1992).

[36] Midwest ISO Answer at 4. Midwest ISO explains that, to the extent the proposed revision to section 43.6.4 of the Tariff does not expressly limit its termination provisions to Year 1 counter-flow ARRs/LTTRs, the Midwest ISO will supplement the initial proposed section 43.6.4 on compliance. We find this provision to be ambiguous and direct Midwest ISO to implement language in section 43.6.4 limiting termination to those market participants assigned Year 1 counter-flow ARRs in a compliance filing as directed below.

37. Finally, we find that this filing constitutes Midwest ISO's final compliance with the Commission's requirement that Midwest ISO supply annual reports on the status of Midwest ISO's efforts to find a replacement for the use of counter-flows as a means to restore curtailed candidate ARRs.[37]

The Commission orders:

(A) Midwest ISO's proposed Tariff revisions are hereby conditionally accepted for filing, to become effective on November 30, 2009, with regard to the termination of counter-flow ARRs based on the expiration of power purchase agreements, and on March 1, 2010, with regard to the proposed alternative restoration method, subject to the compliance filing ordered below and discussed in the body of this order.

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

By the Commission. Commissioner Norris voted present.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

[37] LTTR Initial Order, 119 FERC ¶ 61,143 at P 148.