

130 FERC ¶ 61,243
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. ER10-640-000

Commonwealth Edison Company

Docket Nos. ER10-209-000
EL10-12-000

ORDER ACCEPTING IN PART, REJECTING IN PART, AND SUSPENDING
TARIFF REVISIONS, CONSOLIDATING PROCEEDINGS, AND ESTABLISHING
HEARING AND SETTLEMENT JUDGE PROCEDURES

(Issued March 26, 2010)

1. On January 25, 2010, Midwest Independent Transmission System Operator, Inc. (Midwest ISO) submitted proposed tariff revisions to modify Attachment I (Index of Transmission Customers Eligible for Schedule 10-A) to remove Ameren Services Company (Ameren) and Illinois Power Company (Illinois Power) and their affiliates from the list of entities that are eligible to use Schedule 10-A. Midwest ISO requests waiver of the Commission's sixty-day prior notice requirement to permit an effective date of October 1, 2004.
2. In this order, we accept Midwest ISO's proposed tariff revisions in part, reject them in part, and suspend the filing for a nominal period, subject to refund, to be effective March 27, 2010, and establish hearing and settlement judge procedures. We also consolidate Midwest ISO's filing with the ongoing proceedings in Docket Nos. ER10-209-000 and EL10-12-000, which involve similar issues and are currently in settlement procedures.

I. Background

3. Prior to the operation of Midwest ISO, Illinois Power,¹ ComEd,² and Ameren³ (collectively, Departing Companies) each filed a Notice of Withdrawal from Midwest ISO, with the intent to join the Alliance Regional Transmission Organization (Alliance). Pursuant to the Settlement Agreement Involving the Midwest Independent Transmission System Operator, Inc., Certain Transmission Owners in the Midwest ISO, the Alliance Companies and Other Parties (Settlement Agreement), the Departing Companies agreed to pay a withdrawal fee to Midwest ISO in the amount of \$60 million representing their share of the capital portion of Midwest ISO's start-up costs and were permitted to withdraw from Midwest ISO.⁴ Recognizing that transmission customers would typically pay their share of Midwest ISO start-up costs over time through the Midwest ISO administrative charge (rather than paying such costs up-front via the withdrawal fee), the Settlement Agreement provides in section 4.8 that the Departing Companies would receive credits against the capital cost component of future Midwest ISO administrative charges as they take transmission service from Midwest ISO (Section 4.8 Credits). The Settlement Agreement provides for some transferability of the Section 4.8 Credits by allowing the credits to be applied against the charges owed for transmission services taken by the Departing Companies "or their current affiliates (or their successors or assigns)."⁵

4. The Commission accepted the Settlement Agreement on May 8, 2001.⁶ In December 2001, the Commission found that Alliance did not satisfy the criteria to be declared a Regional Transmission Organization.⁷ The members of Alliance were ordered

¹ See Dynegy Inc., October 13, 2000 Notice of Withdrawal, Docket No. ER01-123-000. Dynegy Inc. filed the notice on behalf of Illinois Power. At the time of the filing, Illinois Power was not yet affiliated with Ameren.

² See Exelon Corp., Commonwealth Edison Company and Commonwealth Edison Company of Indiana, Inc., December 22, 2000 Notice of Withdrawal, Docket No. ER01-780-000.

³ See Union Electric Co. and Central Illinois Public Service Co., January 16, 2001 Notice of Withdrawal, Docket No. ER01-966-000.

⁴ See Settlement Agreement, Docket No. ER01-123-000, *et al.*

⁵ See *id.* section 4.8.

⁶ *Illinois Power Co.*, 95 FERC ¶ 61,183, *reh'g denied*, 96 FERC ¶ 61,026 (2001).

⁷ *Alliance Companies*, 97 FERC ¶ 61,327 (2001).

to elect whether they would rejoin Midwest ISO or join PJM Interconnection, LLC (PJM). Ameren and Illinois Power rejoined Midwest ISO,⁸ at which time Midwest ISO returned their respective portions of the withdrawal fee that they had paid pursuant to the Settlement Agreement, with interest.⁹ ComEd, on the other hand, elected to join PJM and, therefore, did not receive a refund of the portion of the withdrawal fee it had previously paid to Midwest ISO.¹⁰

5. To implement the Section 4.8 Credits provided under the Settlement Agreement, Midwest ISO subsequently amended its tariff to add Schedule 10-A, which details how Midwest ISO would assess its administrative charges against holders of the Section 4.8 Credits. Attachment I to Schedule 10-A lists those entities entitled to take service under Schedule 10-A.¹¹

6. On November 3, 2009, ComEd, on behalf of itself and its wholly-owned subsidiary, Commonwealth Edison Company of Indiana, Inc., submitted two concurrent, related filings. In Docket No. ER10-209-000, ComEd filed a proposed Assignment Rate Schedule to its tariff¹² describing ComEd's assignment to Ameren of Section 4.8 Credits under the Settlement Agreement. Among other things, ComEd argued that the currently effective Schedule 10-A of Midwest ISO's tariff provides that Section 4.8 Credits may be used by any of the transmission customers listed in Attachment I.¹³ ComEd maintained that it could assign the Section 4.8 Credits to Ameren because Attachment I lists both ComEd and Ameren. In Docket No. EL10-12-000, ComEd filed a Petition for

⁸ *See Alliance Companies*, 100 FERC ¶ 61,137 (2002).

⁹ Ameren was reimbursed its entire \$18 million withdrawal fee. *See Ameren Services Co.*, 101 FERC ¶ 61,320 (2002).

¹⁰ *See PJM Interconnection, LLC*, 106 FERC ¶ 61,253 (2004).

¹¹ *See Midwest Indep. Transmission Sys. Operator, Inc.*, 102 FERC ¶ 61,193 (2003) (approving contested Offer of Settlement on Schedule 10-A); *Midwest Indep. Transmission Sys. Operator, Inc.*, 103 FERC ¶ 61,205 (2003) (accepting revisions to Schedule 10-A based on Offer of Settlement); *Midwest Indep. Transmission Sys. Operator, Inc.*, 118 FERC ¶ 61,160 (2007) (accepting further revisions to Schedule 10-A).

¹² ComEd, FERC Electric Tariff, Original Vol. No. 7.

¹³ ComEd November 3, 2009 Filing, Docket No. ER10-209-000, at 9 (citing Midwest ISO, FERC Electric Tariff, Third Revised Vol. No. 1, Schedule 10-A, Second Revised Sheet No. 960).

Declaratory Order requiring Midwest ISO to recognize the assignment of Section 4.8 Credits and allow Ameren to take service under Schedule 10-A of the Midwest ISO tariff.

7. On December 30, 2009, the Commission accepted in part, rejected in part, and nominally suspended ComEd's proposed Assignment Rate Schedule, subject to refund, consolidated the Assignment Rate Schedule filing with ComEd's Petition for Declaratory Order, and set both filings for hearing and settlement judge procedures.¹⁴ Currently, the parties to the above-referenced dockets are engaged in settlement procedures.¹⁵

II. Description of Filing

8. In Docket No. ER10-640-000, Midwest ISO proposes to revise Attachment I "to more accurately reflect those companies eligible for Schedule 10-A," specifically, by removing Ameren, Illinois Power, and their affiliates. Midwest ISO argues that Ameren and Illinois Power are no longer Departing Companies or affiliates of a Departing Company under Schedule 10-A and the Settlement Agreement. Midwest ISO contends that eligibility for the alternative administrative cost adder under Schedule 10-A is restricted to only those transmission customers that have prepaid the capital portion of Midwest ISO's start-up costs in advance and maintains that only those entities should be listed in Attachment I.¹⁶ Midwest ISO contends that Ameren and Illinois Power and their respective affiliates became ineligible for service under Schedule 10-A when they rejoined Midwest ISO and were repaid their respective portions of the withdrawal fee. However, Midwest ISO claims that, due to an administrative oversight, Ameren, Illinois Power, and their affiliates were never deleted from Attachment I. Midwest ISO requests waiver of the Commission's sixty-day prior notice requirement to allow the proposed revisions to become effective on October 1, 2004, which is the latter of the effective dates on which Ameren and Illinois Power rejoined Midwest ISO, thereby becoming ineligible for service under Schedule 10-A.¹⁷

¹⁴ *Commonwealth Edison Co.*, 129 FERC ¶ 61,298 (2009) (December 30 Order).

¹⁵ Settlement conferences were held on January 19, 2010 and February 2, 2010. By order issued by the Chief Judge on February 18, 2010, settlement procedures will be continued. *Commonwealth Edison Co.*, Docket Nos. ER10-209-000 and EL10-12-000 (Feb. 18, 2010).

¹⁶ Midwest ISO January 25, 2010 Filing at 1 (citing Midwest ISO, FERC Electric Tariff, Fourth Revised Vol. No. 1, Schedule 10-A, Original Sheet No. 1970).

¹⁷ To reflect this October 1, 2004 effective date, Midwest ISO submitted proposed tariff sheets under the Second Revised, Third Revised, and Fourth Revised Vol. No. 1 of its tariff effective on October 1, 2004, April 1, 2005, and January 6, 2009, respectively.

III. Notice of Filing and Responsive Pleadings

9. Notice of Midwest ISO's filing was published in the *Federal Register*, 75 Fed. Reg. 6198 (2010), with interventions and protests due on or before February 16, 2010. Motions to intervene were filed by Consumers Energy Company and Ameren.¹⁸ A motion to intervene and protest was filed by ComEd. A notice of intervention was filed by the Illinois Commerce Commission. Motions to intervene out-of-time and comments were filed by Midwest ISO Transmission Owners (Midwest ISO TOs)¹⁹ and the FirstEnergy Companies (FirstEnergy).²⁰ Midwest ISO TOs and Midwest ISO filed answers to ComEd's protest.

10. Midwest ISO TOs and FirstEnergy both support Midwest ISO's proposed revisions to Attachment I. Midwest ISO TOs and FirstEnergy argue that Ameren and Illinois Power were refunded their prepaid Midwest ISO capital obligations upon rejoining Midwest ISO and, thus, should not be listed in Attachment I. FirstEnergy asserts that Midwest ISO's filing does nothing more than remedy Midwest ISO's failure to amend Attachment I when Ameren and Illinois Power rejoined Midwest ISO.

11. ComEd argues that Midwest ISO's proposed revisions are not administrative in nature, but in fact would materially alter ComEd's rights under the Settlement

¹⁸ Ameren submitted the filing on behalf of Union Electric Co.; Central Illinois Public Service Co.; Central Illinois Light Co.; Illinois Power Co.; Ameren Energy Marketing Co.; AmerenEnergy Generating Co.; and AmerenEnergy Resources Generating Co.

¹⁹ For purposes of this filing, Midwest ISO TOs include: City of Columbia Water and Light Department (Columbia, MO); City Water, Light & Power (Springfield, IL); Duke Energy Corp. for Duke Energy Ohio, Inc., Duke Energy Indiana, Inc., and Duke Energy Kentucky, Inc.; Great River Energy; Hoosier Energy Rural Electric Cooperative, Inc.; Indiana Municipal Power Agency; Indianapolis Power & Light Co.; Manitoba Hydro; Michigan Public Power Agency; MidAmerican Energy Co.; Minnesota Power (and its subsidiary Superior Water, L&P); Montana-Dakota Utilities Co.; Northern Indiana Public Service Co.; Northern States Power Co., a Minnesota corp., and Northern States Power Co., a Wisconsin corp., subsidiaries of Xcel Energy Inc.; Northwestern Wisconsin Electric Co.; Otter Tail Power Co.; Southern Illinois Power Cooperative; Southern Indiana Gas & Electric Co.; Southern Minnesota Municipal Power Agency; Wabash Valley Power Association, Inc.; and Wolverine Power Supply Cooperative, Inc.

²⁰ The FirstEnergy Companies include: The Cleveland Electric Illuminating Co.; Ohio Edison Co.; Pennsylvania Power Co.; The Toledo Edison Co.; and FirstEnergy Solutions Corp.

Agreement. ComEd contends that Midwest ISO's request for an October 1, 2004, effective date is an attempt to undermine ComEd's Assignment Rate Schedule filed in Docket No. ER10-209-000 and should be rejected as a collateral attack on the Commission's December 30 Order accepting that rate schedule. According to ComEd, permitting Midwest ISO to eliminate from Attachment I parties to which ComEd has already assigned Section 4.8 Credits would be unjust, unreasonable and unduly discriminatory. ComEd also states that "Midwest ISO has not provided any justification for its proposed revisions and request for retroactivity, other than that the proposed revisions are being submitted 'to more accurately reflect those companies eligible for Schedule 10-A.'" ²¹ ComEd asserts that Midwest ISO entered a binding contract granting ComEd, as well as its affiliates, successors and assigns, rights to \$35 million of Section 4.8 Credits, adding that the Commission should not accept tariff revisions by which a market participant can effectively vitiate a contract to which it is otherwise bound without providing any justification or support. Further, ComEd claims that, by proposing an October 1, 2004, effective date, Midwest ISO is proposing to revise the rate retroactively in violation of the filed-rate doctrine and the prohibition against retroactive ratemaking. ComEd maintains that retroactively eliminating these entities, including the Ameren entities, drastically reduces the value of ComEd's Section 4.8 Credits.

12. ComEd urges the Commission to reject Midwest ISO's filing or, if the Commission does not reject Midwest ISO's filing, requests that the Commission hold this proceeding in abeyance and consolidate it with the ongoing proceedings in Docket Nos. ER10-209-000 and EL10-12-000. ComEd contends that the meaning and significance of the parties listed in Attachment I are central to the issues in the related proceedings in Docket Nos. ER10-209-000 and EL10-12-000 and states that a settlement in those dockets would resolve the Attachment I issue in this proceeding. In addition, ComEd maintains that, if the parties are unable to reach a settlement, the issues in the related dockets share common factual and legal grounds with the issues in this proceeding, making consolidation appropriate.

13. In their answer to ComEd's protest, Midwest ISO TOs argue that Schedule 10-A unambiguously states the eligibility requirements to take service under that schedule, and the fact that a company may be listed on Attachment I does not supplant the need to meet those eligibility requirements. Midwest ISO TOs maintain that Midwest ISO's filing does not reduce the pool of entities eligible to take service under Schedule 10-A; rather, they claim that the pool was reduced when Ameren and Illinois Power were repaid their earlier prepayment of the capital portion of Midwest ISO's start-up costs upon rejoining Midwest ISO and ceased to be eligible to take service under Schedule 10-A. Midwest ISO TOs claim that the Midwest ISO filing is administrative in nature and does nothing

²¹ ComEd Protest at 8-9 (citing Midwest ISO January 25, 2010 Filing at 1).

more than conform the companies listed in Attachment I with those that meet the prerequisites to take service under Schedule 10-A. Midwest ISO TOs contend that Midwest ISO's filing does not deprive ComEd of the benefits of its assignment because neither ComEd's assignment agreement with Ameren nor the rate schedule intended to effectuate that assignment alter Schedule 10-A's provisions restricting the use of that schedule to only those transmission customers that have paid the capital portion of Midwest ISO's start-up costs in advance. Finally, Midwest ISO TOs argue that the Midwest ISO filing cannot be fairly characterized as a collateral attack on the Commission's December 30 Order because the only final determination made by the Commission was to reject section 4 of ComEd's proposed rate schedule, as all other issues raised were set for hearing and settlement judge procedures.

14. In its answer to ComEd's protest, Midwest ISO maintains that ComEd does not dispute that Ameren should no longer be listed on Attachment I or that it is just and reasonable for Midwest ISO to conform Attachment I to the language of its tariff schedules and intervening facts. Instead, Midwest ISO contends that ComEd "mounts a nongermane protest to a tariff amendment that is otherwise wholly right and proper" in order to protect its "tenuous claim of a right to assign [Section 4.8] [C]redits to Ameren."²² Midwest ISO argues that its proposed revisions to Attachment I do not destroy the Settlement Agreement's value to ComEd because the agreement does not provide that the withdrawal fee must be fully recoupable. While Midwest ISO admits that it could have been more diligent in amending Attachment I when Ameren was repaid its withdrawal fee and, thus, was no longer eligible to take service under Schedule 10-A, it claims that ComEd suffered no detrimental reliance from this oversight, as the plain language of Schedule 10-A restricts its use to transmission customers that have paid the capital portion of Midwest ISO's start-up costs in advance.²³ Midwest ISO concludes that, if the ongoing settlement negotiations fail, it has every right to amend its tariff to reflect current circumstances and cannot be compelled to preserve an oversight solely for ComEd's benefit.

15. On March 17, 2010, ComEd filed an "Expedited Unopposed Motion to Hold Proceedings in Abeyance to Provide Time to Finalize and Implement Settlement." As the basis for requesting that Midwest ISO's filing be held in abeyance, ComEd represents that formal settlement discussions in Docket Nos. ER10-209-000 and EL10-12-000 are expected to result in resolution of the issues raised in this proceeding. FirstEnergy filed

²² Midwest ISO Answer at 3.

²³ Midwest ISO asserts that, if ComEd believed that it could assign Section 4.8 Credits to entities other than those that paid a withdrawal fee, it should have protested the eligibility criteria expressed in Schedule 10-A when it was previously filed with and accepted by the Commission.

an answer opposing ComEd's motion, indicating that it currently intends to protest the proposed settlement and that the settlement will not resolve the need for the proposed tariff revisions.²⁴

IV. Discussion

A. Procedural Issues

16. 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 and notice of intervention serve to make the entities that filed them parties to this proceeding.

17. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2009), we will grant Midwest ISO TOs' and FirstEnergy's late-filed motions to intervene given their interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

18. 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 Midwest ISO TOs', Midwest ISO's, and FirstEnergy's answers because they have provided information that assisted us in our decision-making process.

B. Commission Determination

19. Midwest ISO's proposed tariff revisions raise issues of material fact that cannot be resolved based on the record before us and are more appropriately addressed in the hearing and settlement judge procedures ordered below.

20. Our preliminary analysis indicates that Midwest ISO's proposed tariff revisions have not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Therefore, we will accept Midwest ISO's proposed tariff sheet for filing, suspend its effectiveness for a nominal period to become effective March 27, 2010,²⁵ which is after the sixty-day notice period, subject to refund, and set it for hearing and settlement judge procedures. We will deny Midwest

²⁴ FirstEnergy also states that ComEd never contacted FirstEnergy regarding the motion, and therefore, ComEd had no basis to call the motion "unopposed." FirstEnergy Answer at 3.

²⁵ The effective date of Midwest ISO's proposed Sheet No. 2461 submitted under the Fourth Revised Vol. No. 1 of its tariff will be changed to March 27, 2010. Thus, further compliance is not needed to address this issue.

ISO's request for waiver of the 60-day prior notice requirement to allow an effective date of October 1, 2004. Midwest ISO has failed to show good cause as to why waiver should be granted in this case.²⁶ Likewise, we will reject Tariff Sheet Nos. 315 and 1181,²⁷ since they are mooted by our denial of Midwest ISO's request for an October 1, 2004, effective date.

21. We also find that there are common issues of law and fact in this proceeding and the filings made by ComEd in Docket Nos. ER10-209-000 and EL10-12-000. Therefore, we will consolidate Midwest ISO's filing with ComEd's filings in Docket Nos. ER10-209-000 and EL10-12-000 for purposes of hearing, settlement and decision.²⁸

22. We deny ComEd's motion to hold Midwest ISO's filing of proposed tariff revisions in abeyance pending settlement in Docket Nos. ER10-209-000 and EL10-12-000. Since the proposed Midwest ISO tariff sheet that we are accepting and nominally suspending will be consolidated with the filings in Docket Nos. ER10-209-000 and EL10-12-000 for purposes of hearing, settlement and decision, we see no basis to delay action on the filing.

The Commission orders:

(A) Midwest ISO's proposed tariff revisions are hereby accepted in part, rejected in part, and suspended for a nominal period, to become effective March 27, 2010, subject to refund, as discussed in the body of this order.

(B) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, particularly sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R., Chapter I), a

²⁶ *Central Hudson Gas and Electric Corp.*, 60 FERC ¶ 61,106, *order on reh'g*, 61 FERC ¶ 61,089 (1992); *El Paso Electric Co.*, 101 FERC ¶ 61,276 (2002), *order on reh'g*, 105 FERC ¶ 61,131 (2003).

²⁷ Midwest ISO, FERC Electric Tariff, Second Revised Vol. No. 1, First Revised Sheet No. 315; Midwest ISO, FERC Electric Tariff, Third Revised Vol. No. 1, Third Revised Sheet No. 1181.

²⁸ Consistent with the December 30 Order, we will continue to hold the hearing in the consolidated proceedings in abeyance pending settlement negotiations pursuant to Rule 603 of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.603 (2009)).

public hearing shall be held concerning Midwest ISO's proposed revisions to Attachment I. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in the body of this order.

(C) Midwest ISO's filing in Docket No. ER10-640-000 is hereby consolidated with the ongoing proceedings in Docket Nos. ER10-209-000 and EL10-12-000 for purposes of hearing, settlement and decision, as discussed in the body of this order.

(D) The settlement judge or presiding judge, as appropriate, designated in Docket Nos. ER10-209-000 and EL10-12-000 shall determine the procedures best suited to accommodate the consolidation ordered herein.

(E) ComEd's "Expedited Unopposed Motion to Hold Proceedings in Abeyance to Provide Time to Finalize and Implement Settlement" is hereby denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.