131 FERC ¶ 61,210
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Ameren Services Company Northern Indiana Public Service Company v. Midwest Independent Transmission System Operator, Inc.	Docket No. EL07-86-006
Great Lakes Utilities Indiana Municipal Power Agency Missouri Joint Municipal Electric Utility Commission Missouri River Energy Services Prairie Power, Inc. Southern Minnesota Municipal Power Agency Wisconsin Public Power Inc. v. Midwest Independent Transmission System Operator, Inc.	Docket No. EL07-88-006
Wabash Valley Power Association, Inc. v. Midwest Independent Transmission System Operator, Inc.	Docket No. EL07-92-006

ORDER ON COMPLIANCE FILING

(Issued June 2, 2010)

1. In this order the Commission accepts in part and rejects in part the December 10, 2008 compliance filing that the Midwest Independent Transmission System Operator, Inc. (Midwest ISO) made in response to the Commission's Order on Paper Hearing in this proceeding.[1]

I. **Background**

2. In 2007, a number of companies (collectively, Complainants) filed complaints against the Midwest ISO under section 206 of the Federal Power Act (FPA) and Rule 206 of the Commission's Rules of Practice and Procedure.[2] These complaints concerned the allocation of Revenue Sufficiency Guarantee charges to market participants under the Midwest ISO's tariff.[3] The Complainants alleged that the real-time Revenue Sufficiency Guarantee rate, which is based in part on virtual supply offers, is unjustly and unreasonably assessed on only a subset of market participants making both virtual supply offers and withdrawals of energy.[4] The Complainants argued that there is no justification

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[1] *Ameren Servs. Co. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 125 FERC ¶ 61,161 (2008) (Order on Paper Hearing), *order on reh'g*, 127 FERC ¶ 61,121 (2009).

[2] 16 U.S.C. § 824e (2006); 18 C.F.R. § 385.206 (2009). The Complainants are: Ameren Services Company and Northern Indiana Public Service Company (Ameren/Northern Indiana); Great Lakes Utilities, Indiana Municipal Power Agency, Missouri Joint Municipal Electric Utility Commission, Missouri River Energy Services, Prairie Power, Inc., Southern Minnesota Municipal Power Agency, and Wisconsin Public Power Inc.; and Wabash Valley Power Association, Inc.

[3] For additional background to this proceeding, *see Ameren Services Company v. Midwest Independent Transmission System Operator, Inc.*, 121 FERC ¶ 61,205, at P 5-9 (2007) (Order on Revenue Sufficiency Guarantee Complaints), *order on reh'g*, 125 FERC ¶ 61,162 (2008).

Ameren Servs. Co. v. Midwest Indep. Transmission Sys. Operator, Inc., 121 FERC ¶ 61,205, at P 5-9 (2007).

[4] The tariff provision that the Complainants challenged states that the real-time Revenue Sufficiency Guarantee charge is allocated to any market participant that "actually withdraws energy" on a given operating day. Complainants alleged that virtual

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for differentiating among virtual supply offers with regard to Revenue Sufficiency Guarantee charge allocation and that the Commission's prior orders have found that there is no basis for doing so. The Complainants asked that the Commission set for hearing the issue of tariff revisions necessary to remedy this alleged discrimination.

3. The Commission granted in part and denied in part the relief the Complainants requested in the Order on Revenue Sufficiency Guarantee Complaints.[5] It found that the Midwest ISO's existing Revenue Sufficiency Guarantee cost allocation methodology may not be just and reasonable, but that the methodologies the Complainants proposed also had not been shown to be just and reasonable. The Commission thus established a refund effective date of August 10, 2007 and set the complaints for paper hearing. The Commission held the paper hearing in abeyance pending the conclusion of a then-ongoing stakeholder proceeding by the Midwest ISO Revenue Sufficiency Guarantee Task Force that was seeking to identify improvements that could be made to the Revenue Sufficiency Guarantee cost allocation methodology or February 1, 2008, whichever is earlier. The Midwest ISO later proposed to file specific tariff provisions and supporting documentation on or about March 3, 2008.

4. Following a paper hearing, the Commission issued an order finding that the Complainants' proposed replacement cost allocation (Interim Rate), which eliminates the "actually withdraws energy" language in section 40.3.3 of the current Midwest ISO tariff, would provide the basis for a just and reasonable rate. The Commission also required that the term "cleared" should be inserted before "virtual offers" in this provision of the current tariff. Accordingly, the Commission required the Midwest ISO to submit a compliance filing with revised tariff provisions that delete the "actually withdraws energy" language from the current tariff and inserts "cleared" before "virtual offers" in a compliance filing.[6]

II. Midwest ISO Filing

5. In its December 10 compliance filing, the Midwest ISO filed the revisions that the Commission required in the Order on Paper Hearing, making them in both the then-

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supply offers and generator deviations cause Revenue Sufficiency Guarantee charges to be incurred, but that the provision unjustly and unreasonably assigned such costs only to market participants making physical withdrawals of energy. Order on Paper Hearing, 125 FERC ¶ 61,161, at P 12-13.

[5] Order on Revenue Sufficiency Guarantee Complaints, 121 FERC ¶ 61,205.

[6] Order on Paper Hearing, 125 FERC ¶ 61,161 at P 105, 108, Ordering Paragraph (B).

existing Midwest ISO tariff and the Ancillary Services Market tariff that became effective on January 6, 2009. As further described below, the Midwest ISO also proposes to revise the Ancillary Services Markets Tariff counterparts of section 40.3.3.a.ii and 40.3.3.a.iii to conform them to the requirements of a Commission order issued in another proceeding on November 7, 2008.[7]

6. The Midwest ISO also indicated in its December 10 compliance filing that it would commence resettlements required by the Order on Paper Hearing no earlier than February 2009. In a supplemental filing submitted on December 19, 2008 the Midwest ISO noted that the charges associated with the resettlement of Revenue Sufficiency Guarantee charges would be substantial and may produce an increase in Total Potential Exposure calculated under the terms of the Midwest ISO's credit policy.

7. In addition, the December 10 compliance filing contains language that parallels revisions proposed in another docket. In a compliance filing submitted on December 8, 2008, in Docket No. ER04-691-091, the Midwest ISO indicated that the Commission's November 7 Order in that proceeding necessitated revisions to the calculation of the Revenue Sufficiency Guarantee charge. The Midwest ISO states that these calculation revisions are needed to ensure that the calculation of the Revenue Sufficiency Guarantee charge does not have a mismatch between the numerator and denominator of the charge, as required by that order. Accordingly, the Midwest ISO proposed in its December 8 compliance filing to recalculate the Revenue Sufficiency Guarantee charge so that any exempted amounts are taken out of the calculation of both the numerator and denominator of the charge. It also proposed to delete the phrase "all virtual supply offers in the Day-Ahead Energy Market of all Market Participants" from the denominator of the charge and replace it with "the aggregate of the amounts set forth in section 40.3.3.a.ii for cleared Virtual Supply for Market Participants in the Day-Ahead Energy Market," thereby eliminating the rate mismatch as required by the November 7, 2008 Order. This revision is also included in the proposed tariff sheets submitted in the December 10 compliance filing in this proceeding.

8. Finally, in its transmittal letter, the Midwest ISO stated that in consultation with its stakeholders, it was refining the Indicative Rate proposal[8] and would continue to do so

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[7] *Midwest Indep. Transmission Sys. Operator, Inc.*, 125 FERC ¶ 61,156 (2008) (November 7 Order), *reh'g dismissed*, 127 FERC ¶ 61,241 (2009), *reh'g pending*.

[8] In the Order on Paper Hearing, the Commission accepted an alternative mechanism for allocating Revenue Sufficiency Guarantee charges and costs (the Indicative Rate), to be applied prospectively after the Midwest ISO completes software upgrades. The Indicative Rate will supersede the Interim Rate when the Midwest ISO's systems are completed. Among other features, the Indicative Rate allocates Revenue Sufficiency Guarantee costs to cost buckets based on whether the costs were caused by

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for at least another 60 days. The Midwest ISO noted, among other things, that its Markets Subcommittee had passed motions recommending that the Midwest ISO interchange or combine the Indicative Rate proposal's second and third allocation buckets, i.e., intra-hour demand charge and day-ahead schedule deviations, respectively. The Midwest ISO anticipated filing the Indicative Rate proposal at about the end of January, 2009.

III. Procedural Matters

9. Notice of the December 10 compliance filing was published in the *Federal Register*, 71 Fed. Reg. 77,678 (2008), with interventions and protests due on or before December 31, 2008. Constellation Energy Commodities Group, Inc. and Constellation NewEnergy, Inc. and Tenaska Power Services Co. filed a timely motion to intervene.[9] EPIC Merchant Energy, LP, SESCO Enterprises LLC, CAM Energy Trading, LLC, The AI Funds, Inc., Argo Navis Fundamental Power Fund, L.P., JJR Power, LLC, JPTC, LLC, Jump Power, LLC, Solios Power, LLC, and Energy Endeavors, LLC (collectively, Financial Marketers) filed a motion to intervene and protest.[10] DC Energy Midwest, LLC (DC Energy), E.ON U.S. LLC (E.ON), FirstEnergy Service Company (FirstEnergy), Integrys Energy Services, Inc. (Integrys), Otter Tail Power Company (Otter Tail), and Xcel Energy Services Inc. (Xcel) filed timely protests. The Midwest ISO filed an answer to the protests and DC Energy filed an answer to the Midwest ISO's answer.

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unit commitment at constraint points in the Constraint Management Charge bucket, intra-hour demand changes in the Intra-Hour Demand Change Charge bucket, or deviations from day-ahead schedules in the Day-Ahead Schedule Deviations Charge bucket. Remaining costs not recovered through the foregoing charges are recovered in the Second-Pass Charge. The Midwest ISO has submitted a compliance filing with respect to the Indicative Rate that is pending in Docket Nos. EL07-86-008, EL07-88-008, and EL07-92-008.

[9] We note that Constellation Energy Commodities Group, Inc. and Constellation NewEnergy, Inc. are already parties to these proceedings, having filed a timely motion to intervene in them on September 4, 2007.

[10] EPIC Merchant Energy, LP, SESCO Enterprises LLC, and CAM Energy Trading, LLC, previously have been admitted as parties to these proceedings, having filed a timely motion to intervene in them on September 4, 2007.

IV. Discussion

A. Procedural Matters

10. Pursuant to 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.

11. 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 and/or answer unless otherwise ordered by the decisional authority. We are not persuaded to accept the answers of the Midwest ISO and DC Energy and will, therefore, reject them.

B. Protests

12. DC Energy contends that the Midwest ISO's implementation of the Order on Paper Hearing violates the tariff and is unlawful. DC Energy asserts that the Midwest ISO's plan to lower the denominator by excluding certain generator deviations would inflate the Revenue Sufficiency Guarantee charges applicable to many parties retroactive to the August 10, 2007 refund effective date.[11] It argues that an exemption from the Revenue Sufficiency Guarantee charge would require an amendment to the tariff or a waiver, and that the exclusion of the associated volumes from the denominator cannot be effected retroactively. DC Energy notes that the changes the Midwest ISO proposed have never been the subject of a filing under sections 205 and 206 of the FPA, and accordingly those changes now would violate the filed rate doctrine and the doctrine against retroactive ratemaking. FirstEnergy argues that to the extent the Midwest ISO proposes to change the rate, it must make a filing under FPA section 205. Westar and Financial Marketers also recommend that the Midwest ISO make a filing under section 205 to propose such exemptions after the effective date of any resettlement ordered in this proceeding.

13. DC Energy requests that the Commission condition acceptance of the compliance filings on the Midwest ISO's calculation of the Revenue Sufficiency Guarantee charge consistent with the filed rate. Westar and Financial Marketers contend that the Midwest ISO's proposal to exclude these deviations should be rejected as outside the scope of the Commission's directives. Otter Tail and FirstEnergy contend that the Commission did not require the changes that the Midwest ISO made, and they cite to Commission

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[11] DC Energy at 7, 15-16. Westar and Financial Marketers also contend that removing the deviations from the denominator would increase the level of the Revenue Sufficiency Guarantee charge borne by non-exempt market participants.

precedent stating that compliance filings must be limited to the Commission's specific directives.

14. DC Energy asserts that only carved-out grandfathered agreements, which are the subject of prior Commission orders, are exempt from Revenue Sufficiency Guarantee charges. DC Energy states that nothing in the tariff exempts deviation volumes from uninstructed deviation-exempt units from Revenue Sufficiency Guarantee charges. DC Energy also notes that the tariff treats Revenue Sufficiency Guarantee charges and uninstructed deviation penalties differently, and it faults the Midwest ISO for not providing a reason to exempt uninstructed deviation-exempt units from Revenue Sufficiency Guarantee charges.

15. DC Energy maintains that the Commission did not direct the Midwest ISO to remove generator deviations from the calculation of the Revenue Sufficiency Guarantee charge in either the November 7 Order or the Order on Paper Hearing. Quoting the language of the then-effective tariff, DC Energy argues that the Midwest ISO must apply Revenue Sufficiency Guarantee charges to generator deviations, including some of the deviations that it now proposes to exclude from the denominator of the rate.[12] According to DC Energy, by eliminating deviations from the denominator, the Midwest ISO is calculating a higher Revenue Sufficiency Guarantee rate,[13] above and beyond the charges market participants would face as a result of the Order on Paper Hearing. For these reasons, DC Energy recommends that the Commission direct the Midwest ISO to include in the denominator of the Revenue Sufficiency Guarantee charge all of the deviations that are in the numerator of the charge in its calculation of the rate in effect retroactive to August 10, 2007.

16. FirstEnergy contends that the Commission erred in adopting the Interim Rate because it did not adequately demonstrate that the Interim Rate was just and reasonable and because the rate did not result from a stakeholder process. E.ON argues that the compliance filing should be limited to negative deviations of imports and positive deviations of exports to ensure the filing is consistent with cost causation principles. Alternatively, E.ON proposes a lower Revenue Sufficiency Guarantee rate. E.ON suggests that the compliance filing would discourage economy energy imports and would unreasonably raise electric prices, which means that it contradicts Commission policy supporting economy energy purchases.

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[12] DC Energy at 14.

[13] DC Energy estimates that as a result of the Midwest ISO's proposal, market participants will face an increase of approximately 30 percent in Revenue Sufficiency Guarantee charges. *Id*. at 15.

17. FirstEnergy asserts that the Commission exceeded its authority under FPA section 206 by requiring the Midwest ISO to resettle the market back to August 10, 2007. FirstEnergy and E.ON note that the Midwest ISO estimates that the aggregate amount of Revenue Sufficiency Guarantee charges that are not covered by available unsecured credit or available financial security is approximately $77.7 million,[14] and they request that resettlement of Revenue Sufficiency Guarantee charges be held in abeyance pending resolution of the pending requests for rehearing of the Order on Paper Hearing. Westar and Financial Marketers also request that resettlement be deferred until there is a final, non-appealable order in this proceeding. Ameren/Northern Indiana recommend that the Midwest ISO continue with rate recalculations because the Commission's orders are effective when issued, and requests for rehearing do not operate as a stay.

18. Westar considers the resettlement to be unjust and unreasonable because it does not reflect cost causation. Westar maintains that the Midwest ISO has made no effort to identify or quantify Revenue Sufficiency Guarantee costs caused by discrepancies in its real-time network model. Westar also argues that resettlement would be detrimental to the public interest because market participants relied on the allocation method that was in place when the trades were made. Westar asserts that the resettlements will result in higher prices and reduced market efficiency and liquidity.

19. Integrys notes that virtual activity has decreased following issuance of the Order on Paper Hearing, and attributes this trend to the harmful effect of the Interim Rate.

20. Integrys, E.ON, Westar, and Financial Marketers argue that any changes proposed by the Midwest ISO to the Indicative Rate in a prospective allocation for Revenue Sufficiency Guarantee charges, as discussed by the Midwest ISO in a filing made on March 3, 2008, should be the subject of a future section 205 proceeding. Westar and Financial Marketers consider changes proposed by the Midwest ISO to be unsupported, and they maintain that those changes would have substantial effects on the allocation of Revenue Sufficiency Guarantee costs. Integrys does not consider these proposed changes to be consistent with cost causation or to reflect the stakeholder process. It accuses the Midwest ISO of seeking Commission support for the recently developed changes to the March 3 Indicative Rate filing prior to the filing of any tariff sheets or other support required under section 205 of the FPA.

21. Integrys recommends that the Commission defer implementation of re-billing because the Order on Paper Hearing harms certain market participants and is detrimental to market viability. Westar, Financial Marketers, and Ameren/Northern Indiana ask the Commission to require the Midwest ISO to submit a further compliance filing in the form of a refund report and give parties an opportunity to submit comments on the Midwest

[14] Midwest ISO December 19, 2009 Supplemental Information Filing at 2.

ISO's method. E.ON proposes that the Commission convene a technical conference prior to resettlement to review the calculations.

C. <u>Commission Determination</u>

22. The issues in this order are restricted to the compliance requirements of the Order on Paper Hearing. Specifically, the Commission required the Midwest ISO to eliminate the phrase "actually withdraws energy" and insert the term "cleared" before "virtual offers" in the Revenue Sufficiency Guarantee charge provision of the current tariff. We find that the Midwest ISO has complied with those requirements and we accordingly accept these revisions in the compliance filing.

23. Issues involving other aspects of the Revenue Sufficiency Guarantee charge and charge rate, including whether the tariff sheets made effective upon the start of the Ancillary Services Market correctly reflect the Commission's rulings on the rate mismatch in the November 7 Order, are the subject of a separate proceeding in Docket No. ER04-691. They are not at issue in this proceeding, and thus fall outside the scope of compliance here. Accordingly, we reject the tariff sheet with proposed revisions to address the rate mismatch.[15]

24. FirstEnergy and E.ON contend that the Commission erred in accepting the Interim Rate. Such challenges are untimely rehearing requests and therefore represent collateral attacks on the Order on Paper Hearing and the order on rehearing of that order, which addressed these issues. They are outside the scope of this compliance proceeding, and we therefore do not address them here. FirstEnergy, Westar, and Ameren/Northern Indiana's arguments regarding the justness and reasonableness of the resettlement, the Commission's authority to resettle the market, and delay of resettlement, likewise attack the determinations of the Order on Paper Hearing, rather than compliance issues, and are outside the scope of this proceeding. The Commission addressed similar arguments on rehearing of the Order on Paper Hearing.[16]

25. The Commission is considering the Indicative Rate in the dockets in which it was filed, Docket No. EL07-86-008 *et al.*, and the positions that parties are taking on that proposal are therefore beyond the scope of this proceeding.

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[15] Midwest ISO FERC Electric Tariff, Fourth Revised Volume No. 1, First Revised Sheet No. 1098.

[16] *Ameren Servs. Co. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 127 FERC ¶ 61,121, at P 154-58 (2009), *reh'g pending*.

26. Since the Midwest ISO is holding stakeholder discussions on refunds and resettlement, we see no need for additional reports and procedures on refunds.[17] The Midwest ISO stakeholder process provides ample opportunity for customer interaction and review of each customer's bill by the Midwest ISO. The Midwest ISO also has dispute resolution procedures that are available to market participants.

The Commission orders:

The Midwest ISO's December 10, 2008 compliance filing is accepted, in part, and rejected, in part, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.
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[17] Midwest ISO Answer at 14.