

131 FERC ¶ 61,214  
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

Docket No. EL07-86-004

v.

Midwest Independent Transmission System Operator,  
Inc.

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.

Docket No. EL07-88-004

v.

Midwest Independent Transmission System Operator,  
Inc.

Wabash Valley Power Association, Inc.

Docket No. EL07-92-004

v.

Midwest Independent Transmission System Operator,  
Inc.

## ORDER DENYING REHEARING

(Issued June 3, 2010)

1. EPIC Merchant Energy, LP, SESCO Enterprises, LLC, and CAM Energy Trading, LLC, (collectively, Financial Marketers) filed a request for rehearing of the Commission's order commencing a paper hearing to investigate the Midwest Independent Transmission System Operator, Inc.'s (Midwest ISO) then-current Revenue Sufficiency Guarantee cost allocation methodology.<sup>1</sup> In this order, the Commission denies that request for rehearing.

**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.<sup>2</sup> These complaints concerned the allocation of Revenue Sufficiency Guarantee charges to market participants under the Midwest ISO's Transmission and Energy Markets Tariff (tariff).<sup>3</sup> 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 physical withdrawals of energy.<sup>4</sup> The

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<sup>1</sup> *Ameren Servs. Co. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 124 FERC ¶ 61,173 (2008) (Order Commencing Paper Hearing).

<sup>2</sup> 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.

<sup>3</sup> 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 Complaints), *order on reh'g*, 125 FERC ¶ 61,162 (2008).

<sup>4</sup> 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 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

(continued...)

Complainants argued that there is no justification 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 the Commission to 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.<sup>5</sup> 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 instituted an investigation under FPA section 206 to develop the cost causation analysis needed to develop and support a revised cost allocation. The Commission set the matter for a paper hearing rather than a trial-type hearing because the investigation would involve issues of material fact that the Commission expected could be thoroughly presented and resolved in writing.<sup>6</sup> The Commission held the paper hearing in abeyance pending the conclusion of a then-ongoing stakeholder process that was seeking to identify improvements that could be made to the Revenue Sufficiency Guarantee cost allocation methodology. On March 3, 2008, the Midwest ISO filed what it referred to as "indicative" revisions to the tariff that reflected an alternative mechanism for allocating Revenue Sufficiency Guarantee charges and costs.

4. The Commission then ordered the commencement of the paper hearing that it had earlier established but held in abeyance. The Commission stated that the primary task of the FPA section 206 proceeding was to determine whether the existing rate is unjust and unreasonable and, if so, what would be a just and reasonable rate. The Commission noted that it had previously found that a paper hearing is the most appropriate means for the Complainants to state their positions and to provide explanations, analysis, and other materials to support those positions.<sup>7</sup> It stated that a paper hearing would also afford an adequate opportunity for parties opposed to the Complainants' position to challenge the complaints. The Commission also stated that it did not consider a trial-type evidentiary hearing to be suitable in this case. It noted that the only party with data that can illuminate the issue of what the rate should be, the Midwest ISO, provided additional data

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market participants making physical withdrawals of energy. *Ameren Servs. Co. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 125 FERC ¶ 61,161, at P 12 (2008).

<sup>5</sup> Order on Complaints, 121 FERC ¶ 61,205 (2007).

<sup>6</sup> *Id.* P 82.

<sup>7</sup> *Id.*

and analysis in its March 3, 2008 filing and made that information available to all parties. The Commission concluded that there were no issues of material fact and for that reason found that the cross-examination of witnesses would serve no purpose.

## **II. Request for Rehearing**

5. The Financial Marketers advance three arguments in their request for rehearing. First, they argue that the Commission established an inadequate truncated paper hearing that gave parties only twenty days to respond to the Complainants' briefs. The Financial Marketers maintain that this violates due process and the requirements of the Administrative Procedure Act. More specifically, the Financial Marketers argue that because they will have no opportunity for discovery or cross-examination, and because they will have only twenty days to prepare reply briefs, the paper hearing will result in an inadequate record to support a reasoned decision regarding the Complainants' alternative rate proposal. Furthermore, the Financial Marketers argue that a trial-type hearing is the only proper way to deal with the number and complexity of the material issues of fact that are already at issue in this proceeding.

6. Second, the Financial Marketers argue that the Order Commencing Paper Hearing incorrectly concludes that there are no issues of material fact in dispute. They maintain that there are many such issues, including whether the rate the Complainants proposed will adversely affect consumers and the market as a whole by shifting so many supply related costs to virtual transactions that this trading segment is impaired or eliminated, as well as whether and to what extent virtual transactions cause Revenue Sufficiency Guarantee costs to be incurred. The Financial Marketers state that these issues cannot be adequately addressed in a written record and thus require an evidentiary hearing.

7. Finally, the Financial Marketers state that the Order Commencing Paper Hearing appears to go too far by stating that a primary task of this proceeding is to determine what would be a just and reasonable rate. They maintain that if this is meant to allow the Complainants to propose a rate alternative that differs from, or goes beyond, what they proposed in their complaints, it would unlawfully expand the scope of this proceeding. Allowing such proposals would be unfair and unlawful because it would require the parties to respond to a moving target. According to the Financial Marketers, any alternatives that differ from the proposals in the complaints must be presented in new complaints so that the parties will have the benefit of adequate notice and the full protections of the hearing process. The Financial Marketers state that the only alternative rate in the complaints was the same Revenue Sufficiency Guarantee rate that the Midwest ISO applies to physical deviations. They state that the Commission found that applying that rate to virtual supply offers was not just and reasonable and violated cost

causation principles.<sup>8</sup> To reconsider it in this proceeding would be arbitrary and capricious and an abuse of discretion. Finally, the Financial Marketers argue that the Commission should make clear that any new rate proposal submitted by Complainants will be treated as a new filing under section 205 of the FPA for purposes of establishing and protecting the rights of interested parties.

### **III. Discussion**

8. We deny the Financial Marketers' rehearing request. The Order Commencing Paper Hearing served to commence the paper hearing that the Commission established in the Order on Complaints and then held in abeyance. The additional matters discussed in the Order Commencing Paper Hearing are all subsidiary to that action, in that they relate to scheduling or provide clarification concerning the procedural posture of the paper hearing. The objections that the Financial Marketers have made to the use of a paper hearing rather than a trial-type hearing should have been raised in a request for rehearing of the Order on Complaints.<sup>9</sup> Rule 713(b) of the Commission's Rules of Practice and Procedures requires such requests to be filed within 30 days after the order is issued,<sup>10</sup> and the Financial Marketers filed the rehearing request under discussion here more than 10 months after the Order on Complaints was issued. The Financial Marketers' request is thus out of time.

9. Although their request is out of time, we note that the Financial Marketers have mischaracterized a number of statements made in the Order Commencing Paper Hearing, and we will address those matters here for purposes of clarification only. First, the Financial Marketers complain that the Order Commencing Paper Hearing allowed insufficient time to respond to the Complainants' briefs and no opportunity for discovery or cross-examination. To the extent the Financial Marketers had a concern about insufficient time, their proper course of action would be to request an extension of time to file their brief. To the extent their concern is lack of an opportunity for discovery or cross-examination, the substance of their argument is that the Commission improperly set

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<sup>8</sup> The Financial Marketers maintain that the Commission made this finding in *Midwest Independent Transmission System Operator, Inc.*, 118 FERC ¶ 61,213, at P 84 (2007).

<sup>9</sup> The Order Commencing Paper Hearing itself notes that the Commission had already found, in the Order on Complaints, "that a paper hearing is the most appropriate means for the Complainants to state their positions and to provide explanations, analysis and other materials to support these positions." Order Commencing Paper Hearing, 124 FERC ¶ 61,173 at P 10 (*citing* Order on Complaints, 121 FERC ¶ 61,205 at P 84).

<sup>10</sup> 18 C.F.R. § 385.713(b) (2009).

this matter for paper hearing, as such procedures do not fall within the scope of a paper hearing.

10. As explained above, the latter objection is out of time. We note here only that even if the Financial Marketers' filing had been timely, they have failed to show that paper hearing procedures are inadequate in this case. As they acknowledge, the Commission has held that "[a] paper hearing procedure is appropriate where witness motive, intent and credibility are not at issue, and issues of material fact can be adequately addressed on the written record."<sup>11</sup> The Financial Marketers nowhere point to issues of witness motive, intent, and credibility. Their sole objection is that the number and complexity of the factual issues involved makes a trial-type hearing necessary; yet they do not explain why the number and complexity of the issues presented, without more, makes paper hearing procedures inappropriate. We are therefore not persuaded that this case cannot be resolved by paper hearing, and we reject any implication that such procedures should be confined to instances where the issues presented are few and straightforward.

11. With respect to the Financial Marketers' second argument, i.e., that the Commission incorrectly concluded that there are no issues of material fact in dispute, we note that they have quoted the Order Commencing Paper Hearing out of context, and thus have misconstrued it. What the Commission said was as follows:

A paper hearing will also afford an adequate opportunity for parties opposed to the Complainants' position to challenge the complaints. We do not consider a trial-type evidentiary hearing suitable to this issue. The only party with data that can illuminate the issue of what the rate should properly be, the Midwest ISO, has provided additional data and analysis in its March 3, 2008 filing and has made that information available to all parties. Considering that there are no issues of material fact, we find that no purpose would be served with the cross-examination of witnesses.<sup>12</sup>

This statement, when read in context, means that all of the factual data necessary for the parties to undertake their analysis was at hand, and that the factual data itself was not disputed. If there were no issues of material fact presented of the type that the Financial

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<sup>11</sup> Financial Marketers Rehearing Request at 8 (*citing Maryland Public Service Commission v. PJM Interconnection, L.L.C.*, 123 FERC ¶ 61,169 (2008) (additional citation information omitted)).

<sup>12</sup> Order Commencing Paper Hearing, 124 FERC ¶ 61,173 at P 10.

Marketers describe in their rehearing request, i.e., analytic issues regarding the implications of the available data, then there would be no need for a hearing at all, be it a paper or a trial-type hearing. The language in question therefore cannot have the meaning that the Financial Marketers ascribe to it.

12. Finally, we reject the Financial Marketers' third argument, which is that the Order Commencing Paper Hearing can be read to allow the Complainants to propose a rate alternative that differs from, or goes beyond, what was proposed in their complaints. The Financial Marketers attempt to read the simple general statement that "the primary task of the section 206 proceeding . . . is to determine whether the existing rate is unjust and unreasonable and if so, what would be a just and reasonable rate"<sup>13</sup> as somehow overruling basic principles regarding matters like proper notice and as authorizing actions that are inconsistent with those principles. We do not see how one can draw such far-reaching conclusions from this simple statement. When the Commission determines that a rate is unjust and unreasonable, as it has already done here, it has a statutory obligation to "determine the just and reasonable rate, charge, classification . . . to be thereafter observed and to fix the same by order." 16 U.S.C. 824e (2006). Moreover, the Order Commencing Paper Hearing notes that it is "the Complainants' responsibility to demonstrate, on the basis of substantial evidence, both that the rate in effect is unjust and unreasonable and that their proposed alternative rate is just and reasonable."<sup>14</sup>

13. The only specific point that the Financial Marketers make concerning the proper scope of the proceeding is their assertion that, when the Midwest ISO proposed the rate that the Complainants now propose in their complaints, the Commission found it to be unjust and unreasonable when applied to virtual supply offers. The Financial Marketers maintain that it thus would be improper to allow reconsideration of that rate here. However, the specific Commission statement that the Financial Marketers cite does nothing more than say that the "Midwest ISO provides no evidence to support its proposal,"<sup>15</sup> not that the proposal is not just and reasonable. We therefore find nothing in the language that the Financial Marketers cite that places specific limitations on this proceeding. Finally, because the Financial Marketers have not identified any rate proposals that go beyond the scope of this proceeding, we see no reason to provide an analysis of the applicability of section 205 or the treatment of new rate proposals under the FPA as they request.

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<sup>13</sup> *Id.* P 12; Financial Marketers Rehearing Request at 11.

<sup>14</sup> Order Commencing Paper Hearing, 124 FERC ¶ 61,173 at P 9.

<sup>15</sup> *Midwest Independent Transmission System Operator, Inc.*, 118 FERC ¶ 61,213 at P 84.

The Commission orders:

The Financial Marketers' request for rehearing is hereby denied, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.