152 FERC ¶ 61,084
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Philip D. Moeller, Cheryl A. LaFleur,
Tony Clark, and Colette D. Honorable.

Midwest Independent Transmission System Operator, Inc. — Docket No. ER08-925-000

ORDER REJECTING TARIFF REVISIONS

(Issued July 29, 2015)

1. On April 30, 2008, Midwest Independent Transmission System Operator, Inc. (MISO)[1] submitted, pursuant to section 205 of the Federal Power Act (FPA) and Part 35 of the Commission's regulations,[2] revisions to the MISO Open Access Transmission and Energy Markets Tariff (Tariff) to apply the same marginal losses provisions to Grandfathered Agreements (GFA) that apply to non-GFAs. In this order, we reject MISO's proposal.

I. Background

A. Treatment of GFAs

2. In 1998, the Commission conditionally approved MISO as an independent system operator, allowing MISO to assume operational control of the transmission facilities in the region, including those transmission facilities needed for the transmission owners to provide service under their individual contracts with their individual transmission customers.[3] As originally proposed and accepted, transmission service for GFA transactions was not subject to the MISO Tariff.[4] However, in Opinion Nos. 453 and

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[1] Effective April 26, 2013, MISO changed its name from "Midwest Independent Transmission System Operator, Inc." to "Midcontinent Independent System Operator, Inc."

[2] 16 U.S.C. § 824d (2012); 18 C.F.R. pt. 35 (2014).

[3] *See Midwest Indep. Transmission Sys. Operator, Inc.*, 84 FERC ¶ 61,231, *order on reh'g*, 85 FERC ¶ 61,250, *order on reh'g*, 85 FERC ¶ 61,372 (1998). MISO assumed *(continued ...)*

453-A,[5] the Commission ultimately required that transmission owners take transmission service under the MISO open access transmission tariff to meet their transmission service obligations under their GFAs. However, because the GFAs already provide for recovery of the costs of serving GFA customers, the transmission owners were exempted from the rates under the MISO open access transmission tariff for service associated with the GFAs, except for Schedule 10, the ISO Cost Recovery Adder, which reimburses MISO for services it performs to administer GFA transmission service.[6] GFA transactions were also exempted from paying for average transmission losses if losses were provided or paid for under the GFA.[7]

3. In 2004, MISO proposed to expand its open access transmission tariff to include energy markets.[8] As a threshold issue, MISO stated in that filing that it would be unable to operate its proposed energy markets without integrating an estimated 300 GFAs that were then effective in the MISO region.[9] Under its initial proposal, MISO would have required all GFA transactions to comply with the scheduling and financial settlement requirements in the Tariff through one of three options – A, B, or C.[10] In response, the

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operational control of such transmission facilities and commenced operations as transmission provider on February 1, 2002.

[4] GFAs are agreements for transmission service that were entered into before September 16, 1998.

[5] *See Midwest Indep. Transmission Sys. Operator, Inc.*, Opinion No. 453, 97 FERC ¶ 61,033, at 61,170-71 (2001), *order on reh'g*, Opinion No. 453-A, 98 FERC ¶ 61,141 (2002), *order on remand*, 102 FERC ¶ 61,192 (2003), *reh’g denied*, 104 FERC ¶ 61,012 (2003), *aff’d sub nom. Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361 (2004).

[6] *See* Opinion No. 453-A, 98 FERC ¶ 61,141 at 61,413-14.

[7] *Midwest Indep. Transmission Sys. Operator, Inc.*, 101 FERC ¶ 61,113, at PP 15-17 (2002).

[8] Midwest Independent Transmission System Operator, Application, Docket No. ER04-691-000 (filed Mar. 31, 2004).

[9] *Id.* at 9.

[10] Under Option A, the GFA Responsible Entity – a designated contract party financially responsible for energy market activities associated with the GFA – nominates and holds Financial Transmission Rights in order to transact under the GFA and MISO assesses congestion charges and the cost of losses for all transactions. Under Option B, *(continued ...)*

Commission identified a need for further information about the GFAs and a desire to better understand how the GFAs and the proposed energy markets would affect one another.[11] The Commission initiated a three-step investigation of the GFAs under section 206 of the FPA[12] "to decide whether GFA operations [could] be coordinated with energy market operations, whether and to what extent the [transmission owners] should bear the costs of taking service to fulfill the existing contracts and whether and to what extent the GFAs should be modified."[13] Following the investigation, the Commission approved the MISO energy markets and the Tariff in two parallel proceedings. One set of orders considered the justness and reasonableness of the terms of the Tariff, while the second set addressed the relationship between the new markets and the GFAs.[14]

4. In the GFA Order, the Commission found that the GFAs' impact on the energy markets would be significantly less than MISO had projected and that MISO could reliably operate its energy markets while accommodating the GFAs.[15] Among other things, the GFA Order divided the GFAs into several categories, with differing consequences for their treatment. The Commission accepted Options A, B and C as just and reasonable for those GFA parties that voluntarily agreed to accept that treatment prior to July 28, 2004.[16] The Commission also required parties to GFAs that did not

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the GFA transaction is integrated into the energy markets; if parties to the Option B GFA follow the scheduling and settlement provisions in the Tariff, MISO provides the parties to the Option B GFA a refund for all congestion costs that would otherwise apply, plus a rebate for 50 percent of the marginal loss charges. Under Option C, the GFA Responsible Entity does not nominate or hold Financial Transmission Rights for the GFA transactions but must pay the costs of congestion and the cost of losses for all GFA transactions.

[11] *Midwest Indep. Transmission Sys. Operator, Inc.*, 107 FERC ¶ 61,191 (2004) (Procedural Order).

[12] 16 U.S.C. § 824e (2012).

[13] Procedural Order, 107 FERC ¶ 61,191 at P 67.

[14] *See Midwest Indep. Transmission Sys. Operator, Inc.*, 108 FERC ¶ 61,236 (2004) (GFA Order), *order on reh'g*, 111 FERC ¶ 61,042 (GFA Rehearing Order), *order on reh'g*, 112 FERC ¶ 61,311 (2005), *aff'd sub nom. Wisc. Pub. Power, Inc. v. FERC*, 493 F.3d 239 (D.C. Cir. 2007) (*Wisconsin Public Power*).

[15] GFA Order, 108 FERC ¶ 61,236 at PP 4-5.

[16] *Id.* PP 262-264.

settle on one of these options and that were not subject to *Mobile-Sierra* protection to choose Option A, Option C, or conversion to full Tariff service, but held that they could not choose Option B.[17] GFA parties who did not settle by July 28, 2004 could not choose Option B because, as the most attractive financial option for participants, Option B was meant to incentivize early settlement. The Commission stated that, "We find Option B to be just and reasonable for those parties that voluntarily settled prior to July 28, 2004 … but Option B will no longer be available for parties that did not settle by that date. Option B was an incentive to settle and receive a hedge against congestion and marginal losses charges."[18]

5. In the GFA Order, the Commission also directed MISO to carve out of the energy markets the following three types of GFAs (carved-out GFAs): (1) those GFAs for which the parties have explicitly provided that unilateral modification is subject to *Mobile-Sierra* protection; (2) those GFAs that are silent with respect to the standard of review governing unilateral modification; and (3) those GFAs providing for transmission service by an entity that is not a public utility.[19] Carved-out GFAs would submit non-binding day-ahead schedules, but so long as their transactions were balanced in real time, they would not have to pay any congestion or imbalance charges.[20]

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[17] *Id.* P 139. The Commission is responsible for ensuring that rates subject to the Commission's jurisdiction under Part II of the FPA are just and reasonable. Under the *Mobile-Sierra* doctrine, the Commission must presume that "contract rates" meet that requirement. That presumption may be overcome only if the Commission concludes that the rates in question seriously harm the public interest. *New England Power Generators Ass'n, Inc. v. FERC*, 707 F.3d 364, 367 (D.C. Cir. 2013) (quoting *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956); *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956)). *See also Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty.*, 554 U.S. 527 (2008). Accordingly, the Commission has referred to its application of the *Mobile-Sierra* presumption as a "more rigorous application of the statutory 'just and reasonable' standard of review." *Devon Power LLC*, 134 FERC ¶ 61,208, at 62,042 (2011). We continue to use that phrasing in this order.

[18] GFA Order, 108 FERC ¶ 61,236 at P 264. *See also Wisc. Pub. Power*, 493 F.3d at 276 (stating "[Option B] gave GFA parties a distinct financial incentive to switch from real-time scheduling to the new, Day-Ahead market. FERC thus endorsed Option B as a 'carrot' to give GFA parties a reason to settle.").

[19] *Id*. at PP 141-150.

[20] GFA Order, 108 FERC ¶ 61,236 at PP 143-144. *See also Wisc. Pub. Power*, 493 F.3d at 274.

6. The Commission approved the carved-out and Option B GFA treatment for use during a six-year transition period that lasted until February 1, 2008. In addition, the Commission accepted MISO's proposal to: (1) evaluate the impact that the optional treatments for GFAs have on the energy markets; and (2) make an FPA section 205 filing 12 months prior to February 1, 2008 that details a new proposal for the treatment of GFAs after the transition period concludes. The Commission stated that at that time it would evaluate any proposals to extend the availability of Option B and the carve-out beyond February 1, 2008. The Commission further directed that MISO analyze the effect Option B treatment had on the other market participants, including the amount of uplift needed to cover the costs of congestion and the difference between marginal and average losses.[21]

7. Several parties appealed the Commission's GFA orders to the D.C. Circuit. The Court denied the petitions for review and affirmed the Commission's GFA orders.[22] In reaching that decision, the Court found that the Commission appropriately carved out those GFAs that were subject to *Mobile-Sierra* protection;[23] appropriately approved the Option B settlements;[24] and that "approval of the carve out and Option B in combination was not 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'"[25]

B. Treatment of Losses

8. Prior to the establishment of MISO's energy markets, GFA transactions, along with all other transactions under the open access transmission tariff, were ultimately subject to a *pro rata* allocation of average system losses.[26] Market participants were

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[21] GFA Order, 108 FERC ¶ 61,236 at P 268.

[22] *Wisc. Pub. Power*, 493 F.3d at 278-79.

[23] *Id*. at 270-73.

[24] *Id.* at 275-76.

[25] *Id.* at 278 (citing 5 U.S.C. § 706(2)(A) (2012)).

[26] *Wisc. Pub. Power*, 493 F.3d at 265 ("MISO's initial practice was to calculate the average transmission losses for the entire system and then to charge each market participant a pro rata share.").

responsible for physical losses and had to provide (or make arrangements to purchase) actual energy to cover the average losses associated with their transactions.[27]

9. Under the Tariff, losses are handled on a financial, not a physical, basis, and transactions are assessed marginal losses as part of Locational Marginal Prices (LMP) rather than average system losses. When the Commission evaluated MISO's energy market proposal in 2004, it required MISO to return, for a five-year transition period, surplus loss revenues to market participants whose costs for marginal losses exceeded the cost that would result from average loss pricing. The Commission stated that the refund of the surplus marginal losses revenue would replicate a historical loss charge or average losses.[28]

1. Non-GFA Losses

10. Under the surplus marginal loss revenue rebate methodology that MISO proposed and the Commission accepted, MISO returns to market participants the marginal loss surplus, which is the LMP revenue left over (in both the day-ahead and real-time energy markets) after MISO pays generators for energy and allocates all congestion revenues. After rebating marginal loss charges to carved-out and Option B GFAs, MISO allocates a *pro rata* share of the remaining marginal loss surplus to each balancing authority based on the cost of supplying losses to load within each balancing authority. The marginal loss surplus allocated to each balancing authority is divided among the load in that area based on the load ratio share of the total load in the balancing authority.[29]

11. The D.C. Circuit affirmed as just and reasonable the Commission's acceptance of the marginal loss rebate methodology, even given the Commission's acknowledgement that the methodology can and should be refined (i.e., even though some market participants may pay more under the marginal loss rebate methodology than they paid before the market started).[30] The Commission subsequently accepted MISO's proposal

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[27] For example, a generator that served 100 MWh of load in a region with a three percent average system loss factor could inject 103 MWh into the system to meet its loss requirements. Such loss factors reflected allocation of system losses to all users of the system, including GFAs. If a GFA customer did not schedule and supply energy sufficient to cover average losses, the transmission owner/control area operator was responsible for supplying the difference.

[28] *Midwest Indep. Transmission System Operator, Inc.*, 108 FERC ¶ 61,163, at P 73 (2004).

[29] MISO Tariff, § 40.6.

[30] *Wisc. Pub. Power*, 493 F.3d at 266.

to continue to use this marginal loss rebate methodology after the five-year transition period.[31]

2. Carved-Out GFA Losses

12. Responding to the Commission's directive to carve out certain GFAs, MISO proposed that a transmission owner taking Tariff service for carved-out GFAs would receive a refund for 100 percent marginal loss charges for the carved-out GFA transactions. MISO funds the 100 percent carved-out GFA marginal loss rebate using the surplus marginal loss revenue, reducing the amount refunded to non-GFA transactions. MISO proposed, however, that the transmission owner taking service under the Tariff to meet its carved-out GFA obligations is (unless the GFA parties agree otherwise) responsible for charges related to real-time imbalances between injections into and withdrawals from the transmission system, which the Commission found appropriate and accepted.[32]

3. Option B GFA Losses

13. Option B GFA parties receive a refund for 50 percent of the marginal loss charges assessed to Option B GFA transactions, based on the assumption that marginal losses are double the amount of average losses.[33] When the Commission accepted MISO's Option B treatment for certain GFAs, MISO proposed to rebate to Option B parties the difference between marginal losses and average system losses but had not yet proposed the method it would use. The Commission ultimately accepted MISO's proposal to rebate 50 percent of the marginal loss charges to Option B GFAs.[34] Like the carved-out GFA marginal loss rebate, MISO funds the 50 percent Option B GFA marginal loss rebate using the surplus marginal loss revenue, reducing the amount refunded to non-GFA transactions.

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[31] *Midwest Indep. Transmission System Operator, Inc.*, 131 FERC ¶ 61,185 (2010).

[32] GFA Rehearing Order, 111 FERC ¶ 61,042 at PP 371-374.

[33] MISO Compliance Filing, Docket No. ER14-691-019, Transmittal Letter at 5 (filed January 9, 2005). *See also* MISO Supplemental Informational Filing, Docket No. ER04-691-071 (filed June 8, 2006) (describing the origin of the 2-1 marginal vs. average loss ratio for Option B GFAs).

[34] GFA Rehearing Order, 111 FERC ¶ 61,042.

4. GFA Losses After the Transition Period

14. On November 17, 2007, the Commission accepted MISO's proposal to continue treating GFAs the same way after the transition period ended.[35] MISO stated that it was proposing to continue the existing treatment of GFAs, including carved-out GFAs, in light of the relatively small and gradually decreasing percentage of GFAs in its footprint and based on its analysis finding that the GFAs do not significantly affect other transmission customers.[36]

15. With respect to marginal loss refunds for carved-out GFAs, MISO indicated that its evaluation revealed that such refunds result in a cost shift of greater magnitude than those associated with congestion cost refunds to carved-out GFAs and explained that this is because carved-out GFAs are not responsible to pay MISO for the cost of any losses. MISO stated that it was evaluating options for addressing this cost shift and would propose modifications if warranted.[37] Nonetheless, the Commission accepted MISO's proposal to use the existing full marginal loss rebate for carved-out GFAs after the transition period ended, stating that the court found that "such discrimination was inherent in the solution to the GFA problem, and that the extent of the discrimination was relatively small and not 'undue.'"[38]

16. In the Post-Transition GFA Order, the Commission explained that, given the comparatively small number of megawatts associated with carved-out GFAs and MISO's conclusion that "GFAs do not significantly affect other transmission customers," it could not find that the cost-shifts warranted contract modification under the *Mobile-Sierra* doctrine. The Commission also found that, in balancing the interests, there would be relatively small advantages to integrating the carved-out GFAs into the markets after the transition period ended, compared to the clear disadvantages that would result from not exempting them and requiring them to conform to the Tariff.[39]

17. The Commission also noted in the Post-Transition GFA Order that protesters to MISO's proposal to continue the carved-out GFA treatment had not shown other

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[35] *Midwest Indep. Transmission Sys. Operator, Inc.*, 121 FERC ¶ 61,166 (2007) (Post-Transition GFA Order).

[36] *Id.* P 12.

[37] *Id.* P 47.

[38] *Id.* (citing *Wisc. Pub. Power*, 493 F.3d at 274).

[39] *Id.* P 48 (citing *Wisc. Pub. Power*, 493 F.3d at 274).

circumstances that would justify modifying the GFA contracts subject to *Mobile-Sierra* protection. The Commission stated that the end of the transition period was not significant enough to justify modification of the existing GFAs or a change in their treatment.[40]

18. With respect to Option B GFAs, the Commission noted in the Post-Transition GFA Order that both Option B and non-GFA transactions also receive a rebate meant to represent the difference between the cost for marginal losses assessed under the energy market and the cost for system, or average, losses that were previously assessed. The Commission explained that the marginal loss rebate for non-GFAs is reduced by the amount refunded to the Option B GFAs but found that the impact of the Option B marginal loss rebate on the non-GFA marginal loss rebate is comparatively small. The Commission noted that, according to MISO, Option B marginal loss rebates were approximately twice the marginal loss rebate they would have received if the rebate was calculated in the same way it is for non-GFA transactions.[41] However, while protesters cited the higher Option B marginal loss rebate as a reason to reject the proposal to continue the Option B GFA treatment after the transition period, the Commission found that the relative reduction of the total surplus marginal loss revenue rebate for non-GFA transactions caused by the Option B marginal loss rebate would be small because the Option B GFAs represented such a small amount (about four percent at the time) of load in the MISO region.[42]

19. In 2008, the Commission also addressed the treatment of carved-out and non-carved-out GFAs in MISO's then-proposed ancillary services markets.[43]

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[40] *Id.*

[41] *Id.* P 60. The Option B marginal loss rebate methodology is different than the methodology MISO uses to calculate the non-GFA marginal loss rebates. The Option B marginal loss rebate is calculated by dividing the amount of marginal loss costs assessed for a GFA transaction by two and refunding that amount to the Option B GFA Responsible Entity. MISO Tariff at Module C, § 38.8.3(b)(iii). The non-GFA marginal loss rebate is calculated using market loss sensitivity and loss offset estimates that are based on historical experience. MISO Tariff at Module C, § 40.6.

[42] *Id.*

[43] *See Midwest Indep. Transmission Sys. Operator, Inc.*, 122 FERC ¶ 61,172, at PP 433-440 (2008). Similar to the treatment of real-time imbalances for carved-out GFAs, if the parties to a carved-out GFA meet their operating reserve requirements through the provisions of their GFAs, then the carved-out GFA transactions are not charged for operating reserves. However, to the extent that the parties to a carved-out
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II. MISO's Proposal

20. In the instant proceeding, MISO proposes to eliminate the Option B and carved-out GFA marginal loss rebate provisions and instead allocate the full marginal loss surplus to all (both GFA and non-GFA) transactions using the existing non-GFA balancing authority methodology. MISO argues the proposed changes are necessary because the current rebate scheme is excessive. MISO states that, based on its experience with LMPs, marginal losses, and GFAs, the current loss treatment of Option B and carved-out GFAs does not simply keep them financially whole relative to their pre-market level of costs for losses, but rather provides them excessive reimbursement of such costs.[44] MISO states that the GFA marginal loss rebates reduce the marginal loss rebates that would otherwise be provided to all non-GFA parties. MISO argues that refunding the entire cost of physical losses associated with carved-out GFAs and a substantial portion of the cost of physical losses associated with Option B GFAs represents an excessive cost shift to non-GFA parties.[45]

21. MISO states that it must make significant information system modifications and develop settlements-related software to properly implement the proposed Tariff provisions. MISO estimates that software changes will take at least 90 days to develop, test, and implement and states that it would like to wait until the Commission issues its order on this filing to allow MISO to align the provisions to the Commission's directives. Accordingly, MISO requests that the effective date of the proposed tariff sheets be ten days after MISO files with the Commission a notice that the necessary settlement-related software and other systems are in place to implement the provisions.[46]

III. Notice of Filing and Responsive Pleadings

22. Notice of MISO's April 30, 2008 filing was published in the *Federal Register*, 73 Fed. Reg. 31,850 (2008), with interventions and protests due on or before May 21,

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GFA do not provide sufficient reserves in real-time, the GFA transaction is assessed for the operating reserves supplied by MISO through the ancillary services market. All other GFA transactions (including those associated with Option B GFAs) are fully subject to the scheduling and settlement requirements of the ancillary services markets.

[44] Midwest Independent Transmission System Operator, Inc., Transmittal Letter, Docket No. ER08-925-000 (filed Apr. 30, 2008) (Transmittal).

[45] Transmittal at 13 and 15.

[46] *Id.* at 20.

2008. Timely motions to intervene raising no substantive issues were filed by Consumers Energy Company and Wolverine Power Supply Cooperative, Inc.

23. Timely motions to intervene and protests were filed by: Basin Electric Power Cooperative and East River Electric Power Cooperative (together, Basin Cooperatives); Great River Energy (Great River); Hoosier Energy Rural Electric Cooperative, Inc. and Southern Illinois Power Cooperative (together, Hoosier & Southern Illinois); Interstate Power and Light Company and Central Iowa Power Cooperative (together, Interstate Power); Michigan Public Power Agency and Michigan South Central Power Agency (together, Michigan Agencies); and Midwest Transmission Dependent Utilities (Midwest TDUs).[47]

24. Timely motions to intervene and comments in support were filed by: Constellation Energy Commodities Group, Inc. and Constellation NewEnergy, Inc. (together, Constellation); Duke Energy Corporation (on behalf of its subsidiaries Duke Energy Ohio, Inc., Duke Energy Indiana, Inc., and Duke Energy Kentucky, Inc.) (Duke); Dynegy Power Marketing, Inc. (Dynegy); Wisconsin Public Service Corporation and Upper Peninsula Power Company (Wisconsin Public Service & Upper Peninsula); and Wisconsin Electric Power Company (Wisconsin Electric).

25. On June 3, 2008, Ameren Services Company (Ameren) submitted a motion to intervene out-of-time.

26. On June 5, 2008, MISO and Hoosier & Southern Illinois submitted answers. On June 10, 2008, Basin Cooperatives submitted an answer. On June 11, 2008, Duke submitted an answer. On June 18, 2008, Midwest TDUs and Wisconsin Public Service & Upper Peninsula each filed an answer.

IV. Discussion

A. Procedural Matters

27. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2014), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

28. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2014), the Commission will grant Ameren's late-filed motion to

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[47] Midwest TDUs include the Cities of Columbia and Fulton, Missouri; Lincoln Electric System; Midwest Municipal Transmission Group; Missouri River Energy Services; and Wisconsin Public Power Inc.

intervene given its interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

29. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2014), prohibits an answer to a protest and answer unless otherwise ordered by the decisional authority. We accept the answers filed in this proceeding because they have provided information that assisted us in our decision-making process.

B. Substantive Matters

1. Option B GFAs

a. Proposal

30. MISO proposes changes to the Tariff so that Option B GFAs are treated the same as non-GFA transactions with respect to the refund of marginal loss surpluses.[48] MISO argues that that its original estimate that average losses are 50 percent of marginal losses is significantly inaccurate.[49] To support this conclusion, MISO describes the results of an analysis it performed using data it compiled in 2007.[50] MISO states that it analyzed the surplus marginal loss revenue and the proportional distribution of those funds between GFA and non-GFA transactions. MISO states that the analysis demonstrates that load associated with Option B GFA transactions received surplus marginal loss revenue rebates during the study period that were $2.8 million dollars more than they would have been if the Option B GFA transactions had been treated like any other non-GFA transaction. MISO claims that this exacerbates the cost shift caused by the use of the surplus marginal loss revenue to fund the Option B loss rebates, which reduces the surplus marginal loss revenue refunds to all other market participants.[51]

31. MISO asserts that the Commission has already determined that Option B GFAs are subject to the ordinary application of the just and reasonable standard of review under sections 205 and 206 of the FPA.[52] MISO argues that its proposed changes to the

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[48] Transmittal at 13 (citing MISO Tariff, § 38.8.3.b.iii).

[49] *Id.* at 12.

[50] *Id.* at 8-11.

[51] *Id.* at 13.

[52] *Id.* (citing GFA Order, 108 FERC ¶ 61,236 at P 264 (finding Option B “to be just and reasonable” for those parties that voluntarily settled prior to July 28, 2004)).

Option B GFA marginal loss rebate methodology are just and reasonable because the changes simply reduce or temper the loss rebate to a level that more reasonably approximates the Option B GFA parties' pre-market loss exposure. MISO states that the marginal loss treatment should be revised to prevent the Option B GFA parties from receiving more marginal loss rebates than they would receive if they were taking Tariff service and that its proposal prevents the Option B GFA parties from continuing to receive an inequitable share of loss refunds relative to other market participants. MISO also states that it is amenable to implementing the proposed modifications so as to assign costs to the appropriate parties to the Option B GFAs.[53]

b. Comments and Answers

32. Wisconsin Electric submitted comments supporting MISO's proposal and states that the current loss treatment of Option B GFAs provides excessive reimbursement of such costs and that MISO's proposal will bring about a more equitable allocation of marginal loss surpluses.[54] Constellation also supports MISO's proposal, stating that the change is justified because MISO has explained that the loss treatment of Option B and carved-out GFAs during the transition period did not simply keep them financially whole relative to their pre-market level of costs for losses but rather provided them excessive reimbursement of such costs.[55] In addition, Dynegy filed comments supporting MISO's proposal, citing MISO's transmittal letter, and echoing MISO's justifications for the proposed change, stating that the proposed revisions address an improper cost shift between GFAs and other market participants.[56]

33. Duke supports MISO's proposal, stating that GFA Responsible Entities[57] for both Option B and carved-out GFAs are receiving a substantial windfall paid for by other market participants. It argues that changing the treatment of GFAs with respect to losses will not change the GFA contracts nor the service under the GFAs, but will merely stop unfair windfalls to GFA parties that result from the GFAs operating in the MISO system. Duke concludes that the Commission need not evaluate the proposal under *Mobile-Sierra* because contracts are not being modified.[58] Duke contends that the Commission's

[53] *Id.*

[54] Wisconsin Electric May 21, 2008 Comments at 3.

[55] Constellation May 21, 2008 Comments at 3.

[56] Dynegy May 21, 2008 Comments at 3.

[57] *See supra* note 10.

[58] Duke May 21, 2008 Comments at 3.

decision was upheld in *Wisconsin Public Power* because including the GFAs fully within the market would require changes to scheduling practices, and MISO's proposed change requires no such change in scheduling practices.[59]

34. Wisconsin Public Service & Upper Peninsula support MISO's proposal also, asserting that the proposal rectifies a currently unjust, unreasonable, and discriminatory situation which results in non-preferred customers subsidizing the costs of preferred customers.[60] Specifically, they explain that the Option B GFA customers represent about 0.94 percent of the MISO load but receive $586,039 in monthly average rebates or 1.6 percent of the total Over-Collected Losses fund.[61] They assert that the sole arguably valid rationale for preferred treatment of the Option B and carved-out GFA parties prior to MISO's filing was as "a regulatory-created device to smooth the transition between pre-[MISO] and post [MISO] transmission service," but that this transition period was created without knowledge of the financial burden it would have on non-preferred customers. They argue that the Commission's extension of the transition period treatment preceded any detailed knowledge of the magnitude of the unreasonable and discriminatory impacts of the Option B and carved-out GFAs as to marginal losses.[62]

35. Midwest TDUs filed a protest opposing MISO's change. Midwest TDUs argue that the Commission does not have authority to modify non-jurisdictional carved-out and Option B GFAs.[63] Midwest TDUs also argue that, while MISO claims that the proposal would not directly modify the terms of the GFAs, in fact, changing the loss treatments experienced by GFA customers would affect the bargain between parties to the individual GFAs.[64] Further, Midwest TDUs dispute MISO's claim that the changes are necessary for the existence of the energy markets, noting that the energy markets began to operate with Option B GFAs and carved-out GFA loss treatments in place and, thus, it is obviously not necessary to make a change.[65] Midwest TDUs state that, moreover, the GFAs constitute a declining share of MISO's overall load and, according to Midwest

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[59] *Id.* at 2 (citing *Wisc. Pub. Power*, 493 F.3d at 272-273).

[60] Wisconsin Public Service & Upper Peninsula May 21, 2008 Comments at 3.

[61] *Id.* at 4.

[62] *Id.* at 6.

[63] Midwest TDUs May 21, 2008 Comments at 7.

[64] *Id.* at 8-9.

[65] *Id.* at 9.

TDUs, this further weakens arguments for overriding GFAs.[66] In addition, they argue that while MISO asserts that the proposal would not vary the terms of the GFAs, MISO has actually made no such demonstration. Midwest TDUs assert that in order to show that the proposal conforms to what the GFAs already specify MISO would have to show that each GFA is being treated in accordance with its own terms, not merely that GFAs in the aggregate are paying the correct aggregate losses.[67]

36. Midwest TDUs also argue in their protest that the proposal would improperly modify Option B and carved-out jurisdictional GFAs subject to *Mobile-Sierra* protection without making the requisite showing of public interest necessity.[68] With regard to Option B GFAs, Midwest TDUs list four specific Option B GFAs that contain *Mobile-Sierra* clauses and argue that GFA parties who accepted Option B treatment did not "waive Mobile-Sierra, jurisdictional, or other objections to future filings to change Option B."[69] For GFAs not subject to *Mobile-Sierra* protection, Midwest TDUs argue that the filing would improperly modify jurisdictional Option B GFAs because MISO has not demonstrated that the proposed change to each GFA is just and reasonable.[70]

37. Duke in its answer disputes Midwest TDUs' assertion that the Commission has no authority to modify non-jurisdictional GFAs.[71] Specifically, Duke states that, because all transmission owners, jurisdictional or not, take transmission service from MISO and provide service under the GFAs on a back-to-back basis, MISO's proposal is not a modification of the GFAs themselves, but a change to the mechanism by which MISO refunds certain losses charges to GFA parties.[72]

c. Commission Determination

38. We reject MISO's proposal to apply the non-GFA surplus marginal loss revenue rebate provisions in the Tariff to Option B GFAs. MISO has not shown that the non-

[66] *Id.* at 9-10.

[67] *Id.* at 10.

[68] *Id.* at 13.

[69] *Id.* at 14-15.

[70] *Id.* at 28.

[71] Duke June 11, 2008 Answer at 2-4.

[72] *Id.*

GFA surplus marginal loss rebate provisions in the Tariff are just and reasonable when applied to Option B GFA transactions. Because MISO has not demonstrated that its proposal meets the ordinary application of the just and reasonable standard, we need not address whether the Option B GFAs are subject to the more rigorous application of the just and reasonable standard associated with the *Mobile-Sierra* doctrine.

39. The Tariff requires MISO to credit back to each Option B GFA Responsible Entity the difference between marginal losses and average system losses.[73] However, MISO has not demonstrated that the method in the Tariff to return to non-GFA transactions surplus marginal loss revenue is a just and reasonable method to credit Option B GFAs the difference between marginal losses and average system losses.[74] The analysis MISO provides shows only that the existing method of refunding Option B GFA transactions 50 percent of the marginal loss charges gives Option B GFAs a higher loss rebate than non-GFA transactions. The fact that Option B GFAs receive a higher loss rebate than non-GFAs does not mean that applying the non-GFA surplus marginal loss revenue rebate provisions to Option B GFAs is just and reasonable.

40. MISO also asserts that its proposal would reduce or temper the Option B loss rebate to a level closer to the Option B parties' pre-market loss exposure.[75] Again, MISO shows only that Option B GFAs receive a loss rebate higher than the non-GFA surplus marginal loss revenue rebate. Although MISO asserts the loss treatment for Option B GFAs should be revised to prevent Option B GFAs from receiving more of the surplus marginal loss revenue than they would receive if they were not GFAs,[76] the fact that Option B GFAs receive a higher loss rebate than non-GFAs is not a basis to conclude that the non-GFA surplus marginal loss revenue rebate more reasonably approximates the Option B parties' pre-market loss exposure than the 50 percent loss rebate.

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[73] MISO Tariff, § 38.8.3.b.iii.

[74] We note that the Tariff requirement to return Option B GFAs to average-system losses is, as discussed above, a part of the Option B GFA treatment extended to GFA parties as an incentive to settle the treatment of their GFAs in the energy markets. In contrast, the non-GFA surplus marginal loss revenue rebate is meant to provide rebates for over-collected losses in such a manner that the price signal incentives sent by Locational Marginal Pricing are preserved. *See, e.g., Ne. Util. Serv. Co. & Select Energy, Inc.*, 105 FERC ¶ 61,122, at P 20 (2003).

[75] Transmittal at 13.

[76] *Id.*

41. MISO also argues that it is proposing to change the loss treatment for Option B GFAs due to the cost shift to other market participants caused by the existing mechanism for refunding losses to Option B GFAs.[77] But as MISO itself recognizes,[78] the Commission has previously found that although Option B GFA treatment causes uplift for other market participants, the extent of that uplift is mitigated by the limited amount of megawatts under, and the small number of parties that chose, Option B.[79] The Commission made similar findings when approving MISO's proposal to continue the Option B GFA treatment after the transition period ended, notwithstanding that the surplus marginal loss revenue rebate for non-GFAs is reduced by the 50 percent marginal loss rebate provided to Option B GFAs.[80] MISO does not claim, and we do not find, that there has been a change in circumstances that would require us to revisit these previous findings.

42. MISO also does not address its previous explanation of why it is appropriate to use a different loss rebate method for Option B GFAs than for non-GFAs. MISO previously argued that the 50 percent marginal loss rebate is appropriate for Option B GFAs because Option B GFAs can only be scheduled in the day-ahead market and do not share in over-collected loss revenues collected in real-time.[81] MISO also argued that it was improper to apply the 50 percent marginal loss rebate to non-GFA transactions because doing so would not take into account that MISO has two energy markets – day-ahead and real-time – which can interact in ways that cause the ratio to deviate from a simple two-to-one relationship when loss-effects in both markets are considered.[82] Relying on this explanation, the Commission rejected requests to apply the Option B 50 percent marginal loss rebate method to non-GFA transactions. The Commission explained that, while the 50 percent marginal loss rebate is appropriate for Option B GFA parties (because all their transactions occur in the day-ahead market and are unaffected by the day-ahead and real-time market interactions), that ratio may not be appropriate for non-GFA parties, who transact in both the day-ahead and real-time markets. The Commission stated that, for these latter market participants, the impacts of real-time adjustments to day-ahead

[77] *Id.*

[78] *Id.* at 13 & n.36.

[79] *See, e.g.*, GFA Order, 108 FERC ¶ 61,236 at P 267.

[80] Post-Transition GFA Order, 121 FERC ¶ 61,166 at PP 60-63.

[81] MISO, Deficiency Letter Response, Docket No. ER04-691-075, at 6-7 (filed June 8, 2006).

[82] *Id.*

schedules (such as changes in generation sources in real-time) could result in marginal losses not tracking average losses in a straightforward manner.[83]

43. For these reasons, we find MISO has not demonstrated that applying the non-GFA surplus marginal loss revenue rebate to Option B GFAs is just and reasonable, and we therefore reject MISO's proposal to change the marginal loss treatment for Option B GFAs.

2. Carved-Out GFAs

a. Summary of Proposal

44. MISO proposes changes to the Tariff so that carved-out GFAs would be treated the same as non-GFA transactions with respect to the refund of marginal loss surpluses.[84] MISO states that its analysis shows that the rebates to the carved-out GFAs have been over three times the rebate that they would receive if they were settled for losses just like non-GFA transactions and that the rebate of 100 percent of marginal loss charges effectively shifts the entire cost of losses associated with carved-out GFAs to all other market participants serving load in the MISO region.[85] MISO states that its analysis demonstrates that load associated with carved-out GFA transactions received marginal loss revenue rebates during the study period that were $44 million dollars more than they would have been if they had been treated like any other non-GFA transaction.[86]

45. MISO acknowledges that, when the Commission accepted MISO's proposal to continue the existing treatment of carved-out GFAs, the Commission determined that such GFAs are protected by the *Mobile-Sierra* presumption and that the public interest did not require their modification.[87] Nevertheless, MISO argues that in this proceeding, the Commission's review of the proposed Tariff language concerning post-transition

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[83] *Midwest Indep. Transmission Sys. Operator, Inc.*, 117 FERC ¶ 61,142, at P 27 (2006).

[84] Transmittal at 15 (citing MISO Tariff, § 38.8.4.6).

[85] Transmittal at 14.

[86] *Id.*

[87] *Id.* at 15 (citing Post-Transition GFA Order, 121 FERC ¶ 61,166 at P 37).

losses for carved-out GFAs "should be based on the just and reasonable standard"[88] because the Commission previously found that the current language in the Tariff regarding carved-out GFAs was just and reasonable.[89] MISO also argues that the proposed revisions do not vary the terms of the GFAs because the amendments merely rectify the excessiveness of the loss rebates for carved-out GFAs. MISO submits that the carved-out GFAs receive greater rebates than are needed to keep their cost of losses at the pre-market level and it is therefore appropriate to modify their treatment to ensure more equitable results.[90] MISO asserts such a modification should be considered as in conformity with, rather than as changing, the terms of, the GFAs and, accordingly, "do not implicate the public interest standard" and "should be evaluated under the just and reasonable standard."[91]

46. Also, MISO argues that, in accordance with the D.C. Circuit's decision in *Maine Public Utilities Commission v. FERC*, the proposed modification to the tariff language on the treatment of carved-out GFAs should not be deemed subject to the *Mobile-Sierra* public interest standard because MISO is a third party to such GFAs and had initially objected to their carve out.[92]

b. <u>Comments and Answers</u>

47. Wisconsin Electric, Duke, Constellation, Wisconsin Public Service & Upper Peninsula, and Dynegy support MISO's proposal regarding carved-out GFAs for the same reasons they support the proposal as it relates to Option B GFAs.

48. Hoosier & Southern Illinois urge rejection of the proposal because they argue it flouts the Commission's long-standing policy that these GFAs should not be abridged merely to facilitate the design of MISO's energy market. In addition, Hoosier & Southern Illinois state that they are not jurisdictional public utilities and so the

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[88] The Commission interprets MISO's arguing for the application of the "just and reasonable" standard as an argument for the ordinary application of the just and reasonable standard, not the more rigorous just and reasonable standard.

[89] Transmittal at 15 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 111 FERC ¶ 61,053 (2005)).

[90] *Id.* at 15-16.

[91] *Id.* at 16.

[92] *Id.* at 16-17 (citing *Maine Pub. Utilities Commission v. FERC*, 520 F.3d 464 (D.C. Cir. 2008)).

Commission lacks authority to alter the terms of the carved-out GFAs pursuant to which Hoosier & Southern Illinois serve their wholesale customers.[93] Hoosier & Southern Illinois argue that MISO presents its proposal as responding to the Commission's concerns about the costs to other market participants created by the Option B GFAs and carved-out GFAs, whereas, in fact, the Commission asked MISO to analyze the effects on other market participants only for Option B GFAs.[94] Also, Hoosier & Southern Illinois argue that MISO's assertion that the calculations showing that marginal losses may be 1.48 to 1.67 times average losses is inadequate and fails to show that these ratios would return to carved-out GFA parties the difference between marginal losses and average losses.[95] Finally, Hoosier & Southern Illinois contend that MISO's analysis merely shows that the Option B and carved-out GFA parties receive refunds in excess of those received by ordinary market participants, whereas MISO claims that it actually shows that the GFA parties receive refunds in excess of the difference between marginal losses and average losses.[96]

49. In its protest, Great River urges that MISO's proposal be rejected because it fails to challenge the existing loss reimbursements under the public interest standard, which the D.C. Circuit in *Wisconsin Public Power* declared protects the carved-out GFAs.[97] Great River states that applying marginal losses to carved-out GFAs would significantly increase the cost of losses to GFA parties in a manner not contemplated by the contracting parties.[98]

50. Interstate Power opposes MISO's proposal, arguing that no changes in the market have occurred that make MISO's proposed changes necessary, and that the Commission has adequately explained the differential treatment of the GFA parties, while MISO has not adequately explained its proposal.[99] Michigan Agencies also protest MISO's proposal, asserting that MISO ignores that carved-out GFAs are protected by the *Mobile-Sierra* doctrine and that MISO's claims of unfairness are also flawed and

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[93] Hoosier & Southern Illinois May 21, 2008 Comments at 1.

[94] *Id.* at 8.

[95] *Id.* at 13.

[96] *Id.* at 13-14.

[97] Great River May 21, 2008 Comments at 6-12.

[98] *Id.* at 13.

[99] Interstate Power May 21, 2008 Comments at 5-6.

exaggerated because MISO ignores the costs already borne by the GFA parties under those agreements. Michigan Agencies contend that the *Mobile-Sierra* doctrine protects the carved-out GFAs from abrogation and that MISO's proposal would abrogate the carved-out GFAs, which it states the *Wisconsin Public Power* decision supports.[100]

51. In their protest, Basin Cooperatives argue MISO's proposal is unjust and unreasonable for several reasons. They state, first, that there is no basis for imposing marginal losses charges on carved-out GFAs that provide for transmission from resources outside the MISO footprint,[101] second, that MISO's assertion that carved-out GFAs receive a disproportionate refund of over-collected losses is incorrect,[102] and third, that MISO's proposal would result in double charges for losses unless marginal losses are assessed against the transmission owners who are parties to the carved-out GFAs.[103] Further, Basin Cooperatives state that charging marginal losses to carved-out GFAs would constitute a modification to the contracts, that the carved-out GFAs are protected by the *Mobile-Sierra* doctrine, and that the public interest does not require the modification of the contracts.[104]

52. In its answer, MISO disputes Great River's contention that an application of marginal losses to carved-out GFAs would significantly increase the cost of losses to GFA parties in a manner not contemplated by the contracting parties. With respect to Hoosier & Southern Illinois' argument that MISO is modifying the terms of the GFAs, MISO states that the proposal does not ignore costs already borne out by carved-out GFA customers, but rather addresses the inequitable costs borne by the rest of the market and does not change the terms of the GFA but merely returns GFA customers to the losses experienced pre-market.[105] In response to arguments that MISO failed to demonstrate that the public interest would be served by modifying the carved-out GFAs, MISO argues that the current loss treatment constitutes a shift of physical losses to non-GFA market participants.[106] In addition, MISO addresses Basin Cooperatives' argument that the

[100] Michigan Agencies May 21, 2008 Comments at 10.

[101] Basin Cooperatives May 21, 2008 Comments at 5-6.

[102] *Id.* at 10-11.

[103] *Id.* at 13.

[104] *Id.* at 18-22.

[105] MISO June 5, 2008 Answer at 9.

[106] *Id.* at 11.

proposal would result in double charges for losses unless the marginal losses are assessed against the transmission owners by stating that, because the relevant transmission owners would still be the GFA parties financially responsible for the charges, replacing the existing GFA rebate mechanism with the surplus marginal loss revenue rebate would not result in double charges on GFA customers.[107] MISO also addresses Basin Cooperatives' argument that the Commission should reject the proposal to the extent it applies to carved-out GFAs that provide for the transmission of energy from resources not located within MISO. MISO responds that GFAs using external resources to serve load within MISO would still incur losses with respect to transmission service within MISO, thus marginal loss charges on transmission owners taking service under the Tariff to deliver power is merited.[108]

53. In their answer to MISO, Basin Cooperatives state that because loads served from resources external to MISO are not served using security constrained economic dispatch of MISO generation resources, no relationship exists between MISO's marginal loss calculation and the losses incurred from the interface between MISO and the system where the external resources that serve the GFA customer are located.[109] They also argue that MISO's assertion that the entire cost of losses under carved-out GFAs is shifted to other market participants is incorrect.[110]

54. Midwest TDUs, in its protest, argue that the proposal would improperly modify non-jurisdictional carved-out GFAs, and improperly modify carved-out GFAs subject to the *Mobile-Sierra* standard.[111] And in their answer, Midwest TDUs argue that MISO's answer avoided the issues raised by Midwest TDUs and should be dismissed. Midwest TDUs urge that Duke's argument that GFA treatments be conceptualized as a "back-to-back" arrangement, under which MISO transmission owners take jurisdictional service from MISO as an input to the jurisdictional or non-jurisdictional services they provide under the GFAs, is an argument that rehashes one that Duke unsuccessfully presented to the D.C. Circuit in *Wisconsin Public Power*.[112]

[107] *Id.* at 13-14.

[108] *Id.* at 14.

[109] Basin Cooperatives June 10, 2008 Answer at 2-3.

[110] *Id.* at 4.

[111] Midwest TDUs May 21, 2008 Comments at 7 & 13.

[112] Midwest TDUs Response June 18, 2008 at 9.

55. Pleadings were also filed in response to MISO's assertion that the decision in *Maine Public Utilities Commission v. FERC* means that the *Mobile-Sierra* presumption does not apply to third parties to agreements and therefore gives the carved-out GFAs no protection from attacks from third parties. Wisconsin Public Service & Upper Peninsula agreed with this characterization.[113] Several commenters oppose this interpretation or find it inapplicable to this situation, including Hoosier & Southern Illinois,[114]

[113] Wisconsin Public Service & Upper Peninsula May 21, 2008 Comments at 5.

[114] Hoosier and Southern Illinois May 21, 2008 Comments at 11.

56. Great River,[115] Interstate Power,[116] Michigan Agencies,[117] Basin Cooperatives,[118] and Midwest TDUs.[119]

c. <u>Commission Determination</u>

57. We reject MISO's proposal to apply the non-GFA surplus marginal loss revenue rebate provisions in the Tariff to carved-out GFAs.

58. As a preliminary matter, since the filing of the pleadings in this proceeding, the U.S. Supreme Court has determined that "the *Mobile-Sierra* presumption does not depend on the identity of the complainant who seeks FERC investigation. The presumption is not limited to challenges to contract rates brought by contracting parties. It applies, as well, to challenges initiated by third parties."[120] In light of both that determination and the Commission's and the D.C. Circuit's previous findings that this category of GFAs are subject to *Mobile-Sierra* protection, we find that arguments by MISO and the intervenors relying on *Maine Public Utilities Commission v. FERC* are moot.

59. Because this category of GFAs are subject to *Mobile-Sierra* protection, the Commission must consider whether MISO's proposal would modify the terms of these agreements, and, if so, whether MISO has shown that the public interest requires that modification.

60. On the first of those issues, we find that MISO's proposal would modify the carved-out GFAs. MISO claims that its proposal does not modify the terms of the carved-out GFAs because applying the non-GFA loss methodology to carved-out GFAs merely returns the cost of losses to pre-market levels. However, MISO's proposal would have parties to carved-out GFAs account for transmission losses through marginal loss charges instead of the average loss charges that the carved-out GFA parties used prior to the implementation of the MISO market. MISO's proposal thus would impose

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[115] Great River May 21, 2008 Comments at 9.

[116] Interstate Power May 21, 2008 Comments at 7.

[117] Michigan Agencies May 21, 2008 Comments at 6-7.

[118] Basin Cooperatives May 21, 2008 Comments at 20-21.

[119] Midwest TDUs May 21, 2008 Comments at 12.

[120] *NRG Power Mktg., LLC v. Maine Pub. Utilities Comm'n*, 558 U.S. 165, 176 (2010) (*NRG Power Marketing*).

significant changes that could result in cost shifts between the parties to the individual GFAs and would significantly affecting the bargain between the parties to the individual GFAs.[121] Moreover, we note that MISO makes no comparison between what parties to carved-out GFAs paid pre-market and post-market.[122]

61. On the second of those issues, we find that MISO has not shown that the public interest requires its proposed modification. Indeed, as with its justification concerning the terms of the Option B GFAs, MISO has not demonstrated that its proposal is just and reasonable, even without considering *Mobile-Sierra*-related issues. MISO merely asserts that carved-out GFAs receive more beneficial loss treatment than non-GFAs, resulting in a cost-shift to non-GFA parties. Yet, as with MISO's arguments regarding Option B GFAs, the fact that carved-out GFAs may receive a higher loss rebate than non-GFAs is not a basis to conclude that the non-GFA surplus marginal loss revenue rebate more reasonably approximates the carved-out parties' pre-market loss exposure.[123]

62. Accordingly, we also reject MISO's proposal to change the marginal loss treatment for carved-out GFAs.

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[121] *See Wisc. Pub. Power*, 493 F.3d. at 272 (citing GFA Rehearing Order, 111 FERC ¶ 61,042 at P 138).

[122] MISO has consistently argued that it does not have the data to compare pre- and post-market losses for non-GFA transactions.

[123] We note that the requirement to hold carved-out GFAs to no more than average-system losses is part of the treatment of carved-out GFAs necessary to avoid modifying such GFAs absent a public interest showing. In contrast, the non-GFA surplus marginal loss revenue rebate is meant to provide rebates for over-collected losses in such a manner that the price signal incentives sent by Locational Marginal Pricing are preserved. *See supra* note 74.

The Commission orders:

The proposed revisions to the MISO Tariff are hereby rejected, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.