

111 FERC ¶ 61,367  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;  
Nora Mead Brownell, Joseph T. Kelliher,  
and Suede G. Kelly.

Midwest Independent Transmission System Operator, Inc.	Docket Nos. ER04-691-031 ER04-691-032 ER04-691-033
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Public Utilities With Grandfathered Agreements in the Midwest ISO Region	Docket Nos. EL04-104-029 EL04-104-030 EL04-104-031
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ORDER GRANTING CLARIFICATION  
AND CONDITIONALLY ACCEPTING COMPLIANCE FILING

(Issued June 7, 2005)

1. In an order dated August 6, 2004, the Commission approved the Midwest Independent Transmission System Operator, Inc.'s (Midwest ISO) proposed Transmission and Energy Markets Tariff (TEMT), which has allowed the Midwest ISO to initiate Day 2 operations in its 15-state region.<sup>1</sup> The Midwest ISO's Day 2 operations include, among other things, day-ahead and real-time energy markets and a financial transmission rights (FTR) market for transmission capacity.

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<sup>1</sup> *Midwest Independent Transmission System Operator, Inc.*, 108 FERC ¶ 61,163 (TEMT II Order), *order on reh'g*, 109 FERC ¶ 61,157 (2004) (TEMT II Rehearing Order), *order on reh'g*, 111 FERC ¶ 61,043 (2005). The TEMT contemplates that all services provided pursuant to its terms and conditions will be provided by a Transmission Provider. In turn, the TEMT defines "Transmission Provider" as the Midwest ISO or any successor organization. See Module A, section 1.320, Original Sheet No. 133. For clarity, we will refer to the Midwest ISO wherever the TEMT refers to the Transmission Provider.

2. As directed in the TEMT II Order,<sup>2</sup> the Midwest ISO and the transmission owners in the Midwest ISO region<sup>3</sup> negotiated a resolution to the interrelated questions of how functional responsibilities, costs and liability associated with the Midwest ISO's new role in its region should be allocated among the Midwest ISO and the control areas within its footprint. The Commission approved a contested settlement between those parties.<sup>4</sup> Today's order grants a request for clarification of, and accepts a filing (as amended) to comply with, the Balancing Authority Settlement Order. The order benefits customers because it provides added certainty as to how financial and operational responsibility for important Day 2 energy market functions will be divided.

### **I. Background**

3. In a July 25, 2003 Filing, the Midwest ISO filed a proposed TEMT pursuant to section 205 of the Federal Power Act (FPA).<sup>5</sup> The July 25 Filing proposed to implement day-ahead and real-time energy markets, as well as an FTR market, within the Midwest

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<sup>2</sup> See TEMT II Order at P 138.

<sup>3</sup> The transmission owners are: Ameren Services Company, as agent for Union Electric Company d/b/a Ameren UE, Central Illinois Public Service Company d/b/a AmerenCIPS, and Central Illinois Light Co. d/b/a Ameren Cilco; Aquila, Inc. d/b/a Aquila Networks (f/k/a Utilicorp United, Inc.); Cinergy Services, Inc. (for Cincinnati Gas & Electric Co., PSI Energy, Inc., and Union Light Heat & Power Co.); City Water, Light & Power (Springfield, Illinois); Hoosier Energy Rural Electric Cooperative, Inc.; Indianapolis Power & Light Company; LG&E Energy Corporation (for Louisville Gas and Electric Co. and Kentucky Utilities Co.); Minnesota Power (and its subsidiary Superior Water, L&P); Montana-Dakota Utilities Co.; Northern Indiana Public Service Company; Northern States Power Company and Northern States Power Company (Wisconsin), subsidiaries of Xcel Energy Inc.; Northwestern Wisconsin Electric Company; Otter Tail Corporation d/b/a Otter Tail Power Company; Southern Illinois Power Cooperative; Southern Indiana Gas & Electric Company (d/b/a Vectren Energy Delivery of Indiana); and Wabash Valley Power Association, Inc.

<sup>4</sup> *Midwest Independent Transmission System Operator, Inc.*, 110 FERC ¶ 61,177 (2005) (Balancing Authority Settlement Order).

<sup>5</sup> 16 U.S.C. § 824d (2000).

ISO region. The July 25 Filing met with numerous protests, many of which alleged that the filing was incomplete and premature. Following a stakeholder vote, the Midwest ISO filed a motion to withdraw it.

4. The Commission granted the Midwest ISO's motion to withdraw the proposal. It also provided, on an advisory basis, guidance on a number of issues raised in the July 25 Filing in order to better enable the Midwest ISO to revise and re-file the TEMT.<sup>6</sup> Among other things, the Commission advised the Midwest ISO and stakeholders to adopt the North American Electric Reliability Council (NERC) Reliability Functional Model (Functional Model) as a basis for discussions on the allocation of responsibilities for reliable market and power system operations.<sup>7</sup> The Commission also advised that the revised TEMT should "state clearly the current responsibilities under each of these categories and the proposed changes in those responsibilities."<sup>8</sup>

5. The Midwest ISO filed a proposed revised TEMT on March 31, 2003. Section 38.6 of the proposed TEMT assigned responsibility to the Midwest ISO, control area operators, transmission owners, transmission operators and generation owners for three primary roles with authority to carry out reliability functions – Reliability Authority, Balancing Authority and Interchange Authority.<sup>9</sup> Numerous intervenors filed protests that sought further clarification of the Midwest ISO's proposed division of functions between itself and other entities within its footprint.

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<sup>6</sup> See *Midwest Independent Transmission System Operator, Inc.*, 105 FERC ¶ 61,145, *reh'g dismissed*, 105 FERC ¶ 61,272 (2003).

<sup>7</sup> See *Id.* at P 46.

<sup>8</sup> *Id.*

<sup>9</sup> Reliability Authority refers to performing the functions of ensuring real-time operating reliability, performing transmission security analysis, approving generation and transmission outages, and performing regional and inter-regional coordination. The term "Balancing Authority" is used instead of "Control Area Operator" to reflect the new NERC Functional Model. The Balancing Authority maintains load-resource balance within the Balancing Authority Area. Interchange Authority relates, among other things, to the responsibility to serve as Scheduling Agent. The TEMT identifies the Midwest ISO as both transmission service provider and Interchange Scheduling Agent.

6. The Commission found that the proposed TEMT appropriately used the NERC Functional Model as a basis for defining roles and responsibilities within the Day 2 energy markets,<sup>10</sup> and established settlement judge proceedings to address a number of unresolved issues surrounding the allocation of functional responsibilities, costs and liability between the Midwest ISO and other entities within its footprint.<sup>11</sup> The parties filed an Offer of Settlement on October 5, 2004 (Balancing Authority Settlement). The most important component of the Balancing Authority Settlement was the Balancing Authority Agreement, a contract that divides tasks related to TEMT implementation among the Midwest ISO and the Balancing Authorities in its region. On February 18, 2005, the Commission accepted the Balancing Authority Settlement, subject to certain compliance requirements. Among other things, the Commission required the Midwest ISO to propose amendments to the Balancing Authority Agreement, or provide an update on the status of negotiations regarding such amendments, necessary to address grandfathered agreements (GFAs).<sup>12</sup>

## **II. Request for Clarification and Compliance Filing**

7. As further described below, Wisconsin Electric Power Company and WPS Resources Corporation (jointly, Wisconsin Parties) filed a request for clarification, or in the alternative, rehearing of the Balancing Authority Settlement Order.

8. On March 21, 2005, the Midwest ISO filed a compliance filing intending to satisfy the requirements of the Balancing Authority Settlement Order (March 21 Filing). The compliance filing includes: (1) the Balancing Authority Settlement, as a rate schedule designated in accordance with Order No. 614; (2) the Balancing Authority settlement language, as incorporated into pertinent parts of the TEMT; (3) a limitation of liability provision for market participants and generators; and (4) a report on the status of appropriate amendments to the Balancing Authority Settlement addressing the GFAs. On March 29, 2005, the Midwest ISO filed an amended filing to address the GFAs.

9. Notice of the Midwest ISO's compliance filing, as amended, was published in the *Federal Register*, 70 Fed. Reg. 18,387 (2005), with interventions and protests due on or before April 11, 2005. Timely protests were filed by the Michigan Public Power Agency

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<sup>10</sup> See TEMT II Order at P 120-21.

<sup>11</sup> See *Id.* at P 137-38.

<sup>12</sup> See Balancing Authority Settlement Order at P 11, 66.

and the Michigan South Central Power Agency (jointly, Michigan Agencies); and Alcoa Power Generating Inc. (Alcoa). The Midwest Transmission Dependent Utilities (Midwest TDUs)<sup>13</sup> filed comments regarding the compliance filings.

### **III. Discussion**

#### **A. Request for Clarification or, in the Alternative, Rehearing**

10. In their request for clarification, Wisconsin Parties point out that the Balancing Authority Settlement Order states, “We find the concept of recovery of costs incurred by the *transmission owners* as a result of the Agreement is reasonable.”<sup>14</sup> As the Offer of Settlement provided that Balancing Authorities – which are not necessarily the same as transmission owners – would be allowed to collect such costs, Wisconsin Parties request clarification that the Commission intended to find reasonable the concept of recovery of costs incurred by all Balancing Authorities, and not just transmission owners.

11. According to the Balancing Authority Agreement, a Balancing Authority is an entity that: (1) performs the functions described in that agreement, directly or indirectly through an agent or contractor; and (2) is a signatory to that agreement.<sup>15</sup> The intent of the Balancing Authority Settlement was to allocate responsibilities among the Midwest ISO and the Balancing Authorities (and not just transmission owners). Therefore we grant the request of Wisconsin Parties and clarify that paragraph 59 of the Balancing Authority Settlement Order should have used the defined term “Balancing Authorities,” not “transmission owners.” Since the Commission has granted the clarification, we need not consider the request for rehearing.

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<sup>13</sup> The Midwest TDUs are: Great Lakes Utilities, Indiana Municipal Power Agency, Lincoln Electric System, Madison Gas and Electric Company, Midwest Municipal Transmission Group, Missouri Joint Municipal Electric Utility Commission, Missouri River Energy Services, Southern Minnesota Municipal Power Agency, Upper Peninsula Transmission Dependent Utilities and Wisconsin Public Power Inc.

<sup>14</sup> Wisconsin Parties’ Request for Clarification at 2 (quoting Balancing Authority Settlement Order at P 59) (emphasis added).

<sup>15</sup> *See* Balancing Authority Agreement at § 2.7.

**B. Compliance Filing: Duplicative Charges****1. Background**

12. The Balancing Authority Settlement Order required the Midwest ISO to “provide assurance that there are mechanisms in place to prevent double recovery and to allow for these amounts to be clearly identifiable and available for audit.”<sup>16</sup> In its compliance filing, the Midwest ISO proposes to add a Schedule 24, which is intended to allow control area operators to recover costs associated with implementing the TEMT. These costs must be related to control area actions in performing obligations under the TEMT and do not include any costs otherwise reimbursed by Midwest ISO to the control area. Section 1.4 of Schedule 24 states that each control area must maintain at least one account to allow identification and audit of the costs to be recovered. These costs shall be recovered together with, and in the same manner as, Schedule 17 costs. The Balancing Authority Settlement Order also required the Midwest ISO to submit amendments or a status report on negotiations regarding GFAs.

**2. Protest**

13. Alcoa protests the compliance filing, stating that the amendments intended to address GFAs relate exclusively to “carved-out” GFAs.<sup>17</sup> This, Alcoa argues, is inconsistent with section 4.13.5 of the Balancing Authority Agreement, which does not differentiate between carved-out GFAs and any other GFAs. Consequently, to the extent that the amendments deal exclusively with carved-out GFAs, Alcoa states that these amendments do not resolve the issues raised in Alcoa’s original protest or alleviate rate discrimination against non-carved-out GFAs. Alcoa further argues that it was not notified that, if it had not settled on Option B, it would have received a more favorable treatment for its GFA.

14. Second, Alcoa argues that, through the Balancing Authority Agreement, service under its GFA will be assessed additional, and perhaps duplicative, charges that upset the economic balance of the GFA. Alcoa states that section 1.2 of Schedule 24, which is apparently intended to avoid the double recovery of costs collected under the TEMT,

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<sup>16</sup> Balancing Authority Settlement Order at P 59.

<sup>17</sup> Carved-out GFAs do not participate in the energy markets. *See Midwest Independent Transmission System Operator, Inc.*, 108 FERC ¶ 61,236 at P 91, 144 (2004) (GFA Order), *order on reh’g*, 111 FERC ¶ 61,042 (2005), *reh’g pending*.

does not protect GFA customers from being subject to costs already paid under GFAs. Alcoa states that, at a minimum, the language in this section should be amended to prevent recovery of “costs already recovered under Grandfathered Agreements,” and the Commission should direct the Midwest ISO to provide a mechanism to allow the Commission and GFA customers to determine that costs are not being recovered twice.

15. Third, Alcoa avers that it should be clear that Schedule 24 is not applicable to GFA customers and that, to the extent GFA parties seek to pass Schedule 24 costs through to their GFA customers, they must seek prior Commission approval under section 205 of the FPA. Alcoa states Schedule 24 indicates that the Midwest ISO will bill “appropriate entities,” and this is not sufficiently defined. Alcoa adds that costs intended to be recovered via Schedule 24 should be more clearly and narrowly defined, so as to prevent overlap with other cost recovery mechanisms in the TEMT. It concludes that all cost justifications should also use common documentation and be auditable by affected parties.

### 3. Discussion

16. Section 4.13.5 of the Balancing Authority Agreement states that the Agreement did not address GFAs, and that the parties agreed to negotiate appropriate amendments to the Agreement to address GFAs.<sup>18</sup> In the March 29, 2005 amendment to its compliance filing, the Midwest ISO proposed revisions to the TEMT to add language regarding the treatment of carved-out GFAs. That language indicates that the responsibility for scheduled interchange for the carved-out GFAs lies with the Balancing Authorities.

17. Alcoa and Southern Indiana Gas and Electric Company are parties to GFA No. 343, which they agreed to treat as an Option B GFA.<sup>19</sup> Option B GFAs are not carved out of the energy markets; rather, the TEMT already includes provisions that govern how transactions under Option B GFAs are to be scheduled and settled. As such, there was no need for the parties to the Balancing Authority Agreement to file to address such GFAs, and so they did not do so. In short, the revisions to the TEMT proposed here do not apply – and should not apply – to GFA No. 343.

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<sup>18</sup> Balancing Authority Agreement at § 4.13.5, Rate Schedule No. 3, Original Sheet Nos. 13-14.

<sup>19</sup> *See* GFA Order, Appendix B at 7.

18. Alcoa's original protest indicated the company's concern that, as a consequence of the Balancing Authority Agreement, it should not be required to pay additional charges for control area services that it already receives. The Midwest ISO Transmission Owners answered that Alcoa's rights would not be impacted because any potential costs that would be imposed on GFAs would require a separate filing, and because negotiations to amend the GFA provisions of the Agreement were ongoing. Although Alcoa now argues that the amendments to the Agreement do not address its concerns, we note that the amendments do not affect its GFA, as they do not address Option B GFAs. There is, therefore, no harm to Alcoa.

19. Alcoa also states that section 1.2 of Schedule 24 does not protect GFA customers from being subject to costs already paid under GFAs. Alcoa asks the Commission to direct the Midwest ISO to add language to section 1.2 of Schedule 24 to prevent the recovery of costs already recovered under GFAs. We find no need to add such language. As we stated in the Balancing Authority Settlement Order, "any transmission owner seeking to recover additional costs must make a section 205 filing with the Commission."<sup>20</sup> Should any Balancing Authority make such a filing, Alcoa will have the right to contest it.

20. Alcoa asks the Commission to confirm that Schedule 24 does not apply to GFA customers. As discussed above, GFAs that have not been carved out of the market – as relevant here, where the parties chose Option B – take service under the TEMT. Schedule 24, as part of the TEMT, therefore applies to such GFAs, and correspondingly does not apply to carved-out GFAs. Alcoa is correct that GFA parties who seek to pass Schedule 24 costs through to their customers will be required to make an appropriate filing under section 205 of the FPA, as they were with respect to passing through charges under Schedules 10, 16 and 17.<sup>21</sup>

21. Next, Alcoa states that Schedule 24 should be more clearly and narrowly defined. The Midwest ISO Transmission Owners (Midwest ISO TOs) volunteered earlier in this proceeding to provide additional detail regarding the treatment of costs incurred as a result of implementing the Midwest ISO energy markets and services under the TEMT,

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<sup>20</sup> Balancing Authority Settlement Order at P 61.

<sup>21</sup> See *Transmission Owners of the Midwest Independent Transmission System Operator, Inc.*, 110 FERC ¶ 61,339 (2005) (Schedules 10 and 17), *reh'g pending*; *Otter Tail Power Company*, 110 FERC ¶ 61,220 (2005) (Schedules 10, 16 and 17).

and the Commission accepted their offer.<sup>22</sup> The Midwest ISO TOs have not yet filed this information. The Midwest ISO TOs and Designated Balancing Authorities sought, and the Commission granted, extensions of time to make such a filing.<sup>23</sup> It is premature to judge the entirety of Schedule 24 until that filing is made. We will therefore conditionally accept Schedule 24 subject to further order. Alcoa will have an opportunity to protest the Midwest ISO TOs' filing at the time it is made.

22. Finally, Alcoa asks the Commission to clarify that any additional control area charges arising under the Balancing Authority Agreement do not apply to GFA No. 343. As we have stated above and in prior orders, any Balancing Authority seeking to recover any additional costs under GFA No. 343, or any other GFA, must make an appropriate filing with the Commission. We will not rule on the appropriateness of any cost recovery in the abstract.

**C. Compliance Filing: Liability Provisions for Generators and Market Participants**

**1. Background**

23. In the TEMT II Rehearing Order, the Commission found that it had erred in limiting the settlement discussions to the Midwest ISO and the transmission owners, foreclosing the possibility that the settlement process would provide for a limitation of liability for generators and market participants. In the Balancing Authority Settlement Order, the Commission directed the Midwest ISO to submit a compliance filing that would provide a limitation of liability for generators and market participants that was lacking from the agreement. In the compliance filing, the Midwest ISO states that it has included a new section 10.7 of the TEMT to address the limitation of liability for generators and market participants. Additionally, the Midwest ISO has made certain clarifying changes to other areas in section 10.

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<sup>22</sup> See Balancing Authority Settlement Order at P 54, 59.

<sup>23</sup> See Notice of Extension of Time, Docket Nos. ER04-691-002 and EL04-104-002 (Mar. 29, 2005) (extending due date to April 22, 2005); Notice of Further Extension of Time, Docket Nos. ER04-691-002 and EL04-104-002 (May 9, 2005) (extending due date to June 6, 2005).

## 2. Protest

24. Michigan Agencies claim that the proposed new tariff provisions do not comply with the TEMT II Rehearing Order. They argue that the compliance filing does not simply add market participants to section 10.5, which would place them on the same footing as generators and other entities acting under the Midwest ISO's direction, but that it adds two new sections. Michigan Agencies go on to argue that new section 10.6 limits the liability of control area operators, but contains no provision for indemnification of market participants acting at the direction of the Midwest ISO. They also argue that the Midwest ISO has not explained why market participants should not receive the same protections in sections 10.2 and 10.3 that the TEMT gives generators in section 10.5. Michigan Agencies conclude that the Commission should require the Midwest ISO to revise the compliance filing in order to make clear that the indemnity protection afforded other parties under sections 10.2 and 10.3 applies to market participants acting in good faith to implement the Midwest ISO's instructions or a Balancing Authority's directions for complying with the Midwest ISO's instructions. Michigan Agencies state that this can be accomplished by amending section 10.7 to include references to sections 10.2, 10.3 and 10.5.

## 3. Discussion

25. Proposed section 10.7 states:

The provisions on limitation of liability and damages, and on indemnification, set forth in section 10.6 shall be applicable to Market Participants and Generation Owner [*sic*] acting in good faith to implement or comply with the directives of the Transmission Provider.

26. We find that, with proposed section 10.7, the Midwest ISO has met the compliance requirements of the Balancing Authority Settlement Order and the TEMT II Rehearing Order. The Balancing Authority Settlement Order specifically instructed Midwest ISO to "provide the limitation of liability for generators and market participants that is lacking from the Agreement."<sup>24</sup> The TEMT II Rehearing Order, in turn, stated that

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<sup>24</sup> Balancing Authority Settlement Order at P 46 (citing TEMT II Rehearing Order at P 476-77).

the “compliance filing should propose liability provisions for generators and market participants who act in good faith in following the Midwest ISO’s directives.”<sup>25</sup> Proposed section 10.7 satisfies these requirements.

27. We note, however, that proposed section 10.7 is inconsistent with the indemnification requirements approved in another proceeding that addressed liability and indemnification provisions in the Midwest ISO’s open access transmission tariff (OATT).<sup>26</sup> There, the Midwest ISO was required to extend indemnification protection, along with liability protection, to owners and operators of generation facilities in section 10.5 of the OATT.<sup>27</sup> Subsequently, the Midwest ISO filed, and (pursuant to delegated authority) the Commission accepted, a revision that added to section 10.5 a reference to the indemnification provisions of section 10.2.<sup>28</sup>

28. The Midwest ISO indicated in that OATT proceeding that it would make a filing to update the TEMT in order to incorporate the tariff language accepted for the OATT.<sup>29</sup> Michigan Agencies have correctly identified a discrepancy between the OATT and the TEMT that the Midwest ISO has promised to correct. We will therefore require the Midwest ISO to revise section 10.7 of the TEMT to include the indemnification provisions for owners and operators of generators as required by our February 16 Order. We also find it appropriate that section 10.7 be revised to extend the indemnification protection as well to market participants as requested by Michigan Agencies. The Midwest ISO is instructed to make this revision within 30 days of the date of this order.

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<sup>25</sup> TEMT II Rehearing Order at P 477.

<sup>26</sup> See *Midwest Independent Transmission System Operator, Inc.*, 110 FERC ¶ 61,164 (2005) (February 16 Order).

<sup>27</sup> *Id.* at P 34.

<sup>28</sup> See Letter Order, Docket No. ER04-1160-003 (Apr. 26, 2005).

<sup>29</sup> See February 16 Order at P 26, 37.

**D. Compliance Filing: Implications of *Kentucky Power Company v. Huelsmann***

**1. Comments**

29. The Midwest TDUs request clarification that the amendments to the Balancing Authority Agreement continue to provide for non-discriminatory curtailment in which no adverse distinction is made against transmission loads that are not Balancing Authorities' retail loads.

30. The Midwest TDUs are concerned that, in *Kentucky Power Company v. Huelsmann*,<sup>30</sup> the Midwest ISO has "taken the position that states may legally 'afford priority of service to retail customers within a utility's certified territory.'"<sup>31</sup> They add that the Midwest ISO supported a Kentucky statute that provided that transmission owners' native load is curtailed last. According to the Midwest TDUs, these arguments ignore the anticompetitive impact on a captive municipal utility and the harm to that utility's retail customer if the transmission supplier has discretion to treat the municipal customer in a discriminatory fashion. The Midwest TDUs also note that the federal court evaluating the statute in question found that it was an unauthorized burden on interstate commerce,<sup>32</sup> but they add that the proceeding has continued.

31. According to the Midwest TDUs, the Midwest ISO's litigation position "puts a new and unflattering light on what had appeared to be unremarkable language in the Balancing Authority [Agreement]. . . ."<sup>33</sup> They explain that the Balancing Authority Agreement provides that the Midwest ISO will "[i]ssue corrective actions (*e.g.*, Curtailment or Load Shedding) to Transmission Operators, Balancing Authorities and interchange authorities, *consistent with federal and state law,*" and ask whether, if state

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<sup>30</sup> Docket No. 3:03-47-JMH (E.D. Ky.).

<sup>31</sup> Comment of Midwest Transmission Dependent Utilities at 4. The Midwest TDUs do not attribute the internal quotation.

<sup>32</sup> See *Kentucky Power Company v. Huelsmann*, 352 F. Supp. 2d 777 (E.D. Ky. 2005).

<sup>33</sup> Comment of Midwest Transmission Dependent Utilities at 5.

law demands undue discrimination, the TEMT would allow (or even require) the Midwest ISO to accede to that demand. Consequently, the Midwest TDUs ask the Commission to make clear that the Midwest ISO's tariff would not have that effect.<sup>34</sup>

## 2. Discussion

32. The issue before the Commission in the instant filing is whether or not the Midwest ISO has complied with the requirements of the Balancing Authority Settlement Order. The proceeding in Kentucky is ongoing – in fact, as the Midwest TDUs note, the statute in question has been invalidated<sup>35</sup> – and it is premature to evaluate its effect, if any, on the TEMT. The Midwest TDUs submit no evidence that the tariff language they cite would result in undue discrimination; in fact, they describe the language as “unremarkable” except when considered in light of the statute at issue in *Kentucky Power Company v. Huelsmann*.<sup>36</sup> Therefore, at this point in time, we can safely dismiss the comments of the Midwest TDUs. But we do so without prejudice. Should the Midwest TDUs, or any other transmission customer, believe that the Midwest ISO is applying the TEMT in an unduly discriminatory manner, it may file a complaint with the Commission.

The Commission orders:

(A) The Midwest ISO's compliance filing is hereby conditionally accepted subject to further order, as described in the body of this order.

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<sup>34</sup> *Id.* (citing *New PJM Companies*, 107 FERC ¶ 61,272 at P 23 (2004)).

<sup>35</sup> *See Kentucky Power Company v. Huelsmann*, 352 F.Supp.2d 777, 787 (E.D. Ky. 2005) (“As a result of the curtailment procedure in KRS 278.214, retail and wholesale customers in other states will have their service curtailed during transmission system emergencies while similarly situated customers in Kentucky will be unaffected. The dormant Commerce Clause simply does not permit this result.”).

<sup>36</sup> *Id.*

(B) The Midwest ISO is hereby required to make the further compliance filing described in the body of this order.

By the Commission. Commissioner Kelly dissenting in part with a separate statement attached.

( S E A L )

Linda Mitry,  
Deputy Secretary.

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Midwest Independent Transmission System Operator, Inc.	Docket Nos. ER04-691-031 ER04-691-032 ER04-691-033
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Public Utilities With Grandfathered Agreements in the Midwest ISO Region	Docket Nos. EL04-104-029 EL04-104-030 EL04-104-031
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(Issued June 7, 2005)

KELLY, Commissioner, *dissenting in part*:

For the reasons set forth in my dissent from the Balancing Authority Settlement Order, *Midwest Independent Transmission System Operator, Inc.*, 110 FERC ¶ 61,177 (2005), I believe that the revised limitation on liability provisions being accepted in this order are overly broad and have not been adequately supported. Therefore, I dissent in part from this order.

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Sudeen G. Kelly