127 FERC ¶ 61,048
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Suedeen G. Kelly, Marc Spitzer,
and Philip D. Moeller.

Midwest Independent Transmission System Operator, Inc. — Docket No. ER09-757-000

ORDER ACCEPTING IN PART AND REJECTING IN PART TARIFF REVISIONS

(Issued April 15, 2009)

1. On February 25, 2009, the Midwest Independent Transmission System Operator, Inc. (Midwest ISO) submitted, under section 205 of the Federal Power Act (FPA),[1] proposed revisions to its Open Access Transmission, Energy and Operating Reserve Markets Tariff (Tariff)[2] to revise the section 7 billing and payment provisions to address changes resulting from the operation of the Midwest ISO's voluntary capacity auction and the related financial settlement charges (deficiency charges). In this order, the Commission accepts in part and rejects in part the proposed revisions, to be effective April 15, 2009, as discussed below.

I. **Background**

2. As part of the second phase of a two-phased approach, the Midwest ISO proposed a long-term resource adequacy plan in Module E of the Tariff on December 28, 2007.[3] In a March 26, 2008 order, the Commission conditionally accepted the Midwest ISO's

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[1] 16 U.S.C. § 824d (2006).

[2] FERC Electric Tariff, Fourth Revised Volume 1.

[3] The Midwest ISO filed Phase I of its resource adequacy plan, its proposed ancillary services market, on February 15, 2007, and it was conditionally accepted on February 25, 2008. *Midwest Indep. Transmission Sys. Operator, Inc.*, 122 FERC ¶ 61,172, *order on reh'g*, 123 FERC ¶ 61,297, *reh'g denied*, 125 FERC ¶ 61,322 (2008).

proposal, subject to its completion of financial settlement provisions for its resource adequacy program, and ordered two compliance filings.[4]

3. On May 27, 2008, the Midwest ISO filed the first compliance filing to address various issues including, but not limited to, the planning reserve margins for load modifying resources, the methodology for calculating planning reserve margins, and the verification of resources for planning reserves. The Commission conditionally accepted this compliance filing on October 20, 2008, and directed further compliance filings.[5]

4. On June 25, 2008, the Midwest ISO submitted the second compliance filing containing its proposed financial settlement provisions. The Midwest ISO generally proposed to hold a voluntary capacity auction each month to allow load serving entities (LSEs) that have insufficient capacity for the month to satisfy their resource adequacy requirements with planning resources from market participants that have excess planning resources. Under the proposal, the Midwest ISO would administer a voluntary capacity auction five days prior to the resource plan deadline.[6] This auction would allow deficient LSEs (i.e., those LSEs that lack sufficient capacity to meet their resource adequacy requirements) to acquire sufficient capacity and thereby avoid financial penalties.

5. After the voluntary capacity auction, the Midwest ISO would assess deficiency charges on those LSEs that continue to be deficient. On October 20, 2008, the Commission conditionally accepted these provisions but rejected the Midwest ISO's proposal to procure capacity on behalf of deficient LSEs.[7]

II. <u>The Filing</u>

6. On February 25, 2009, the Midwest ISO filed default provisions (i.e., default by market participants that are capacity deficient by the resource plan deadline and/or

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[4] *Midwest Indep. Transmission Sys. Operator, Inc.*, 122 FERC ¶ 61,283 (2008) (March 26 Order), *order on reh'g*, 125 FERC ¶ 61,061 (2008), *reh'g denied*, 126 FERC ¶ 61,143 (2009).

[5] *Midwest Indep. Transmission Sys. Operator, Inc.*, 125 FERC ¶ 61,062 (2008), *order on reh'g*, 126 FERC ¶ 61,144 (2009).

[6] Resource plan deadline is defined in Module A of the Tariff as "the first day of the month prior to each Month for which there exists a Planning Resource obligation."

[7] *Midwest Indep. Transmission Sys. Operator, Inc.*, 125 FERC ¶ 61,060, at P 132 (2008).

default by market participants that clear auction bids but fail to pay auction charges) that implicate billing and payment provisions of the Tariff, as described below.

7. The Midwest ISO states that the first voluntary capacity auction will be held on April 24, 2009. The Midwest ISO requests waiver of the Commission's 60-day prior notice requirement and an effective date of April 15, 2009 to allow the tariff sheets to become effective prior to the first voluntary capacity auction.

III. Notices of Filing and Responsive Pleadings

8. Notice of the Midwest ISO's filing was published in the *Federal Register*, 74 Fed. Reg. 9812 (2009), with comments, interventions and protests due on or before March 18, 2009. Consumers Energy Company, Integrys Energy Group,[8] Calpine Corporation, Hoosier Energy Rural Electric Cooperative, Inc. and Southern Illinois Power Cooperative, Illinois Municipal Electric Agency, and American Municipal Power-Ohio, Inc. filed timely motions to intervene raising no substantive issues.

9. Xcel Energy Services, Inc. (Xcel)[9] filed a timely motion to intervene and comments in support of the filing.

10. Ameren Services Company (Ameren),[10] Integrys Energy Services, Inc. (Integrys), Midwest Transmission Dependent Utilities (Midwest TDUs),[11] Reliant Energy, Inc. (Reliant), and Detroit Edison Company (Detroit Edison) filed timely motions to intervene and protest.

11. On March 24, 2009, Integrys filed an errata to its motion to intervene and protest, submitting an exhibit that had been inadvertently omitted from its pleading.

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[8] Integrys Energy Group filed on behalf of Wisconsin Public Service Corporation, Upper Peninsula Power Company, and Integrys Energy Services, Inc.

[9] Xcel filed on behalf of Northern States Power Company and Northern States Power Corporation.

[10] Ameren filed on behalf of Union Electric Company; Central Illinois Public Service Company; Central Illinois Light Company; Central Illinois Public Service Company; Illinois Power Company; Ameren Energy Marketing Company; Ameren Energy Generating Company; and AmerenEnergy Resources Generating Company.

[11] Midwest TDUs consist of Madison Gas & Electric Company; Missouri Joint Municipal Electric Utility Commission; Missouri River Energy Services; and WPPI Energy.

12. On March 31, 2009, the Midwest ISO filed an answer to the protests.

IV. Discussion

A. Procedural Matters

13. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2008), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

14. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2008), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We are not persuaded to accept the Midwest ISO's answer to the protests and therefore reject it.

B. Defaults Regarding Voluntary Capacity Auction Transactions - Sections 7.11, 7.12 and 7.13

1. Midwest ISO's Proposal

15. The Midwest ISO proposes to modify section 7 of the Tariff to include sections 7.11, 7.12 and 7.13 to account for the billing procedures related to voluntary capacity auction transactions. The Midwest ISO proposes in section 7.11 that two business days after the auction clears, it will submit an invoice to market participants for charges for all goods and services related to such auction. According to the Midwest ISO, a market participant will not be entitled to payment for any other goods or services provided under Module E, for the subject billing cycle, until all credit and debit amounts have been netted and invoiced against each other and a net credit amount, if any, has been calculated and invoiced.

16. If the invoiced amounts are not paid to the Midwest ISO, it will use payments received from other market participants to pay all amounts due to the Midwest ISO under the Tariff before the Midwest ISO makes any payments to any other market participants. The Midwest ISO asserts that it will use funds from credit support documents provided by a market participant to pay any past due amounts, as well as any late charges or interest payments. If this process does not yield sufficient monies to cover the amount due to the Midwest ISO, the Midwest ISO will reduce the payment to market participants that are due voluntary capacity auction credits to the extent necessary to allow the Midwest ISO to clear its accounts by the close of banking business on the day the payment is due. As funds are received, they will be distributed *pro rata* to the market participants that did not receive the full amount of their net credit invoiced amount, subject to the Midwest ISO's first right of payment, setoff, recoupment and security interests. The Midwest ISO also proposes a "short pay approach" whereby the market participant will be "paid-as-offered" rather than paid the auction clearing price, with

remaining revenues paid *pro rata*; or if there are not sufficient funds to accomplish the "paid-as-offered" approach (i.e., there are insufficient funds to pay the market participants their "as offered" price at the quantities that cleared), the Midwest ISO will pay as much as possible according to the approach described above and then release any incremental unpaid capacity.

17. The Midwest ISO notes that there may be alternative approaches that could be implemented to resolve a default in the voluntary capacity auction, but argues that the proposed approach is appropriate because it was supported "on the whole" by stakeholders. In addition, the Midwest ISO states that the nature and timing of the voluntary capacity auction is such that if the Midwest ISO paid the auction clearing price instead of the "pay-as-offered" amount with the monies it had, and released the remaining capacity that originally cleared but could not be paid due to insufficient funds, market participants with the released capacity would have a difficult time finding buyers before the resource plan deadline and would have little opportunity for external sales. By "paying-as-offered," the Midwest ISO states that market participants at least cover their offers and remain whole. The Midwest ISO asserts that generally sellers in the auction should receive the auction clearing price and that the likelihood of having these default positions in the voluntary capacity auction is low, so a "pay-as-offer" approach is appropriate for these rare occurrences.

2. <u>Comments and Protests</u>

18. Xcel supports the Midwest ISO's proposal and agrees that the charges described in the Midwest ISO proposal should not be uplifted to the entire market, as would be the case without the Midwest ISO's proposed revisions to the billing and payment provisions of section 7 in the Tariff.

19. Integrys explains that the Midwest ISO's proposal will (1) charge the winning bidders the full auction clearing price, (2) deduct the amount not paid by the defaulting market participants, (3) deduct any "other debts" that the defaulting market participants might owe the Midwest ISO, and (4) pay whatever is left over to the winning offerers, but pay no less than the offered prices.

20. Integrys states that the auction clearing price is the proper price signal in the voluntary capacity auction. If those participants that offer capacity into the auction do not know whether they will be paid the auction clearing price or their individual offer prices, or something in between, or nothing at all and get their "released" capacity back despite the presence of willing buyers, Integrys maintains that participants offering capacity may well include a risk premium in the offered price.

21. Integrys also notes that the Midwest ISO fails to specify who receives credit for the capacity paid for by other market participants on behalf of the defaulting participant.

Integrys maintains that there are better and more equitable solutions, and Integrys provides a detailed example of an alternative credit solution in its protest.[12]

22. Integrys states that the Midwest ISO's proposal is inconsistent with the Tariff because the Midwest ISO is not supposed to procure capacity for deficient LSEs. Integrys states that section 69.3.9.a of the Tariff provides that if an LSE is deficient in capacity and is assessed deficiency charges, these revenues are not used to procure capacity to fill the deficiency, but rather distributed on a *pro rata* basis to LSEs that met their capacity requirements.[13] Integrys asserts that under section 69.3.9.a, the deficient LSE must pay the deficiency charges, but no capacity is purchased, and the LSE remains deficient. In contrast, Integrys states that the Midwest ISO's current proposal would have the small group of market participants that offer capacity into the voluntary capacity auction subsidize capacity purchases for defaulting participants.

23. Detroit Edison states that the Midwest ISO's proposal unfairly forces winning suppliers in the voluntary capacity auctions to shoulder the burden if an LSE fails to pay a winning load bid. Due to the imminent start date for the first auction under Module E, Detroit Edison notes that little opportunity was given to openly develop and discuss alternative approaches in the Midwest ISO stakeholder process. Detroit Edison states that the Commission should direct the Midwest ISO to revisit this issue in the stakeholder process and submit a replacement proposal that has been thoroughly vetted by the stakeholder process and more equitably resolves the issue of market participant defaults.[14] Ameren also argues that the payment mechanism threatens resource owners who participate in (and clear) the auction with the possibility of after-the-fact modification of the price they receive for their capacity. Reliant asserts that suppliers should have the assurance that they will receive the auction clearing price and should not face the possibility of receiving an "as-offered" price, due to a defaulting participant, if their offer clears the auction.

24. Finally, Midwest TDUs oppose the proposal to shorten the period for paying capacity auction transactions to two business days. Midwest TDUs assert that most Midwest ISO bills, including those arising under Module E for load modifying resources and administrative services, are due "within seven (7) days of receipt."[15] Midwest TDUs

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[12] Integrys March 18, 2009 Protest at 10-13.

[13] *See id*. at 5-6 (citing Tariff section 69.3.9.a, First Revised Sheet No. 1507).

[14] Detroit Edison states in its protest that it supports the alternative proposal submitted by Integrys. Detroit Edison March 18, 2009 Protest at 4.

[15] *See* Tariff section 7.6, First Revised Sheet No. 349.

assert that market participants' existing internal administrative processes and cash flow management rules are geared toward that payment cycle, and should not have to be retooled, at potentially substantial cost, without good reason.

3. Commission Determination

25. We find that the Midwest ISO has failed to demonstrate why the proposed changes in sections 7.11, 7.12 and 7.13 are just and reasonable. We find that the proposal to use an "as offered" settlement price in the case of a default puts suppliers in the capacity market at increased risk of not being paid the auction clearing price as compared to the existing Tariff that would spread the cost responsibility for such a default among a wider group of market participants.[16] Also, because the Midwest ISO proposal would assign cost responsibility for unpaid amounts from the voluntary capacity auction to a narrower group of market participants (i.e., only market participants that are due voluntary capacity auction credits), it is unclear how the proposal is consistent with the existing Tariff that assigns cost responsibility for unpaid amounts in the financial transmission rights auction, for example, to all market participants transacting during the invoicing period, including market participants transacting in the voluntary capacity auction.

26. The Commission shares the concern voiced by Integrys that it is important to maintain the integrity of the auction clearing price and the price signal. Moreover, the Commission finds that the proposed "as offered" settlement price, in the case of a default, could result in suppliers including risk premiums in their offers.

27. Finally, the Commission notes that the Midwest ISO's own proposal contains a similar defect to the defect the Midwest ISO identifies in the alternative proposals. The Midwest ISO states that if it paid the auction clearing price for capacity with the monies it had, and released the remaining capacity that originally cleared, but could not be paid due to insufficient funds, market participants with released capacity would have little or

[16] *See* section 7.10 "Uplift of Uncollectible Past Due Amounts to Market Participants" of Module A of the existing Tariff. Currently, in the event that a market participant defaults and any amounts invoiced are not paid when due, the Midwest ISO shall use monies received by it from the market participants to pay all amounts due before making any payments to any other market participants. If there are still not sufficient funds to pay all invoiced amounts in full, then the Midwest ISO shall reduce payments to market participants owed monies for that billing period *pro rata* based on the net credit invoiced amounts owed to such market participants. As funds attributable to a past due amount are received by the Midwest ISO, they shall be distributed *pro rata* to the market participants that did not receive the full amount of their net credit invoiced amount.

no opportunity to find buyers before the resource plan deadline, and likewise would have little opportunity for external sales.[17] The Midwest ISO's proposal also would result in releasing the incremental unpaid capacity where the Midwest ISO could not pay market participants their "as offered" price.[18]

28. We reject the Midwest ISO's proposed changes to section 7.11, 7.12 and 7.13 as unsupported. We understand the Midwest ISO's desire to mitigate defaults and minimize uplift, and we encourage the Midwest ISO to continue working with its stakeholders to develop an alternative approach. We direct the Midwest ISO to continue using the existing provisions in the Tariff to address any default by a market participant in the voluntary capacity auction.

29. Midwest TDUs' concern regarding the Midwest ISO's proposal to shorten the period for paying voluntary capacity auction bills is rendered moot, as the existing procedures in the Tariff (which will be in effect in lieu of the proposed sections) allow seven business days for these payments.

C. Defaults Regarding Financial Settlement Charge Amounts - Sections 7.14, 7.15 and 7.16

1. Midwest ISO's Proposal

30. To address defaults by capacity deficient market participants, the Midwest ISO proposes to modify section 7 of the Tariff to add sections 7.14, 7.15 and 7.16 to include billing procedures for Module E financial settlement charges. Proposed section 7.14 provides that the Midwest ISO will submit an invoice five business days following the resource plan deadline to market participants that owe charges due to capacity deficiencies. The Midwest ISO proposes that the affected market participant will be required to pay the Midwest ISO within two business days of receipt of the invoice. Proposed section 7.15 provides that interest on any unpaid amounts will be calculated in accordance with section 7.3.

31. Section 7.16 provides that if a market participant defaults with respect to these deficiency charges and does not pay what is owed then the Midwest ISO will use payments received from other market participants to pay all amounts due to the Midwest ISO under the Tariff before it makes any payments to any other market participants. The Midwest ISO explains that it will use funds from the credit support documents provided by the market participant to pay any amounts due to the Midwest ISO that are not paid

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[17] *See* Midwest ISO February 25, 2009 Filing at 6.

[18] *See* proposed Tariff section 7.13.b.ii.

when due (past due amounts), as well as any late charges or interest payments. If this process does not yield sufficient monies to cover the amount due to the Midwest ISO, the Midwest ISO will reduce the payment to market participants that are due deficiency charge revenues for that billing period, on a *pro rata* basis, to the extent necessary to allow the Midwest ISO to clear its accounts by the close of banking business on the day such payment is due. As funds are received, they will be distributed *pro rata* to the market participants that did not receive the full amount due to them, subject to the Midwest ISO's first right of payment, setoff, recoupment and security interests. Where the Midwest ISO reduces the payments owed to market participants to cover non-payment, there will be no declaration by the Midwest ISO of an uncollectable obligation associated with the non-payment and there will be no uplift of the unpaid amount.

2. Protest

32. Midwest TDUs oppose the proposal to shorten periods for paying deficiency charges to two business days for the same reasons cited above with respect to paying voluntary capacity auction bills.

3. Determination

33. Except as noted below, we find the proposed revisions to sections 7.14, 7.15 and 7.16 regarding billing procedures for deficiency charges are just and reasonable. These provisions appropriately allow the Midwest ISO to remain revenue neutral. We further agree that where the Midwest ISO reduces the payments owed to market participants to cover non-payment, there will be no declaration by the Midwest ISO of an "uncollectable obligation" associated with the non-payment and there will be no uplift of the unpaid amount. This last provision makes sense given that market participants that are due funds have not directly provided services to the defaulting market participant. However, with regard to the proposal to shorten the period for paying the deficiency charges to two business days, we agree with Midwest TDUs in this instance. Because other bills are due within seven days, we find no reason at this time to change the due date for payment of deficiency charges to two days. Accordingly, we reject the Midwest ISO's proposal of a shortened period for payment of invoices in proposed section 7.14. Therefore, we direct the Midwest ISO to submit a compliance filing to revise the appropriate sections to use seven days for payment of invoices, within 30 days of the date of this order.

D. Minor Tariff Revisions

1. Midwest ISO's Proposal

34. The Midwest ISO also proposes minor changes to its Tariff in: (1) the definition of "Default" in Module A; (2) section 7 in Module A; and (3) Attachment L (Credit Policy), including ministerial changes (i.e., modifications to section numbers) for consistency and to further accommodate the necessary Module E revisions.

2. **Commission Determination**

35. We find that the proposed minor changes, which are unopposed, are just and reasonable, as they appropriately reflect the revisions we have accepted to Module E. However, those proposed minor changes that relate to or refer to proposed sections 7.11, 7.12 and 7.13 must be rejected in conformance with our rejection of those sections as described above. We note that, at a minimum, the following sections need to be revised as they directly or indirectly refer to sections 7.11, 7.12 or 7.13: (1) section 1.127 on First Revised Sheet No. 114 refers to sections 7.13 and 7.19(c) which in turn refers to proposed section 7.11; (2) references to section 7.11 on First Revised Sheet No. 355; (3) reference to section 7.11 on First Revised Sheet No. 357; and (4) reference to section 7.11 on Original Sheet No. 373A. We direct the Midwest ISO to submit a compliance filing to remove these references, and to make any other changes that are necessary to conform to the determinations in this order, within 30 days of the date of this order.

36. Also, we note that in section 7.6, the Midwest ISO adds "and for charges applicable to Load Modifying Resources pursuant to Module E." We direct the Midwest ISO to either explain the purpose of "Load Modifying Resources pursuant to" or remove this language in the compliance filing to be submitted within 30 days of the date of this order. This language appears to be unnecessarily restrictive in describing the application of section 7.

E. **Waiver of Notice**

37. With the exception of the provisions discussed above that we reject, we find good cause to grant waiver of the Commission's 60-day prior notice requirement to allow the tariff sheets to become effective on April 15, 2009, prior to the date that the Midwest ISO conducts its initial voluntary capacity auction.[19]

The Commission orders:

(A) The Midwest ISO's proposed revisions to section 7 of the Tariff are hereby accepted in part and rejected in part, to be effective April 15, 2009, as discussed in the body of this order.

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[19] *See Central Hudson Gas and Electric Corp.*, 60 FERC ¶ 61,106, at 61,339, *reh'g denied*, 61 FERC ¶ 61,089 (1992); *Prior Notice and Filing Requirements Under Part II of the Federal Power Act*, 64 FERC ¶ 61,139, at 61,983-84 (1993), *clarified*, 65 FERC ¶ 61,081 (1993).

(B) The Midwest ISO is hereby directed to submit a compliance filing regarding the necessary conforming changes within 30 days of the date of this order, as discussed in the body of this order.

(C) Waiver of the 60-day prior notice requirement is hereby granted, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.