

127 FERC ¶ 61,287
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Michigan South Central Power Agency

v.

Docket No. EL08-63-001

Midwest Independent Transmission
System Operator, Inc.

ORDER DENYING REHEARING

(Issued June 19, 2009)

1. Michigan South Central Power Agency (Michigan South Central) seeks rehearing of the Commission's order denying its request that the Commission authorize and direct the Midwest Independent Transmission System Operator, Inc. (Midwest ISO) to resettle and refund certain Revenue Sufficiency Guarantee charges assessed against Michigan South Central.¹ These charges arose in connection with virtual transactions that Michigan South Central states it engaged in because conduct by Constellation Energy Commodities Group (Constellation) under a seller's-choice contract with Michigan South Central prevented the latter from receiving carved-out treatment for its Grandfathered Agreement (GFA) No. 266 (GFA No. 266).²

¹ *Michigan South Central Power Agency v. Midwest Independent Transmission System Operator, Inc.*, 124 FERC ¶ 61,180 (2008) (Order on Complaint).

² The Midwest ISO's tariff defines a GFA as an agreement or agreements executed or committed to prior to September 16, 1998. Carved-out GFAs are agreements held by Midwest ISO market participants that elected not to include these agreements in the Midwest ISO energy market and did not choose one of the settlement options the Commission made available at the start of the Midwest ISO energy markets. *See Midwest Independent Transmission System Operator, Inc.*, 108 FERC ¶ 61,236 (2004),

(continued...)

I. Background

2. The background to Michigan South Central's rehearing request is set forth in the Order on Complaint; we will not repeat it in full here.³ In summary, GFA No. 266 is a transmission service agreement that gives Michigan South Central an undivided ownership interest in, and associated use rights over, transmission facilities of Michigan Electric Transmission Company LLC (METC). Michigan South Central also is party to a seller's-choice contract with Constellation that was in effect from January 1, 2002 through December 31, 2008. This contract requires Constellation to provide 30 megawatts (MW) of power around the clock to Michigan South Central. Constellation is free to choose the source for this power as long as it delivers it "into METC," the designated delivery point under the contract.

3. Prior to implementation of the Midwest ISO Day 2 Energy Markets in 2005, Michigan South Central used GFA No. 266 to move the 30 MW of power delivered by Constellation from the METC border to its member load centers on the METC system. According to Michigan South Central, Constellation has, since the start of the Midwest ISO Day 2 Energy Markets, chosen to make financial rather than physical deliveries of this power. As a result, Michigan South Central has not been able to identify, on a day-ahead basis, the physical source of the power it will receive. Michigan South Central states that the Midwest ISO's scheduling rules require a GFA party to make such an identification.

4. Michigan South Central states that, in response to Constellation's decision, it re-converted the real-time commodity into a day-ahead commodity and also used day-ahead virtual supply transactions to move its price exposure from the real-time energy market to the day-ahead market. Michigan South Central maintains that it is exempt from all Revenue Sufficiency Guarantee charges under its carved-out GFA No. 266,⁴ but it nonetheless has been assessed such charges on its virtual transactions through April 31, 2008 in the amount of \$366,611. In the Order on Complaint, the Commission denied Michigan South Central's request that these charges be re-settled and refunded.

order on reh'g, 111 FERC ¶ 61,042 (2005), *aff'd sub nom. Wisconsin Public Power, Inc. v. FERC*, 493 F.3d 239 (D.C. Cir. 2007).

³ See Order on Complaint, 124 FERC ¶ 61,180 at P 3-6.

⁴ See *Midwest Independent Transmission System Operator, Inc.*, 115 FERC ¶ 61,108, at P 135 (2006) (RSG Order); *reh'g granted in part and denied in part*, 117 FERC ¶ 61,113 (2006) (RSG Rehearing Order), *reh'g denied*, 118 FERC ¶ 61,212, *reh'g denied*, 121 FERC ¶ 61,131 (2007).

5. The Commission noted in the Order on Complaint that it had previously held that that “an entity that does not want to become a market participant for purposes of a carved-out GFA cannot avoid an obligation to become a market participant for transactions not related to a carved-out GFA.”⁵ Michigan South Central maintains that its virtual scheduling activity was related to GFA No. 266 because this activity was “associated with” the amounts it would have scheduled under its seller’s choice agreement and GFA No. 266. The Commission, however, found that this argument fails to acknowledge that carved-out GFAs are agreements for transmission service and therefore do not encompass offers and bids for virtual supply.⁶ The Commission stated that those offers and bids are energy market activities that are subject to the terms and conditions of the Midwest ISO Transmission and Energy Markets Tariff (Midwest ISO Tariff), whereas carved-out GFAs are older transmission agreements that are not subject to certain energy market scheduling and financial settlement provisions of the Midwest ISO Tariff.

6. The Commission stated that it does not consider virtual transactions to be part of carved-out GFA service. The supply arrangement associated with carved-out GFAs is instead assumed to be the scheduling of physical supply in a process that occurs outside the energy market framework. The Commission explained that to the extent that Michigan South Central was unable to obtain energy from Constellation in a timely manner, its remedy would be to obtain other physical supply from other suppliers. Instead of obtaining alternative physical supplies, however, Michigan South Central engaged in arbitrage activities to manage price risk.

II. Rehearing Request

7. Michigan South Central maintains that the Commission improperly concluded that Michigan South Central’s carved-out GFA service is not associated with its virtual transactions. According to Michigan South Central, this conclusion fails to account for evidence that shows that its virtual transactions are in fact tied to its carved-out GFA service. Michigan South Central claims that Constellation’s conduct deprived Michigan South Central of the ability to treat its seller’s-choice supply transaction as a day-ahead transaction that would have been a carved-out transaction exempt from Revenue Sufficiency Guarantee charges. Michigan South Central states that it had to use virtual transactions to convert the real-time commodity back to a day-ahead commodity, and that its virtual transactions were intended to mimic the financial position that formal carved-

⁵ Order on Complaint, 124 FERC ¶ 61,180, at P 16 (citing *Midwest Independent Transmission System Operator, Inc.*, 111 FERC ¶ 61,042, at P 330 (2005)).

⁶ *Id.*

out treatment would have afforded it. Michigan South Central states that these virtual transactions were made at the node at which Constellation made its real-time deliveries to Michigan South Central prior to the implementation of Day 2 Energy Markets, or at the CONS.MSCPA commercial pricing node, which is a registered sink under GFA No. 266. Michigan South Central argues that this supports its contention that the subject transactions and resulting Revenue Sufficiency Guarantee charges are directly tied to the Constellation deliveries. It also states that the Midwest ISO has acknowledged that it engaged in “Virtual Transactions as mitigation measures to the extent that GFA No. 266 was not treated as carved-out due to the absence of Day-Ahead Schedules for up to 30 MW delivered under the seller’s choice agreement. . . .”⁷

8. Michigan South Central argues that the Commission improperly presumed that it voluntarily elected to forego its carved-out GFA treatment. It states that it “did not elect to participate in the virtual market so much as it was forced into that market to mitigate harm.”⁸ In order to receive carved-out treatment, the Midwest ISO Tariff requires that a GFA customer provide the Midwest ISO with a day-ahead schedule that identifies the physical source of the power. Michigan South Central states that the Midwest ISO’s Physical Scheduling Business Practice Manual provides, in section 5.1, that bilateral schedules that do not adhere to the physical scheduling system data requirements “are denied.”⁹ These data requirements include identification of the source of power.

9. Michigan South Central further maintains that the Commission was incorrect when it stated that “carved-out GFAs . . . *are not subject to the certain energy market scheduling and financial settlement provisions of the [Midwest ISO Tariff].*”¹⁰ On the contrary, Michigan South Central states that “GFAs in fact are subject to certain requirements of the [Midwest ISO Tariff] and must comply with those requirements in order to avoid being subject to other scheduling and financial settlement provisions of the [Midwest ISO Tariff].”¹¹ Michigan South Central maintains that this issue underlies its complaint. The Midwest ISO’s scheduling procedures require holders of carved-out GFAs to comply with Midwest ISO Tariff requirements that include the physical day-

⁷ Rehearing Request at 11 (citing Midwest ISO Answer at 8).

⁸ Rehearing Request at 6.

⁹ *Id.* at 5-6.

¹⁰ *Id.* at 5 (citing 124 FERC ¶ 61,180 at P 16 (emphasis supplied by Michigan South Central)).

¹¹ *Id.*

ahead scheduling requirement that Michigan South Central states is the source of the difficulties it attempted to remedy. Because Constellation would not commit to or identify a source of power that Michigan South Central could submit to the Midwest ISO in the day-ahead scheduling process, Michigan South Central has been precluded from obtaining carved-out treatment for GFA No. 266.

10. Michigan South Central states that it had previously proposed alternative scheduling procedures to ensure that the Midwest ISO had the scheduling information it desired. The Commission ruled, however, that such procedures were not necessary because Michigan South Central's transactions related to its grandfathered agreement are not subject to Revenue Sufficiency Guarantee charges.¹²

III. Discussion

11. We affirm the Commission's finding in the Order on Complaint that Michigan South Central's virtual supply offers were not related to service under GFA No. 266 or to the denial of carved-out GFA treatment. Michigan South Central's claim to be exempt from Revenue Sufficiency Guarantee charges rests on the carved-out status of GFA No. 266, and it presents its virtual transactions as the necessary result of conduct by Constellation that precluded it from complying with scheduling requirements that would allow it to receive carved-out treatment. Michigan South Central in effect seeks to use the issues raised by Constellation's conduct to transfer the carved-out treatment that applies to physical transactions under GFA No. 266 to its virtual transactions.

12. To begin with, we question Michigan South Central's premise that Constellation's conduct precluded it from taking actions necessary to preserve carved-out status for GFA No. 266. The relevant Midwest ISO Tariff provision, section 38.8.4, contains nothing to indicate that market participants will be denied carved-out treatment if they fail to designate the supply location or supply entity in their schedules. Rather, section 38.8.4.3 requires that parties to carved-out GFAs provide the transmission provider with *non-binding* day-ahead schedules of transactions, and the day-ahead schedules can be updated in the real-time market.¹³ We cannot discern any reason that Michigan South Central, whether or not it knew where Constellation planned to source the 30 MW of power, could not have provided a schedule based on its own assessments and later made any necessary adjustments to that schedule.

¹² Michigan South Central here refers to statements in the RSG Order that are discussed further below.

¹³ Midwest ISO, FERC Electric Tariff, Fourth Revised Vol. No. 1, Original Sheet Nos. 670 and 671.

13. Nor do the Business Practices Manuals indicate that the Midwest ISO would deny carved-out treatment to Michigan South Central in this situation. Michigan South Central refers to section 3.3.5 of that manual, but this section simply lists the information required for physical scheduling of carved-out GFA transactions. Nothing that Michigan South Central cites to in those manuals states that non-compliance with the physical scheduling procedures in the Physical Scheduling Business Practices Manual will result in denial of carved-out GFA treatment.

14. Michigan South Central is correct when it says that section 5.1 of the Physical Scheduling Business Practices Manual states that bilateral schedules that do not adhere to the physical scheduling system data requirements are denied. We disagree, however, with the conclusion Michigan South Central draws from that statement, namely that it “did not elect to participate in the virtual market so much as it was forced into that market to mitigate harm.”¹⁴ As discussed in the preceding paragraph, a plain reading of the tariff suggests that Michigan South Central need only have submitted a non-binding schedule. The tariff trumps the Business Practices Manual, so we read the two provisions together to mean that Michigan South Central could have satisfied the Midwest ISO’s scheduling requirements for carved-out GFAs – a special type of bilateral contract that receives specific treatment – by providing the best data it could.¹⁵

15. When Michigan South Central argues that there is a relationship between GFA No. 266 and its virtual transactions, it is pointing to a factual nexus that it maintains explains its conduct. This asserted factual connection does not translate into a legal connection. Michigan South Central fails to show why it was denied carved-out GFA status (i.e., that it submitted a schedule that conformed with the tariff, but was denied carved-out treatment). It also has not demonstrated how any loss of a legal claim to carved-out GFA status with respect to physical transactions translates into a legal claim to immunity from Revenue Sufficiency Guarantee charges with respect to virtual transactions. Michigan South Central’s focus on the problem of mitigating what it treats as the loss of price certainty does not speak to this issue because it confuses the question of its motivation with the question of the alternatives that were available to it under the applicable Commission’s orders. Virtual trading is not one of those alternatives because those orders do not address virtual trading in this connection.

¹⁴ Rehearing Request at 6.

¹⁵ We further note that, at least effective October 1, 2008, schedules for all types of carved-out GFA transactions are updated 30 minutes prior to the operating hour. Midwest ISO Physical Scheduling Business Practices Manual at § B.6, pages B-21 through B-28.

16. Carved-out GFA treatment does not have a price component. It only describes the scheduling requirements, and liability for energy market costs, for certain pre-energy market contracts. Such contracts, as the Commission explained in the Order on Complaint, “are agreements for transmission service, and they therefore do not encompass virtual supply offers and bids such as those Michigan South Central made in the Midwest ISO energy market. . . . Rather, the supply arrangement associated with carved-out GFAs is assumed to be the scheduling of physical supply in a process that occurs outside the energy market framework.”¹⁶ For this reason, the Midwest ISO’s statement that Michigan South Central’s virtual transactions were mitigation measures, and Michigan South Central’s description of how its virtual offers mimicked its physical transactions, are not on point and do not support the exemption that Michigan South Central claims.

17. Michigan South Central maintains that prior Commission orders support its claim, but we disagree. It cites for these purposes the following language in the RSG Order:

Parties to carved-out GFAs are not subject to RSG charges, as the Commission has clarified in another proceeding; the Midwest ISO may not charge parties to carved-out GFAs for any deviation from their day-ahead schedules, as long as injections and withdrawals are balanced in real-time. Also, any costs associated with schedule changes post day-ahead when the carved-out GFAs allow for such changes cannot be charged to the carved-out GFAs through uplift, per prior Commission precedent. While the Michigan Agencies propose revised designations of commercial nodes as a solution to avoid RSG charges, there is no need to implement those changes since none of the Michigan Agencies’ transactions are subject to RSG charges.¹⁷

What Michigan South Central fails to note is that when the Commission asserted in the RSG Order that none of its transactions are subject to Revenue Sufficiency Guarantee charges, it was responding to comments that referred only to physical transactions.¹⁸ For

¹⁶ Order on Complaint, 124 FERC ¶ 61,180 at P 16-17.

¹⁷ Complaint at 10 (citing RSG Order, 115 FERC ¶ 61,108 at P 135, internal citations omitted). We note that the Michigan Agencies referred to here included Michigan South Central.

¹⁸ See RSG Order, 115 FERC ¶ 61,108 at P 123-29.

that reason, the final sentence of the quoted passage means, in context, that Michigan South Central was not subject to Revenue Sufficiency Guarantee charges because its GFA was eligible for carved-out treatment, not because it had a carved-out GFA. In other words, the Commission's statement does not create for Michigan South Central a general immunity from Revenue Sufficiency Guarantee charges that applies in all circumstances, including the virtual realm, but rather an immunity that applies specifically to its *physical* transactions under GFA No. 266. Michigan South Central did not provide any information in that proceeding to suggest that it was engaging or would engage in virtual transactions, and the Commission's decision therefore only pertained to physical transactions. The issue presented in that proceeding related only to deviations between day-ahead and real-time transactions and the potential liability for Revenue Sufficiency Guarantee charges that results solely from this activity.

18. The consequence of not obtaining carved-out GFA treatment is that Michigan South Central would be required to comply with the Midwest ISO's energy market offer and bid requirements and to meet energy market scheduling requirements, or pay penalties and be subject to energy market charges. But Michigan South Central's complaint addresses these matters only indirectly and does not succeed in making them the basis of a legal claim. Its sole concern is the receipt of deliveries in the real-time market rather than deliveries at day-ahead market prices. Yet none of the Commission's orders dealing with carved-out treatment for GFAs guarantees that performance under power supply agreements of parties with carved-out GFAs will achieve a certain economic result, and nothing in them permits provisions that are applicable to virtual trading to be overridden when a certain economic result is not achieved. Those orders therefore are not a basis for turning Michigan South Central's disagreement with Constellation about performance under the seller's-choice agreement into a claim to exemption from Revenue Sufficiency Guarantee charges applicable to virtual trading. In short, Michigan South Central's actions are simply outside the scope of those orders. Accordingly, we affirm the finding in the Order on Complaint that the virtual offers are unrelated to the carved-out GFA.

19. We now turn to the issue of whether Michigan South Central has shown that virtual trading can be viewed as a means of mitigating the problem of price uncertainty and the conclusions that follow from this line of inquiry. Because our orders do not provide a basis for the exemption from Revenue Sufficiency Guarantee charges that Michigan South Central claims, this inquiry involves whether there are sufficient reasons to nevertheless provide Michigan South Central with the relief it seeks on the facts presented. We have acknowledged that Constellation's decision to make financial deliveries created scheduling issues that Michigan South Central claims drew into question its ability to enjoy the benefits of carved-out treatment for GFA No. 266. But we disagree that Michigan South Central's virtual trading activities represent appropriate mitigation measures that could justify granting its rehearing request.

20. First, the Midwest ISO has made clear that any resettlement of the Revenue Sufficiency Guarantee charges assessed on Michigan South Central “will result in a related resettlement of [Revenue Sufficiency Guarantee] charges with respect to transactions engaged in by other Market Participants during the relevant time period, and in an amount equal to the [Revenue Sufficiency Guarantee] charges ultimately refunded to [Michigan South Central]”¹⁹ In other words, Michigan South’s Central’s claim does not exist in a vacuum, and the Commission therefore must consider whether it is fair to impose on others the charges that Michigan South Central has incurred. An examination of Michigan South Central’s description of its virtual trading activity convinces us that it is not.

21. Michigan South Central’s core claim is that it engaged in virtual supply offers in order “to mimic as closely as appeared possible the carved-out treatment that [Michigan South Central] should have obtained.”²⁰ Michigan South Central is, however, somewhat inconsistent in describing what it was attempting to accomplish. At some points, it speaks of obtaining “better price certainty” and “mov[ing] its price exposure from the Real-Time Energy Market to the Day-Ahead Energy Market.”²¹ At other points it refers to its virtual offers as an effort to mitigate charges for losses and congestion that resulted from the denial of carved-out treatment.²² But in neither case can Michigan South Central demonstrate a plausible relationship between its virtual trading and the carved-out treatment applicable to GFA No. 266.

22. In stating that it was seeking better price certainty, Michigan South Central appears to be making the novel claim that its alleged loss of carved-out treatment for GFA No. 266 forced it to pay a different, and presumably higher and less certain, price for energy. But we can find nothing that explains why Michigan South Central felt compelled to obtain the day-ahead price for its energy purchase when it was compensated for its energy purchases by payments from Constellation, whatever the price.²³ Further,

¹⁹ Midwest ISO Answer at 3.

²⁰ Complaint at 12.

²¹ *Id.* at 11; White Affidavit at ¶ 9 and 10. Exhibit MSC-1 to the Complaint.

²² Exhibit MSC-1 to the Complaint at 2.

²³ *See* White Affidavit at ¶ 6-7. Witness White describes Constellation to be making financial deliveries rather than physical deliveries for this seller’s choice arrangement. As is commonly the case, the contract in question contains a liquidated damages provision that assures Michigan South Central that it will recover any positive difference between the contract price and the price at which Constellation is able to

(continued...)

Michigan South Central has not provided any evidence it would have paid a day-ahead energy price if it received physical supplies from Constellation. Its contract with Constellation sets forth price terms that would not have been affected by the day-ahead market price.²⁴ Accordingly, we find that Michigan South Central has not established that any loss of carved-out treatment for GFA No. 266 put it in an inferior financial position with respect to energy supply costs than would have been the case if it had received carved-out GFA treatment.

23. But even assuming that Michigan South Central could have paid a day-ahead energy price for energy to be transmitted under its carved-out GFA, it has not shown that its payment of real-time energy prices instead of day-ahead energy prices represents a harm. Real-time energy prices can be higher or lower than day-ahead energy prices, and Michigan South Central has not shown that payment of real-time prices necessarily represented a harm that needed mitigation.²⁵

24. Taking Michigan South Central's price-certainty argument to its logical conclusion, the only circumstance in which it could show harm in price terms would be where it had to purchase real-time energy at a higher price than the day-ahead energy price. But in this case a virtual supply offer provides no mitigation. Assuming Michigan South Central bought 30 MW at \$50/MW in the real-time energy market, and the day-ahead energy price was \$30/MW, a virtual supply offer in the day-ahead market would result in a loss of \$20/MW. The only circumstance in which a virtual offer can provide a benefit to the market participant is when the day-ahead price is higher than the real-time price, the opposite of the circumstance in which Michigan South Central can establish a harm.

25. In short, Michigan South Central's argument about mitigating price uncertainty fails to show the relationship between its concerns about the price it paid for power and either its virtual trading or carved-out treatment, something which, in any event, lacks a price component.

obtain comparable supplies of power. *See* Section 3.2(a), Power Purchase and Sale Agreement, Exhibit MSC-2 filed in Docket No. ER05-6-002 *et al.* on May 8, 2006 (Constellation Agreement). Michigan South Central therefore was assured of never paying an energy price that was higher than the contract price.

²⁴ *See* Exhibit A to the Constellation Agreement.

²⁵ We also note that Michigan South Central has not provided any evidence that supports its suggestion that the day-ahead market offers greater price certainty than the real-time energy market.

26. Things are no different if Michigan South Central instead maintains that it engaged in virtual offers to mitigate charges for losses and congestion that resulted from the denial of carved-out treatment for GFA No. 266. Michigan South Central attached to its complaint a letter it sent to the Midwest ISO which states that “In an effort to mitigate . . . [loss and congestion] charges, which would not have been assessed had the Midwest ISO treated this transaction as the carved-out transaction that it is, MSCPA submitted some virtual supply offers in the Day-Ahead Market.”²⁶ However, as discussed above, virtual offers may or may not result in revenues to Michigan South Central, depending on market conditions, and therefore the mitigation value of virtual offers is uncertain. Moreover, in cases where virtual supply offers yield positive revenues for Michigan South Central, those revenues could be multiples of the cost of congestion and losses. In any case, the revenues received from virtual supply offers have no causal relation to the costs of congestion and losses, in that they are simply based on price convergence considerations that do not encompass matters related to congestion and costs. Lacking a nexus between the virtual supply offers and the costs of congestion and losses, we can find no plausible basis to conclude that virtual offers provide mitigation.

27. Therefore, even if we were willing to go beyond the requirements of our orders and consider whether the specific difficulties that Michigan South Central encountered in its dealings with Constellation could justify an exemption from Revenue Sufficiency Guarantee charges, we find nothing in Michigan South Central’s description of virtual trading activities that could justify transferring the costs arising from those activities to other market participants.

The Commission orders:

Michigan South Central’s request for rehearing of the Order on Complaint is hereby denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

²⁶ Exhibit MSC-2 to the Complaint at 2.