

129 FERC ¶ 61,281
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Midwest Independent Transmission
System Operator, Inc.

Docket No. ER09-1769-000

ORDER ACCEPTING NOTICE OF CANCELLATION

(December 29, 2009)

1. On September 30, 2009, pursuant to section 35.15 of the Commission's regulations, 18 C.F.R. § 35.15 (2009), the Midwest Independent Transmission System Operator, Inc. (Midwest ISO) submitted a Notice of Cancellation of the Amended and Restated Midwest Contingency Reserve Sharing Group Agreement (Amended CRSG Agreement).¹ In this order, the Commission accepts the Notice of Cancellation, to be effective December 31, 2009, as requested.

I. Background

2. On May 30, 2008, as supplemented,² Midwest ISO, under section 205 of the Federal Power Act,³ filed the Amended CRSG Agreement to replace the then existing 2006 Midwest Contingency Reserve Sharing Group Agreement (2006 CRSG Agreement). On December 18, 2008, the Commission conditionally accepted the Amended CRSG Agreement for filing and conditionally accepted the notice of cancellation of the 2006 CRSG Agreement.⁴ The Amended CRSG Agreement replaced the 2006 CRSG Agreement commensurate with the start-up of Midwest ISO's Ancillary Services Market, when Midwest ISO began to operate as a NERC-certified Balancing

¹ Midwest ISO Rate Schedule No. 14.

² On August 6, 2008, August 15, 2008 and September 9, 2008, the Midwest ISO submitted additional information in response to a deficiency letter.

³ 16 U.S.C. § 824d (2006).

⁴ *Midwest Indep. Trans. Sys. Operator, Inc.*, 125 FERC ¶ 61,323 (2008) (December 18 Order).

Authority, and the obligation to carry reserves shifted from the multiple Balancing Authorities in the Midwest ISO footprint to the new Midwest ISO Balancing Authority.

3. The Amended CRSG Agreement includes a provision in section 4.2.3 that provides for the termination of the Amended CRSG Agreement on its own terms at midnight, December 31, 2009, unless the Contingency Reserves Committee votes to extend that date.

4. Over concerns raised by E.ON that the expiration of the Amended CRSG Agreement could have significant cost implications and perhaps reliability implications, the Commission accepted the termination provision in section 4.2.3 of the Amended CRSG Agreement, finding that the proposed termination at the end of 2009 provides the parties with the necessary time to evaluate the Amended CRSG Agreement and the impact of the Ancillary Services Market.⁵ The Commission also noted, notwithstanding, that Midwest ISO must file a notice of cancellation to effect such termination.⁶

5. There are two other contingency reserve sharing proceedings being addressed by the Commission concurrently with this proceeding. In Docket Nos. ER10-27-000 and ER10-27-001, Midwest ISO proposed a new Attachment RR (Real-Time Reserve Services Available to Balancing Authorities During Phased Integration) setting forth the details, rates and procedures to be employed to facilitate the supply of reserves to new Transmission Owners during a phased integration into Midwest ISO.⁷ In Docket No. ER10-54-000, Midwest ISO filed proposed amendments to its Coordination Agreement with Manitoba Hydro to include terms and conditions that the parties have agreed upon to execute a bilateral reserve sharing group.⁸

II. Filing

6. In accordance with section 4.2.3 of the Amended CRSG Agreement, Midwest ISO requests authorization to cancel the Amended CRSG Agreement, effective December 31, 2009. Midwest ISO notes that the Amended CRSG Agreement will terminate on its own terms at midnight, December 31, 2009, unless the Contingency Reserves Committee votes to extend that date. Midwest ISO states that the Amended CRSG Agreement is a

⁵ December 18 Order, 125 FERC ¶ 61,323 at P 46.

⁶ *Id.*

⁷ *Midwest Indep. Trans. Sys. Operator, Inc.*, 129 FERC ¶ 61,283 (2009) (conditionally accepting proposed Attachment RR).

⁸ *Midwest Indep. Trans. Sys. Operator, Inc.*, 129 FERC ¶ 61,282 (2009) (accepting proposed revisions to Coordination Agreement).

voluntary commercial contract among Balancing Authorities to reduce the cost of contingency reserves. Midwest ISO states that, pursuant to North American Electric Reliability Corporation (NERC) Reliability Standard BAL-002-0 – Disturbance Control Performance, a Balancing Authority area must carry reserves sufficient to offset its single largest contingency. Midwest ISO states that the NERC standard provides that a Balancing Authority area may demonstrate compliance with that requirement by carrying the required reserve amount itself, or by sharing this obligation through a reserve sharing agreement with one or more Balancing Authority areas.

7. Midwest ISO states that reserve sharing groups are not critical to maintaining reliability in the region. Midwest ISO states that the failure to carry required reserves is a violation of NERC standards; the failure to participate in a reserve sharing group is not.

8. Midwest ISO also submitted certificates of concurrence from Dairyland Power Cooperative (Dairyland), Manitoba Hydro and Midwest ISO certifying that such signatories to the Amended CRSG Agreement assent to and concur with the cancellation of the Amended CRSG Agreement, effective December 31, 2009.

III. Notice of Filing and Responsive Pleadings

9. Notice of Midwest ISO's September 30, 2009 filing was published in the *Federal Register*, 74 FR 51844 (2009), with interventions and protests due on or before October 21, 2009. MidAmerican Energy Company, Consumers Energy Company, and Xcel Energy Services, Inc. filed motions to intervene.

10. Big Rivers Electric Corporation (Big Rivers), The Detroit Edison Company (Detroit Edison), E.ON U.S., LLC (E.ON),⁹ Wisconsin Electric Power Company (Wisconsin Electric), Dairyland, Western Area Power Administration (WAPA), and Duke Energy Corporation (Duke)¹⁰ filed motions to intervene and comments. East Kentucky Power Cooperative, Inc. (East Kentucky) filed a motion to intervene and conditional protest. Midwest ISO filed an answer.

11. Detroit Edison states that it is a signatory to the Amended CRSG Agreement and supports Midwest ISO's Notice of Cancellation, to be effective December 31, 2009, agreeing with Midwest ISO that interested parties have had ample time to make alternative arrangements prior to the planned expiration date of the Amended CRSG Agreement.

⁹ E.ON filed on behalf of its subsidiaries Louisville Gas & Electric Company and Kentucky Utilities Company.

¹⁰ Duke filed on behalf of its subsidiaries Duke Energy Ohio, Inc., Duke Energy Indiana, Inc., and Duke Energy Kentucky, Inc.

12. Dairyland states that it is a signatory to the Amended CRSG Agreement and that it has applied to join Midwest ISO as a Transmission Owner. Dairyland states that it is essential that the Commission accept Midwest ISO's Attachment RR (Real-Time Reserve Services Available to Balancing Authorities During Phased Integration) filing in Docket No. ER10-27-000 with an effective date prior to December 31, 2009, in order to effectuate Dairyland's arrangement to meet the reserve obligation for the Balancing Authority area it operates and will operate until its Balancing Authority area becomes a part of Midwest ISO's Balancing Authority area on June 1, 2010. Dairyland states that it will not be able to make other arrangements to meet its obligations under NERC Standard BAL-002-0 if Dairyland is not permitted to utilize Midwest ISO's proposed Attachment RR immediately upon termination of the Amended CRSG Agreement.

13. Wisconsin Electric states that it fully supports the termination of the Amended CRSG Agreement, as it would be the termination of any voluntary commercial contract by its own terms. Wisconsin Electric also agrees with Midwest ISO that reserve sharing provides only an economic benefit to the participants and is not required by the NERC standards.

14. WAPA states that it is currently a signatory to the Amended CRSG Agreement. WAPA supports Midwest ISO's notice of cancellation, and concurs with Midwest ISO that participating in a reserve sharing group is an economic benefit, not a reliability benefit. WAPA states that, pursuant to the terms of the Amended CRSG Agreement, it provided a notice of intent to withdraw from the Amended CRSG Agreement by letter dated June 15, 2009, and that its withdrawal from the Amended CRSG Agreement will occur at midnight on December 31, 2009. WAPA states that, in its December 18 Order, the Commission approved section 6.1.1 of the Amended CRSG Agreement which provides: "[a]pproval of the FERC shall not be required to effect the withdrawal of a Party under this Agreement."¹¹ Further, WAPA argues that, since it is a non-jurisdictional entity for purposes of section 205 and 206 of the Federal Power Act, the Commission cannot require WAPA to continue to participate in the Amended CRSG Agreement.¹²

15. Duke states that it supports the proposed cancellation of the Amended CRSG Agreement. Duke argues that a reserve sharing agreement is not like a typical agreement providing for a sale of jurisdictional services – rather, it provides for reciprocal services. Duke states that, under the Amended CRSG Agreement, every party is a service provider – and every party is also a customer. Duke states that, contrary to any precedent it is aware of, if the Commission disallowed the termination of the Amended CRSG

¹¹ WAPA Protest at 8.

¹² WAPA Protest at 8-9 (citing *Union Electric Co.*, 112 FERC ¶ 61,089 (2005)).

Agreement, the Commission would be forcing customers to continue taking service they no longer want, despite the exercise of a lawful, mutually negotiated cancellation option.

16. East Kentucky states that it is a party to the Amended CRSG Agreement. East Kentucky states that it does not protest the Notice of Cancellation at this time, as it has been actively negotiating with other parties for more than a year for alternate sources of reserves following the termination of the Amended CRSG Agreement. However, East Kentucky states that it shares concerns with other members regarding continued reliability and the possible gap that could be left if an alternate agreement cannot be reached by the parties in time to take effect on January 1, 2010.

17. Big Rivers objects to the proposed termination of the Amended CRSG Agreement and requests that the Commission postpone the effectiveness of the notice of termination for six months, until June 30, 2010, to give Big Rivers and any other similarly situated entities a reasonable and definite period of time to enter into the arrangements that will be necessary to comply with NERC Standard BAL-002-0. Big Rivers also notes that it would be necessary to prohibit any party to the Amended CRSG Agreement from withdrawing from the agreement during the six-month extension period.¹³ Big Rivers states that it was not until about the middle of 2009 that Midwest ISO, as Administrator to the Amended CRSG Agreement, confirmed that the term of the Amended CRSG Agreement would not be extended. Big Rivers states that it has been diligently evaluating its option for obtaining a replacement source of contingency reserves but, at the present time, there is no guarantee that Big Rivers will be able to enter into an arrangement to replace the Amended CRSG Agreement prior to December 31, 2009. Big Rivers notes that Midwest ISO has offered to provide backstop service to Big Rivers pursuant to the proposed Attachment RR (Docket Nos. ER10-27-000 and ER10-27-001). However, Big Rivers states that Midwest ISO will only make Attachment RR available to Big Rivers if it agrees to commence the process of joining Midwest ISO as a Transmission Owner. Big Rivers states that, while it may conclude that joining Midwest ISO is appropriate, its decision involves an evaluation of many more factors than merely satisfying contingency reserve requirements. Big Rivers states that it would have to justify its decision to the Kentucky Public Service Commission based on a complete analysis that Big Rivers is in the process of performing.

18. E.ON states that it does not protest the Notice of Cancellation at this time because it is moving toward alternative arrangements for contingency reserves, but E.ON raises the following concerns regarding Midwest ISO's actions. First, E.ON states that Midwest ISO has not asserted or shown that the same level of regional reliability and reduced costs enjoyed by all parties under the Midwest Contingency Reserve Sharing Group will continue after termination. Second, E.ON argues that Midwest ISO is giving

¹³ Big Rivers Protest at 6, n.8.

the appearance of providing services on a preferential basis by providing reserve sharing through Attachment RR only to those who have a stated intent to join Midwest ISO as a Transmission Owner and extending reserve sharing service to Manitoba Hydro, who is not a Transmission Owner.

19. Finally, E.ON argues that the Commission should review the Notice of Cancellation of the Amended CRSG Agreement, Attachment RR (Docket Nos. ER10-27-000 and ER10-27-001) and the Manitoba Hydro filing (Docket No. ER10-54-000) together in order that the totality of consequences might be considered.

20. Midwest ISO responds to comments raised by E.ON, Big Rivers and East Kentucky. First, Midwest ISO opposes E.ON's suggestion that the Commission combine its review of the Notice of Cancellation with considerations related to the proposed Attachment RR, or the proposed revisions to the Manitoba Hydro Coordination Agreement. Midwest ISO states that E.ON appropriately did not request consolidation of these matters, and the Commission should reject E.ON's veiled threat to hold hostage the outcome of other dockets to gain a bargaining chip in this one.

21. Second, Midwest ISO rejects E.ON's argument that Midwest ISO has a burden to demonstrate the same or better reliability to obtain termination of a reserve sharing group. Midwest ISO states that E.ON does not explain by what logic the Commission should conclude that if each member of the Midwest Contingency Reserve Sharing Group were to carry sufficient reserves to meet the NERC Standard BAL-002-0, reliability would be harmed by having a higher, rather than lower, total operating reserve level in the region. Midwest ISO states that the availability of emergency energy, if needed, under these circumstances would be as good or greater if all neighboring Balancing Authority areas were to carry additional reserves on system. Midwest ISO also notes the irony that E.ON would require Midwest ISO to demonstrate that E.ON, Big Rivers and East Kentucky's alternative arrangements are equally reliable, yet none of them identify what their alternative arrangements are.

22. Third, Midwest ISO rejects E.ON's suggestion that Midwest ISO demonstrate that termination of the Amended CRSG Agreement will not result in higher costs for the members of the group. Midwest ISO cites to *Louisville Gas and Electric Co.*, 114 FERC ¶ 61,282 (2006), where the Commission rejected demands for a cost/benefit analysis of the economic and reliability impacts of E.ON's departure from Midwest ISO. Midwest ISO notes that, on rehearing, the Commission also rebuffed Midwest ISO's argument that E.ON should demonstrate that its proposed alternatives would not reduce regional reliability, finding that "Midwest ISO's argument that [E.ON]'s facilities could be operated in a more reliable, efficient manner in an R[egional] T[ransmission] O[rganization] . . . simply overlooks [E.ON]'s contractual rights under the

T[ransmission] O[w]ners] Agreement, which we are not at liberty to ignore.”¹⁴ Midwest ISO states that the Commission should decline to follow E.ON’s weather-vane pronouncements about what is and is not reliable, and should instead follow its own precedent by accepting the cancellation of Rate Schedule No. 14 on the basis that the Amended CRSG Agreement is a voluntary agreement among its members with contractual rights to terminate, which the Commission “*is not at liberty to ignore.*”¹⁵

23. Finally, Midwest ISO rejects E.ON’s assertion that Midwest ISO must share reserves on a non-discriminatory basis. As an initial matter, Midwest ISO disputes that entering into a reserve sharing agreement is a public utility service that must extend to all third parties without preference or discrimination. Midwest ISO states that section 205 of the Federal Power Act applies to transmission and wholesale sales regulated by the Commission. Midwest ISO states that transmission services and the energy transfers that enable reserve sharing in real time may be subject to the Commission’s jurisdiction, but the commercial relationship embodied in an agreement to share reserves is not a public utility service, and the Commission has no authority to require a public utility to contract with another on that basis. Midwest ISO states that, to do so, would be to deprive a given utility of the right to meet its NERC reserve obligation by setting aside reserves on its own system if it believes that was the most reliable alternative. Further, Midwest ISO states that the availability of proposed Attachment RR does not exclude E.ON and makes reserves available to E.ON, Big Rivers or East Kentucky on the same basis that Dairyland plans to obtain them. Additionally, Midwest ISO states that it is not showing undue preference to Manitoba Hydro. Midwest ISO states that “[t]o prove the existence of undue discrimination or undue preference, it must be shown that: (1) two classes of customers are treated differently; and (2) that the two classes of customers are similarly situated.”¹⁶ Midwest ISO states that E.ON, Big Rivers and East Kentucky share none of the characteristics of Manitoba Hydro that are reflected in the Coordination Agreement. Midwest ISO states that Manitoba Hydro, though a Canadian company, is nonetheless a coordinating member of Midwest ISO, it pays a full Schedule 10 charge on its native load, it obtains Reliability Coordination service from Midwest ISO, and it coordinates its transmission service to eliminate pancaked rates within the Midwest ISO and Manitoba Hydro combined system. Midwest ISO notes that, but for the legal barriers to placing Canadian utility assets under foreign control, Manitoba Hydro would likely be a Midwest ISO Transmission Owner.

¹⁴ Midwest ISO Answer at 6 (citing *E.ON U.S. LLC*, 116 FERC ¶ 61,020, at P 30 (2006)).

¹⁵ *Id.* (emphasis in original).

¹⁶ Midwest ISO Answer at 4 (citing *Energy Transfer Partners, L.P.*, 120 FERC ¶ 61,086, at P 169 & n.140 (2007)).

IV. Discussion

A. Procedural Matters

24. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2009), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

25. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2009), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept Midwest ISO's answer because it has provided information that assisted us in our decision-making process.

B. Commission Determination

26. We accept Midwest ISO's Notice of Cancellation. As discussed below, we find no basis for the Commission to require Midwest ISO to retain the current reserve sharing group past the contractual term set forth in the Amended CRSG Agreement. We find that Midwest ISO complied with the Commission's regulations,¹⁷ the termination provision in section 4.2.3 of the Amended CRSG Agreement, and the Commission's December 18 Order accepting the termination provision in section 4.2.3. Furthermore, we agree with Midwest ISO that there is no NERC standard that requires such a reserve sharing group to exist.

27. We deny Big Rivers' request to extend the effectiveness of the Notice of Cancellation to June 30, 2010 and to prohibit any party to the Amended CRSG Agreement from withdrawing during that extended period. First, Big Rivers' argument that the termination is not just and reasonable because it needs more time to find an adequate alternative to meeting its reserve obligation is not persuasive. Each of the parties to the Amended CRSG Agreement was aware of the termination provision at the time they signed the Amended CRSG Agreement, and should have planned accordingly. Additionally, the parties could have sought to amend the termination provision or add additional requirements by making a filing with the Commission. No such filings were made. Second, the Commission will not require the parties to the Amended CRSG Agreement to continue to offer reserves under an agreement which, by its own terms, terminates at midnight, December 31, 2009. Several parties have already withdrawn from the Midwest Contingency Reserve Sharing Group in accordance with the provisions in the Amended CRSG Agreement.¹⁸ As we stated in *Union Electric Company*, "it

¹⁷ 18 C.F.R. § 35.15 (2009).

¹⁸ We note that several of these parties are not "public utilities" within the meaning of the Federal Power Act.

would be unreasonable to require the public utility companies to hold others harmless for the consequences of [the] termination of [an] agreement, an event that is beyond their control.”¹⁹

28. We also reject E.ON’s assertion that Midwest ISO must make a showing that termination of the Amended CRSG Agreement will achieve the decreased costs and enhanced regional reliability as the broader regional group. The Amended CRSG Agreement does not condition termination on requiring decreasing costs for the parties or enhancing regional reliability. In the December 18 Order, the Commission accepted the termination provision reasoning that “the proposed termination at the end of 2009 provides the parties with the necessary time to evaluate the Amended CRSG Agreement and potentially adjust the Amended CRSG Agreement once the parties have been able to evaluate the impact of the Ancillary Services Market.” The Ancillary Services Market, in operation since January 6, 2009, was previously accepted by the Commission as a just and reasonable mechanism for Midwest ISO to provide its members with contingency reserve capacity and for market participants to bid available capacity into the market.²⁰ Under these circumstances, the Notice of Cancellation serves a simple purpose: to notify the Commission of the Contingency Reserve Committee’s decision not to extend the termination date beyond midnight on December 31, 2009.

29. We also note that E.ON’s argument that termination of the Amended CRSG Agreement will reduce reliability fails. As Midwest ISO notes, it is illogical to conclude that having each party to the Amended CRSG Agreement meet its contingency reserve obligation on its own, as opposed to sharing the obligation, would somehow reduce reliability in the region. To the contrary, the logical conclusion is that increased reserves being held on each Balancing Authority’s transmission system would increase regional reliability.

30. Finally, we reject as beyond the scope of this proceeding E.ON’s arguments that Midwest ISO’s proposed arrangements with Manitoba Hydro (Docket No. ER10-54-000) and proposed Attachment RR (Docket Nos. ER10-27-000 & ER10-27-001) are unduly preferential. E.ON has raised similar arguments in those proceedings, and we will address those arguments in those dockets.²¹

¹⁹ *Union Electric Co.*, 112 FERC ¶ 61,089 at P 18.

²⁰ *Midwest Indep. Trans. Sys. Operator, Inc.*, 122 FERC ¶ 61,172 (2008) (accepting Midwest ISO’s revised Ancillary Services Market proposal, subject to compliance filings).

²¹ *Midwest Indep. Trans. Sys. Operator, Inc.*, 129 FERC ¶ 61,282 (2009); *Midwest Indep. Trans. Sys. Operator, Inc.*, 129 FERC ¶ 61,283 (2009).

31. We find that consistent with section 4.2.3 of the Amended CRSG Agreement, which provides that the Amended CRSG Agreement terminates at midnight December 31, 2009, the effective date for the termination will be December 31, 2009 and we will accept the proposed tariff sheet effective on December 31, 2009, as requested.

The Commission orders:

The Notice of Cancellation of the Amended CRSG Agreement is hereby accepted for filing, effective December 31, 2009, as requested.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.