

131 FERC ¶ 61,185  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Midwest Independent Transmission System  
Operator, Inc.

Docket No. ER10-980-000

ORDER ACCEPTING TARIFF REVISIONS

(Issued May 28, 2010)

1. On March 31, 2010, Midwest Independent Transmission System Operator, Inc. (Midwest ISO) submitted, under section 205 of the Federal Power Act,<sup>1</sup> proposed revisions to its Open Access Transmission, Energy and Operating Reserve Markets Tariff (Tariff) to address the method used for calculating and distributing marginal loss surplus revenues. In this order, we accept the proposed revisions, effective April 1, 2010, as requested.

**I. Background**

2. On August 6, 2004, the Commission approved Midwest ISO's Open Access Transmission and Energy Markets Tariff (TEMT),<sup>2</sup> which was designed to initiate Day 2 operations in Midwest ISO's region.<sup>3</sup> Midwest ISO's Day 2 operations included, among other things, a refund to load of the surplus of marginal losses over average losses during a five-year transition period. In particular, the Commission directed Midwest ISO to file

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<sup>1</sup> 16 U.S.C. § 824d (2006).

<sup>2</sup> With the Commission's acceptance of Midwest ISO's proposal to implement an Ancillary Services Market, effective January 6, 2009, Midwest ISO's TEMT became the current version of the Tariff. *See Midwest Indep. Transmission Sys. Operator, Inc.*, 125 FERC ¶ 61,321 (2008).

<sup>3</sup> *Midwest Indep. Transmission Sys. Operator, Inc.*, 108 FERC ¶ 61,163 (TEMT II Order), *order on reh'g*, 109 FERC ¶ 61,157 (2004), *order on reh'g*, 111 FERC ¶ 61,043, *reh'g denied*, 112 FERC ¶ 61,086 (2005), *aff'd sub nom. Wisconsin Public Power, Inc. v. FERC*, 493 F.3d 239 (D.C. Cir. 2007) (*Wisconsin Public Power*).

a transitional marginal loss surplus refund methodology within 60 days.<sup>4</sup> The Commission further directed Midwest ISO to file a revised marginal loss surplus refund method, after consultation with stakeholders, within 270 days from market start based on experience with the energy markets.<sup>5</sup>

3. On October 5, 2004, Midwest ISO made a compliance filing as required by the TEMT II Order (October 5 Filing). In its compliance filing, Midwest ISO proposed a marginal loss surplus refund method based on balancing authority areas rather than through previously proposed “loss pools.”<sup>6</sup>

4. On December 20, 2004, the Commission issued an order conditionally accepting Midwest ISO’s October 5 Filing. The Commission found that refunds of marginal loss surplus on a balancing authority area basis have greater granularity than the previous “loss pools” approach. Under the approved methodology, the total surplus would first be allocated to each balancing authority area based on the costs of supplying losses to load within that balancing authority area. Then the amount allocated to a given balancing authority area is allocated among market participants on a load ratio share basis.<sup>7</sup> The Commission determined that Midwest ISO’s proposal was consistent with the goal of protecting participants from charges in excess of their average actual losses, had stakeholder support, and could be implemented. The Commission, however, expressed concern that market participants with remote generation outside the territory of the balancing authority area may not be eligible for a sufficient refund share based on a load ratio share calculation and directed Midwest ISO to explain its method for determining the marginal loss surplus for such entities. The Commission also encouraged Midwest ISO and its stakeholders to monitor the experience with marginal loss pricing, to evaluate how other regional markets undertake refunds of surplus marginal loss charges, and to study new instruments for hedging loss charges.<sup>8</sup>

5. On January 21, 2005, Midwest ISO made a compliance filing addressing the requirements of Compliance Order I. The Commission addressed requests for rehearing of Compliance Order I, and Midwest ISO’s January 21, 2005 compliance filing, in

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<sup>4</sup> TEMT II Order, 108 FERC ¶ 61,163 at P 73-74.

<sup>5</sup> *Id.* P 79, 239, 649.

<sup>6</sup> *Midwest Independent Transmission System Operator, Inc.*, 109 FERC ¶ 61,285, at P 160-61 (2004) (Compliance Order I), *order on reh’g*, 111 FERC ¶ 61,053 (Compliance Order IV), *order on reh’g*, 112 FERC ¶ 61,086 (2005), *aff’d sub nom. Wisconsin Public Power*, 493 F.3d 239.

<sup>7</sup> *See* Tariff at section 40.6.2.

<sup>8</sup> Compliance Order I, 109 FERC ¶ 61,285 at P 171-72.

Compliance Order IV. In that order, the Commission reiterated that Midwest ISO was required to submit a filing providing data on losses among market participants within balancing authority areas within 270 days of market start. Additionally, the Commission directed Midwest ISO to submit, within 270 days from market start, an informational filing that addresses different losses among market participants within a balancing authority area and the possibility that these differences could result in significant cross-subsidies, and to specifically provide information and analysis bearing on the issue of whether certain market participants are paying more in losses in the energy market compared to before the market started and the extent of any cross-subsidies.<sup>9</sup>

6. On March 27, 2006, as supplemented on June 8, 2006, Midwest ISO submitted a filing to update the Commission on its analysis of marginal loss surpluses. On November 1, 2006, the Commission issued an order accepting Midwest ISO's compliance filing.<sup>10</sup> However, in light of the protests of the Midwest Transmission-Dependent Utilities (Midwest TDUs) and Wisconsin Public Service Corporation and Upper Peninsula Power Company (together, the WPS Companies), the Commission directed Midwest ISO to analyze the marginal loss surplus refunds calculated by the protesters. The Commission stated that, to the extent Midwest ISO found their methods acceptable for calculating the marginal loss surplus refunds, Midwest ISO must determine if their methods could be applied to all market participants and would result in a more equitable allocation of marginal loss surplus refunds than the current allocation.<sup>11</sup>

7. On January 30, 2007, Midwest ISO submitted a compliance filing analyzing methods proposed by the Midwest TDUs and the WPS Companies for allocating the refund of over-collected marginal losses, as required by the November 1 Order. The Commission accepted Midwest ISO's January 30 compliance filing on May 31, 2007.<sup>12</sup> On November 28, 2007, the Commission denied rehearing of the May 31 Order and reaffirmed that Midwest ISO's methodology was just and reasonable.<sup>13</sup>

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<sup>9</sup> *Id.* P 51-52.

<sup>10</sup> *Midwest Indep. Transmission Sys. Operator, Inc.*, 117 FERC ¶ 61,142 (2006) (November 1 Order), *order on reh'g*, 119 FERC ¶ 61,207, *order on reh'g*, 121 FERC ¶ 61,208 (2007), *aff'd Integrys Energy Group, Inc. v. FERC*, No. 08-1032, 2009 U.S. App. LEXIS 3027 (D.C. Cir. Feb. 4, 2009).

<sup>11</sup> November 1 Order, 117 FERC ¶ 61,142 at P 28.

<sup>12</sup> *Midwest Indep. Transmission Sys. Operator, Inc.*, 119 FERC ¶ 61,216 (May 31 Order), *order on reh'g*, 121 FERC ¶ 61,208 (2007) (November 28 Order).

<sup>13</sup> November 28 Order, 121 FERC ¶ 61,208 at P 22.

## II. Filing

8. Midwest ISO proposes to remove the following language from section 40.6 of the Tariff in order to make permanent its methodology for allocating marginal loss surpluses, which expired April 1, 2010: “For a transition period not exceeding five (5) years starting from April 1, 2005.”<sup>14</sup> Midwest ISO argues that its methodology is just and reasonable because its analysis and the Commission findings in previous orders have shown that its methodology returns “resulting surplus revenues to its customers in a way that is equitable and that does not distort the marginal price signals.”<sup>15</sup> In addition, Midwest ISO states that its methodology ensures that “market participants in balancing authorities with the highest losses receive the largest refunds.”<sup>16</sup>

9. Midwest ISO explains that if the Commission does not accept its proposed revisions, surplus marginal loss revenues will be distributed under the Revenue Neutrality Uplift provision and would effectively result in a load ratio share allocation. It states that, as the Commission has previously recognized, this methodology may not accurately match refunds with the zones where the loss surpluses were actually incurred.<sup>17</sup>

10. Midwest ISO asks that the Commission grant waiver of the 60-day notice requirement and permit an effective date of April 1, 2010 on the basis that its proposed revision essentially provides for the uninterrupted continuation of its transitional methodology for allocating marginal loss surplus revenues, which has been found to be just and reasonable.

## III. Notice of Filing and Responsive Pleadings

11. Notice of Midwest ISO’s filing was published in the *Federal Register*, 75 Fed. Reg. 18,194-95 (2010), with interventions and protests due on or before April 21, 2010. Timely motions to intervene were filed by American Municipal Power, Inc., on behalf of itself and those of its members that participate in Midwest ISO; Wisconsin Electric Power Company; and Xcel Energy Services, Inc.<sup>18</sup> Manitoba Hydro, DC Energy

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<sup>14</sup> Filing, Second Revised Sheet No. 1180.

<sup>15</sup> Filing, Transmittal Letter at 5 (citing TEMT II Order, 108 FERC ¶ 61,163 at P 66).

<sup>16</sup> Filing, Transmittal Letter at 4 (citing May 31 Order, 119 FERC ¶ 61,216 at P 27).

<sup>17</sup> Filing, Transmittal Letter at 4.

<sup>18</sup> On behalf of its affiliates, Northern States Power Company, a Minnesota Corporation, and Northern States Power Company, a Wisconsin Corporation.

Midwest, LLC (DC Energy), and Tenaska Power Services Co. (Tenaska) filed motions to intervene and protests. Midwest ISO filed a motion for leave to answer and answer to the protests.

12. Tenaska argues that Midwest ISO has not demonstrated that its proposal is just and reasonable because the only evidence that Midwest ISO has provided are citations to previous Commission orders accepting Midwest ISO's methodology. Tenaska argues that Midwest ISO's reliance on the Commission's previous orders ignores the fact that the Commission stated that it intended to revisit the issue upon the expiration of the transition period.<sup>19</sup> Tenaska states that Midwest ISO has failed to give further consideration to its method for allocating marginal loss surplus revenues or to consult with stakeholders as required by the Commission.<sup>20</sup>

13. Tenaska also argues that Midwest ISO's proposal is inconsistent with *Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.* because exporters that pay for transmission service are not eligible for marginal loss refunds.<sup>21</sup> It urges the Commission to reject Midwest ISO's proposal and direct Midwest ISO to apply the Revenue Neutrality Uplift provision consistent with *Black Oak Energy*, such that exporters that pay for transmission service would receive marginal loss refunds on the same basis as other transmission customers. If the Commission accepts Midwest ISO's proposal, Tenaska states that the Commission should condition its acceptance on the requirement that exporters receive non-discriminatory treatment so that exports are considered part of load and are included in the load ratio share on the same basis as transactions that sink within Midwest ISO's footprint.

14. Tenaska further contends that Midwest ISO appears to have misinterpreted the Commission's directives in Compliance Order I as forbidding the allocation of marginal loss refunds on a load ratio share basis. Tenaska states that the Commission gives Independent System Operators and Regional Transmission Organizations discretion to determine the appropriate allocation, and in fact, has specifically permitted PJM Interconnection, L.L.C. (PJM) to use a load ratio share allocation.<sup>22</sup> Tenaska states that Midwest ISO's suggestion that reverting to the Revenue Neutrality Uplift provision would violate Commission policy is disingenuous.

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<sup>19</sup> Tenaska Protest at 6 (citing Compliance Order I, 109 FERC ¶ 61,285 at P 198).

<sup>20</sup> Tenaska Protest at 6.

<sup>21</sup> *Id.* at 7 (citing 128 FERC ¶ 61,262, at P 26 (2009) (*Black Oak Energy*)).

<sup>22</sup> Tenaska Protest at 7-8 (citing *Black Oak Energy*, 128 FERC ¶ 61,262 at P 25-26; *Black Oak Energy v. PJM Interconnection, L.L.C.*, 131 FERC ¶ 61,024, at P 14 n.7, 38, 45 (2010)).

15. Similarly, DC Energy argues that Midwest ISO has failed to demonstrate that Midwest ISO's methodology is still just and reasonable, and argues the methodology unduly discriminates against entities exporting energy from Midwest ISO. Like Tenaska, DC Energy argues that the Commission should direct Midwest ISO to expand the distribution of marginal loss surplus revenues to include external load consistent with Commission precedent and the approach used by other ISOs/RTOs.<sup>23</sup>

16. Manitoba Hydro argues that Midwest ISO's method for allocating marginal loss surplus revenues is inequitable because it disadvantages remote generation. Manitoba Hydro states that the Midwest ISO's assertion that the existing loss methodology "ensure(s) that market participants in balancing authorities with the highest losses receive the largest refunds" is generally true.<sup>24</sup> It contends, however, that Midwest ISO has not demonstrated that a market participant's share of the marginal loss surplus is commensurate with the extent that losses have been overcollected from that market participant. In fact, Manitoba Hydro states that its review of data concerning locational marginal prices has revealed that remote generators are incurring higher marginal loss charges.<sup>25</sup> It urges the Commission to require further analysis, stakeholder consultations, and the exploration of more equitable alternatives prior to accepting the current loss methodology as permanent. Manitoba Hydro notes that it proposed an alternative methodology to the Midwest ISO board of directors; in particular, it proposed that surplus marginal loss revenues should be used to fund the construction of transmission facilities in Midwest ISO that would decrease the marginal losses paid by market participants, especially remote generators.<sup>26</sup>

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<sup>23</sup> DC Energy Protest at 3-6 (citing NYISO, FERC Electric Tariff, Schedule 1 § 5; ISO-NE FERC Electric Tariff No. 3, section III, Market Rule I § III.3; *Central Hudson Gas & Elec.*, 86 FERC ¶ 61,062, at 61,213-14, *order on reh'g*, 88 FERC ¶ 61,138 (1999); *Midwest Indep. Transmission Sys. Operator, Inc.*, 104 FERC ¶ 61,105, at P 36, *order on reh'g*, 105 FERC ¶ 61,212, at P 8-9 (2003)).

<sup>24</sup> Manitoba Hydro Protest at 5 (citing Transmittal Letter at 4).

<sup>25</sup> Manitoba Hydro states that it reviewed and compared the marginal loss components of LMP data at the MHEB node, the Minn Hub and the Cinergy Hub for the period from April 1, 2005 to April 1, 2010. Manitoba Hydro states that this data indicates that generators near the MHEB node or Minn Hub pay much higher marginal loss charges (approximately seven to 14 times as large) as compared to generators near the Cinergy Hub. Manitoba Hydro argues that this demonstrates that remote generators are incurring much higher marginal loss charges. Manitoba Hydro Protest at 4.

<sup>26</sup> *Id.* at 3-5.

17. Finally, both Manitoba Hydro and Tenaska argue that the Commission should require Midwest ISO to consult with stakeholders to develop an appropriate replacement methodology. Manitoba Hydro states that the Commission required consultation with stakeholders prior to the implementation of Midwest ISO's methodology and should do so here as well.<sup>27</sup> Tenaska states that Midwest ISO neither informed nor consulted with stakeholders before submitting its proposal to the Commission and argues that the lack of consultation, coupled with Midwest ISO's decision to submit the filing one day before the expiration of the methodology, indicates that Midwest ISO itself has given little or no consideration to the relative merits of alternative methodologies. Tenaska states that Midwest ISO should be required to perform the impact studies discussed in Compliance Order IV and the November 1 Order, as well as any other stakeholder requested studies, and provide the results for stakeholder review.<sup>28</sup>

18. In its answer, Midwest ISO states that it disagrees with the protesters' claims that Midwest ISO's method for allocating marginal loss surplus revenue is not just and reasonable, because the method retains the same advantages that it had when it was first approved.<sup>29</sup> Midwest ISO states that Tenaska's reliance on *Black Oak Energy* is misplaced because that case concerned PJM and regional differences can, and do, drive rate differences.<sup>30</sup> Specifically, Midwest ISO notes that it is a net importer of energy while PJM is primarily a net exporter of energy.<sup>31</sup>

19. With respect to Manitoba Hydro's suggested replacement method, Midwest ISO states that it has not been presented with a detailed and mature proposal of how the allocation of marginal losses surpluses would work and whether it would result in just and reasonable rates. It also states that it does not have the detailed analysis proving that the Revenue Neutrality Uplift provisions are superior to the existing methodology, and would not result in unjust and unreasonable rates. Specifically Midwest ISO states that it is concerned that the Tariff's Revenue Neutrality Uplift provisions do not account for the netting of imports and exports and may overstate the quantity of external load served by market participants without adjusting associated refunds. As such, Midwest ISO opposes

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<sup>27</sup> *Id.* at 6.

<sup>28</sup> Tenaska Protest at 9-10.

<sup>29</sup> Midwest ISO Answer at 3-4 (citing TEMT II Order, 108 FERC ¶ 61,163 at P 77).

<sup>30</sup> Midwest ISO Answer at 4.

<sup>31</sup> *Id.* (citing PJM 2009 State of the Market Report, Volume 2 Section 4 Interchange Transactions, Aggregate Imports and Exports in the Real-Time Market.)

defaulting to the Revenue Neutrality methodology absent further analysis and stakeholder input.<sup>32</sup>

20. Midwest ISO concedes that there were not significant stakeholder discussions preceding its proposal to make its methodology permanent. But Midwest ISO maintains that the lack of stakeholder consultation is immaterial to the justness and reasonableness of its proposal. It notes that the Market Subcommittee maintains a list reflecting the issues that stakeholders have approved for further action and that, except for Manitoba's informal suggestion to the board of directors, no other proposal or request to develop an alternative methodology has been raised.<sup>33</sup>

#### **IV. Discussion**

##### **A. Procedural Matters**

21. 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.

22. 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. Substantive Matters**

23. We will accept Midwest ISO's proposed revisions, effective April 1, 2010, as requested. We agree with Midwest ISO that good cause exists to grant waiver of the 60-day notice requirement because granting waiver will provide for the uninterrupted continuation of the transitional methodology.<sup>34</sup>

24. We disagree with the protesters' claims that Midwest ISO has failed to demonstrate that its proposal is just and reasonable. In Compliance Order I, the Commission concluded that Midwest ISO's method for allocating marginal loss surplus

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<sup>32</sup> Midwest ISO Answer at 4-5.

<sup>33</sup> *Id.* at 5-6.

<sup>34</sup> *Central Hudson Gas & Electric Corp.*, 60 FERC ¶ 61,106, order on reh'g, 61 FERC ¶ 61,089 (1992).

revenues is just and reasonable.<sup>35</sup> The Commission has consistently reaffirmed its conclusion that Midwest ISO's method for allocating marginal loss surplus revenues is just and reasonable,<sup>36</sup> and the Court of Appeals for the District of Columbia Circuit affirmed this conclusion in *Wisconsin Public Power*.<sup>37</sup> We agree with Midwest ISO that the relative advantages of Midwest ISO's methodology identified in the Commission's previous orders continue to exist.

25. We do not disagree with the protesters' suggestions that it may be possible to further refine Midwest ISO's methodology. But the mere fact that the methodology can be refined does not undercut our conclusion that the overall method affords a just and reasonable rate for transmission customers. As the court noted in *Wisconsin Public Power*, "reasonableness is a zone, not a pinpoint."<sup>38</sup> In other words, we are not convinced that the existing methodology is unjust and unreasonable. The protesters have neither provided a sufficiently detailed alternative methodology nor pointed to a change in circumstances that would render the existing methodology unjust and unreasonable.

26. As far as Midwest ISO's admitted failure to consult with stakeholders is concerned, the lack of consultation is not reason enough for the Commission to deny a proposal that is otherwise just and reasonable.

The Commission orders:

(A) Midwest ISO's proposed revisions to its Tariff are hereby accepted, effective April 1, 2010.

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<sup>35</sup> Compliance Order I, 109 FERC ¶ 61,285 at P 160, 171; *also see* November 1 Order, 117 FERC ¶ 61,142 at P 25.

<sup>36</sup> Compliance Order IV, 111 FERC ¶ 61,053 at P 51; November 1 Order, 117 FERC ¶ 61,142 at P 29; November 28 Order, 121 FERC ¶ 61,208 at P 22 ("Midwest ISO's method of allocating marginal loss surplus revenue has been found to be just and reasonable . . . the existing allocation method is no longer open to challenge . . . except pursuant to section 206 of the FPA.").

<sup>37</sup> 493 F.3d at 266-67 (affirming Compliance Order I).

<sup>38</sup> 493 F.3d at 266.

(B) For good cause shown, we hereby waive the 60-day prior notice requirement.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.