

136 FERC ¶ 61,235
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Midwest Independent Transmission System Operator, Inc.	Docket Nos. ER05-6-117, ER05-6-012, ER05-6-027, ER05-6-032
Midwest Independent Transmission System Operator, Inc. PJM Interconnection, LLC	EL04-135-119, EL04-135-014, EL04-135-029, EL04-135-034
Midwest Independent Transmission System Operator, Inc. PJM Interconnection, LLC	EL02-111-138, EL02-111-032, EL02-111-047, EL02-111-052
Ameren Services Company	EL03-212-133, EL03-212-028, EL03-212-043, EL03-212-048

ORDER REJECTING REHEARING

(Issued September 30, 2011)

1. In May 2010, the Commission issued an order on rehearing which denied rehearing of several previous orders¹ dealing with the elimination of regional through-

¹ *Midwest Indep. Transmission Sys. Operator, Inc.*, 105 FERC ¶ 61,212 (2003) (November 2003 Rehearing Order); *Midwest Indep. Transmission Sys. Operator, Inc.*, 105 FERC ¶ 61,288 (2003); *Midwest Indep. Transmission Sys. Operator, Inc.*, 106 FERC ¶ 61,106 (2004); *Midwest Indep. Transmission Sys. Operator, Inc.*, 106 FERC ¶ 61,262 (2004) (Going Forward Principles Order); *Midwest Indep. Transmission Sys. Operator,*

(continued...)

and-out rates in the PJM Interconnection, LLC (PJM) and Midwest Independent Transmission System Operator, Inc. (Midwest ISO) region and the implementation of a Seams Elimination Charge/Cost Adjustment/Assignment (SECA) transition mechanism.² The Commission also concurrently issued an Order on Initial Decision on these issues.³ BP Energy Company (BP Energy) filed a request for rehearing of the Commission's May 2010 Rehearing Order.⁴ Because the May 2010 Rehearing Order is itself an order on rehearing which did not modify the earlier orders which it addressed, we find that a request for rehearing does not lie and reject BP Energy's request for rehearing.

I. Background⁵

2. In July 2002, the Commission accepted the choices of American Electric Power Service Corporation (AEP), Commonwealth Edison Company and Commonwealth Edison Company of Indiana (collectively, ComEd), and Dayton Power and Light Company (Dayton) to join PJM.⁶ In so doing, the Commission found that those Regional Transmission Organization (RTO) choices would result in an elongated and highly irregular seam between Midwest ISO and PJM that would "island" portions of Midwest ISO (Wisconsin and Michigan) from the remainder of Midwest ISO and would divide highly interconnected transmission systems across which substantial trade takes place. The Commission found that, without mitigation, the seam would subject a large number of transactions in the region to continued rate pancaking, impeding the goals of Order

Inc., 109 FERC ¶ 61,168 (2004) (November 2004 Order); *Midwest Indep. Transmission Sys. Operator, Inc.*, 109 FERC ¶ 61,243 (2004); *Midwest Indep. Transmission Sys. Operator, Inc.*, 110 FERC ¶ 61,107 (2005) (February 2005 Order); *Midwest Indep. Transmission Sys. Operator, Inc.*, 111 FERC ¶ 61,409 (2005) (June 2005 Order).

² *Midwest Indep. Transmission Sys. Operator, Inc.*, 131 FERC ¶ 61,174 (2010) (May 2010 Rehearing Order).

³ *Midwest Indep. Transmission Sys. Operator, Inc.*, 131 FERC ¶ 61,173 (2010) (Order on Initial Decision).

⁴ *See supra* note 2.

⁵ For a more detailed historical account of these proceedings, *see* May 2010 Rehearing Order, 131 FERC ¶ 61,174, and Order on Initial Decision, 131 FERC ¶ 61,173.

⁶ *Alliance Co.*, 100 FERC ¶ 61,137 (2002) (Alliance 2002 Order), *order on reh'g*, 103 FERC ¶ 61,274 (2003).

No. 2000.⁷ Therefore, as a condition of accepting those RTO choices, the Commission required parties in the region to address the problem of rate pancaking across the Midwest ISO-PJM seam. Accordingly, the Commission instituted a proceeding under section 206 of the Federal Power Act (FPA)⁸ to investigate the rates for service between the two RTOs and found that the rates for service through or out of one RTO to serve load in the other RTO (i.e., regional through-and-out rates) appeared to be unjust and unreasonable.⁹

3. Following the hearing, the Commission found the regional through-and-out rates for service through or out of one RTO to serve load in the other RTO to be unjust and unreasonable.¹⁰ The Commission adopted a license plate rate design for the region and found that the SECA,¹¹ if properly structured, could serve as a reasonable transitional mechanism to mitigate abrupt cost shifts resulting from the replacement of rate pancaking with license plate rates. However, the Commission found that the record at that time was inadequate to establish the SECA as a just and reasonable replacement rate and adopted a license plate rate design without the SECA. The Commission later granted rehearing adopting the SECA, delaying the replacement of rate pancaking, and ordering compliance filings to implement the SECA.¹²

4. The Commission subsequently instituted settlement proceedings,¹³ and the parties entered into a settlement, the Going Forward Principles and Procedures (Going Forward

⁷ *Regional Transmission Organizations*, Order No. 2000, FERC Stats. & Regs. ¶ 31,089 (1999), *order on reh'g*, Order No. 2000-A, FERC Stats. & Regs. ¶ 31,092 (2000), *aff'd sub nom. Pub. Util. Dist. No. 1 of Snohomish County, Washington v. FERC*, 272 F.3d 607 (D.C. Cir. 2001).

⁸ 16 U.S.C. § 824e (2006).

⁹ Alliance 2002 Order, 100 FERC ¶ 61,137 at P 49-52.

¹⁰ *Midwest Indep. Transmission System Operator, Inc.*, 104 FERC ¶ 61,105 (2003)

¹¹ The SECA would be a non-bypassable surcharge to license plate zonal rates for delivery to load within the combined region (i.e., within the Midwest ISO-PJM footprint). The SECA would recover revenues that would be lost due to the elimination of rate pancaking from loads in each RTO based on the revenues received in a recent historical test period associated with transactions to serve that load.

¹² November 2003 Rehearing Order, 105 FERC ¶ 61,212.

¹³ *Midwest Indep. Transmission Sys. Operator, Inc.*, 106 FERC ¶ 61,105 (2004).

Principles),¹⁴ which the Commission approved.¹⁵ Among other things, the settlement delayed the elimination of rate pancaking until December 1, 2004 and committed the transmission owners to file pricing proposals under section 205 of the FPA.¹⁶

5. In its order on the two resultant pricing proposals, the Commission adopted a license plate rate design for the region and adopted the SECA as a transitional mechanism to mitigate abrupt cost shifts resulting from the replacement of rate pancaking with license plate rates.¹⁷ The Commission ordered compliance filings to implement the SECA. In a series of orders, the Commission accepted and set for hearing initial and revised SECA implementation filings.¹⁸ In May 2010, the Commission issued its Order on Initial Decision and, as relevant here, the May 2010 Rehearing Order addressing pending requests for rehearing of earlier orders.

II. Request for Rehearing

6. In its request for rehearing BP Energy argues that, in the May 2010 Rehearing Order and the Order on Initial Decision, the Commission changed its position and reassigned SECA liability to BP Energy. BP Energy asserts that, prior to this change in direction, it did not expect to be liable for SECA assessments and, therefore, did not participate in the challenges to the SECA mechanism. Consequently, BP Energy argues that, since it did not have the opportunity to challenge the SECA mechanism, it should be allowed to request rehearing of the May 2010 Rehearing Order at this time.

7. BP Energy argues that, since the Commission changed its position on rehearing and harmed BP without previously providing BP an opportunity to challenge the SECA mechanism, the rehearing order should be treated as a new order, thereby allowing parties to request rehearing of that order.¹⁹

¹⁴ *Midwest Indep. Transmission Sys. Operator, Inc.*, 106 FERC ¶ 63,024 (2004).

¹⁵ Going Forward Principles Order, 106 FERC ¶ 61,262.

¹⁶ 16 U.S.C. § 824(d) (2006).

¹⁷ November 2004 Order, 109 FERC ¶ 61,168.

¹⁸ February 2005 Order, 110 FERC ¶ 61,107; June 2005 Order, 111 FERC ¶ 61,409; *Midwest Indep. Transmission Sys. Operator, Inc.*, 112 FERC ¶ 61,267 (2005); *Midwest Indep. Transmission Sys. Operator, Inc.*, 113 FERC ¶ 61,010 (2005).

¹⁹ BP Request for Rehearing at 2 (*citing Columbia Gas Trans. Corp. v. FERC*, 477 F.3d 739, 741 (D.C. Cir. 2007) (*Columbia Gas*); *Western Area Power Admin. v. FERC*, 525 F.3d 40, 52 (D.C. Cir. 2008) (*WAPA*)).

8. Substantively, BP Energy argues that the May 2010 Rehearing Order's affirmation of the SECA constituted impermissible retroactive ratemaking, violated the filed rate doctrine and section 206 of the FPA, and was not a just and reasonable replacement of the regional through-and-out rates.

III. Commission Determination

9. For the reasons discussed below, we reject BP Energy's request for rehearing.²⁰ The Commission does not allow parties to seek rehearing of an order denying rehearing.²¹ Any other result would lead to never-ending litigation as every response by the Commission to a party's arguments would allow yet another opportunity for rehearing.

10. Furthermore, contrary to BP Energy's assertion, the Commission did not change its result in the May 2010 Rehearing Order. In that rehearing order, the Commission consistently and repeatedly affirmed its previous decision adopting the SECA mechanism as a transitional rate for the Midwest ISO-PJM region.

11. Since the May 2010 Rehearing Order did not alter a prior decision, but instead denied the various then-pending requests for rehearing, BP Energy's reliance on *Columbia Gas*²² and *WAPA*²³ is misplaced. In fact, in *WAPA* the court stated that "[w]hen a rehearing has been denied in its entirety with no substantive modification in the order – the case is ripe for judicial review." The May 2010 Rehearing Order denied multiple requests for rehearing, discussing each issue at length and affirming each of the prior orders without modification.²⁴

²⁰ See, e.g., *New York Indep. Sys. Operator, Inc.*, 129 FERC ¶ 61,045, at P 10-11 (2009); *Entergy Serv., Inc.*, 124 FERC ¶ 61,203, at P 10-12 (2008).

²¹ See, e.g., *Key Span-Ravenswood, LLC v. N.Y. Indep. Operator, Inc.*, 112 FERC ¶ 61,153, at P 6 (2005); *Southern Co. Services, Inc.*, 111 FERC ¶ 61,329 (2005); *AES Warrior Run, Inc. v. Potomac Edison Co.*, 106 FERC ¶ 61,181 (2004); *Southwestern Pub. Serv. Co.*, 65 FERC ¶ 61,088, at 61,533 (1993).

²² *Columbia Gas*, 477 F.3d at 741 ("Where the Commission on rehearing changes its actual order adversely to the petitioner – not merely the reasoning – it is commonly treated as having issued a new order.").

²³ *WAPA*, 525 F.3d at 52.

²⁴ Including addressing the substantive issues BP Energy raises here in its untimely rehearing request.

12. In the Order on Initial Decision, the Commission did reverse the Initial Decision in certain respects and found that BP Energy should pay Green Mountain's SECA obligation. That is the order to which BP Energy's concerns regarding the shift in SECA costs from Green Mountain to BP Energy are more appropriately addressed. In fact, BP Energy has filed a request for rehearing of the Order on Initial Decision. In an order issued concurrently with this order, we address BP Energy's arguments pertaining to the Order on Initial Decision.

13. In any event, as we explain below, BP Energy's arguments here opposing the adoption of the SECA as a regional transitional mechanism are belated and untimely. BP Energy had ample prior knowledge of and prior opportunity to participate in this lengthy proceeding but chose not to do so.

14. On October 15, 2004, BP Energy filed a motion to intervene in Docket No. EL04-135-000,²⁵ stating that it "actively participates in the competitive wholesale electricity markets within the Midwest ISO and PJM area" and that it would be "affected by the outcome of this proceeding to the extent that a new transmission pricing mechanism is established within the Midwest ISO and PJM."²⁶ In addition, on June 2, 2006, in the course of the hearing, BP Energy filed an answer in response to a motion for admission of three contracts between Green Mountain and BP Energy.²⁷ In its motion, BP Energy stated that it was a counterparty to two of the contracts at issue in the hearing.²⁸ On

²⁵ In light of the potential for two alternative proposals resulting from the Going Forward Principles, and the need to adopt a single transmission pricing structure, the Commission initiated an FPA section 206 proceeding in Docket No. EL04-135-000 and established a refund effective date of December 1, 2004. This proceeding was implemented to ensure that the Commission had adequate authority to implement a new long-term transmission pricing structure for all parties across the PJM and Midwest ISO regions. *Midwest Indep. Transmission Sys. Operator, Inc.* 108 FERC ¶ 61,313 (2003).

²⁶ BP Energy October 15, 2004 Motion for Leave to Intervene, Docket No. EL04-135-000, at 3.

²⁷ BP Energy June 2, 2006 Answer to Motion for Admission of Redacted Cross-Examination Exhibits at 2 (*referring to* Ex. No. PTO-111 – Second Amended and Restated Energy Service Agreement between Green Mountain and BP Energy; Ex. No. PTO-111 – Power Purchase and Retail Load Servicing Agreement between Green Mountain, BP Energy and CMS Marketing, Services and Trading Company; and Ex. No. PTO-112 – Amended and Restated Firm All-Requirements Retail Electric Supply Agreement between Green Mountain and Northeast Ohio Public Energy Council).

²⁸ Ex. Nos. PTO-110 and PTO-111.

June 27, 2006, BP Energy filed a reply brief in which it stated that “BP Energy has monitored this proceeding” and acknowledged that it was a party to the proceeding.²⁹ On October 12, 2007, BP Energy filed a motion to intervene in Docket No. EL07-101-000 and, again, acknowledged that it was a party to the various SECA-related dockets.³⁰

15. BP Energy thus has been a party to these proceedings since 2004. By its own admission, it monitored the proceedings and hearing and chose its level of participation. BP Energy had ample opportunity to challenge on rehearing the earlier orders and make known its arguments as to the appropriateness of the SECA as a transitional mechanism; it simply chose not to do so. It cannot belatedly do so here.

The Commission orders:

(A) BP Energy’s request for rehearing is hereby rejected, as discussed in the body of this order.

(B) Docket Nos. ER05-6-012, ER05-6-027, ER05-6-032; EL04-135-014, EL04-135-029, EL04-135-034; EL02-111-032, EL02-111-047, EL02-111-052; and EL03-212-028, EL03-212-043, EL03-212-048 are hereby dismissed as moot.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

²⁹ BP Energy June 27, 2006 Reply Brief, Docket Nos. ER05-06-001, *et al.*; EL04-135-003, *et al.*; EL02-111-020, *et al.*; and EL03-212-017, *et al.* at 1 n.2.

³⁰ BP Energy October 12, 2007 Motion to Intervene, Docket Nos. EL07-101-000, ER05-6-100; EL04-135-103; EL02-111-120, EL03-212-116 at P 1 n.1.