



scheduling procedures do not comport with Order No. 638.<sup>1</sup> Tenaska requests that the Commission direct Midwest ISO to allocate capacity on a first-come, first-served basis (except for the right of later-queued rollover requests to preempt earlier-queued new service requests) and to provide customers that are asked to match a competing request with at least seventy-two hours in which to make such a decision.

3. On December 29, 2003, Cargill Power Markets, LLC (Cargill) filed a complaint against Midwest ISO in Docket No. EL04-46-000. Cargill alleges that Midwest ISO changed its treatment of rollover rights through a notice that was posted on Midwest ISO's OASIS and that this change was presented to its transmission customers with almost no notice and without a proper vetting through the stakeholder process. Cargill also alleges that Midwest ISO's change in its treatment of rollover rights is inconsistent with its open access transmission tariff (OATT) and Business Practices as well as Commission policy and precedent. Cargill requests that the Commission order Midwest ISO to modify its treatment of rollover rights to comply with Commission policy and reprocess its transmission queue.

4. The complainants state that Midwest ISO is currently providing long-term firm point-to-point transmission service to Tenaska, as well as Connectiv Energy Supply, Inc. (Connectiv), Detroit Edison Trading, Inc. (DTET), Public Service Enterprise Group (PSEG) and TransAlta Energy Marketing, Inc. (TransAlta), over the Michigan-Ontario (MI-IMO) interface which terminates at 24:00 on December 31, 2003. The complainants state that pursuant to section 2.2 of Midwest ISO's OATT, all of these incumbent customers have rollover rights and rights of first refusal. They also state that, consistent with Commission policy these incumbents must exercise their section 2.2 rights no later than sixty days prior to December 31, 2003 (i.e., by November 1, 2003).

5. Section 9.3.1, Rollover Rights for Long-term Firm, of Midwest ISO's Business Practices states that:

AFCs posted will not reflect rollover rights (i.e. it is assumed in the AFC calculations that the rollover right will not be exercised). However, in its determination of whether a new request can be granted, the Midwest ISO will include the effect of any reservations that continue to have the right to rollover their request. This may cause some transactions to be denied even though it appears that AFC is available. If the new request cannot be accommodated, the new customer will have the option of proceeding with an impact study to determine any upgrades necessary to accommodate the

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<sup>1</sup> Open Access Same-Time Information System and Standards of Conduct, Order No. 638, FERC Stats. & Regs., Regulations Preambles July 1996-December 2000 ¶ 31,093 (2000).

request, or holding its request in Study mode until such time as other customers exercise their rollover rights.

6. On March 6, 2003, Tenaska submitted one-year rollover requests for four of its long-term firm contracts over the MI-IMO interface – two 51 MW blocks and two 1 MW blocks. At this time, there were no other requests in Midwest ISO's transmission queue for service to the MI-IMO interface. Midwest ISO did not accept the requests, but placed the requests in study mode.

7. On May 6, 2003, Cargill submitted a 52 MW seven-year long-term firm transmission service request for new transmission service to the MI-IMO interface.<sup>2</sup> On May 12, 2003, Cargill submitted additional requests for long-term firm transmission service. All of Cargill's requests were placed in study mode by Midwest ISO.

8. From August through October 2003, Tenaska, PSEG, Conectiv, TransAlta and DTET placed rollover requests for their long-term transmission service.

9. On October 31, 2003, Midwest ISO posted on its OASIS the following notice (October 31 Notice):

#### Important Notice on Rollover Rights

The last calendar day to exercise rollover rights for long-term firm point to point transmission service expiring 1/1/2004 00:00:00 EST is this Saturday, November 1, 2003. (The queue time of the renewal request must be earlier than 11/2/2003 00:00:00 EST.)

A renewal request is subject to pre-emption (with right of first refusal) by competing later-queued, longer duration requests, provided the later-queued, longer duration request is queued prior to 11/2/2003 00:00:00 EST. Existing customers exercising renewal rights by submitting a request for renewal will have the option to match competing requests of longer duration.

10. On December 12, 2003, Midwest ISO required two of Tenaska's March rollover requests, totaling 52 MW, to match the seven-year term set forth in Cargill's May 6

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<sup>2</sup> On May 6, 2003, Split Rock Energy (Split Rock) also submitted a two-year long-term firm transmission request for new transmission.

request. Midwest ISO provided Tenaska with twenty-four hours in which to respond.<sup>3</sup> Tenaska declined to match the seven-year term set forth in Cargill's May 6 request and on December 15, 2003, Midwest ISO awarded Cargill its seven-year request.

11. Subsequently, Midwest ISO accepted one-year rollover requests from PSEG, TransAlta, Tenaska, DTET and Conectiv without having them match any of Cargill's May requests. When Cargill contacted Midwest ISO to inquire specifically about the acceptance of PSEG's rollover requests, Midwest ISO asserted that its decision was consistent with Commission policy and referred Cargill to the October 31 Notice.

12. On December 19, 2003, Cargill contacted the Commission's Enforcement Hotline to inquire about the propriety of Midwest ISO's practice for processing transmission service requests and its failure to provide effective notice to the Midwest ISO's stakeholders. On December 23, 2003, the same day Tenaska filed its complaint, the Commission's Enforcement Staff notified Cargill that in light of Tenaska's complaint, the Commission's Enforcement Staff would not address Cargill's matter.

### **Tenaska's Complaint**

13. Tenaska argues that Midwest ISO is processing its queue backwards. It states that its March rollover requests do not compete with the Cargill requests because they are ahead of the Cargill requests in the queue. Tenaska states that the fact that its March rollover requests are rollover requests, and not new service requests, does not negate that queue priority.

14. Tenaska asserts that a rollover request is similar to a new service request. It states that the most significant differences are that (a) a rollover request does not need to be studied in the same manner as a new service request and (b) the customer requesting to rollover existing service has a right of first refusal in the event of a competing request, while a customer requesting new service does not. Tenaska asserts that Midwest ISO should have treated its March requests as akin to a new service request, absent a competing request, without placing them in study mode.<sup>4</sup> Tenaska states that section 13.2 of Midwest ISO's OATT provides that long-term firm transmission service requests are processed on a first-come, first-served basis. Tenaska asserts that because its requests

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<sup>3</sup> On December 14, 2003, Midwest ISO required Tenaska's other two March rollover requests, totaling 52 MW, to match Split Rock's May request within twenty-four hours.

<sup>4</sup> Citing Constellation Power Source, Inc. v. American Electric Power Service Corp., 102 FERC ¶ 61,142 at P 38 (2002).

were first in the queue, they should have had first priority to transmission capacity and should have been accepted immediately.

15. Tenaska states that section 13.2 permits Midwest ISO to bump a short-term service request (i.e., for service less than one year in duration) with a longer-term request. It also states that section 13.2 and Order No. 638<sup>5</sup> do not allow a long-term request to be bumped by another later-queued, long-term request.

16. Further, Tenaska asserts that to deem Cargill's May requests as competing with its March requests under section 2.2 of Midwest ISO's OATT would mean that a rollover request has less rights than a customer placing a request in the queue at the same time solely because they are a rollover request. Tenaska asserts that such a result is unduly discriminatory. Tenaska notes that as a result of Midwest ISO's queue processing, rollover requests received subsequent to Tenaska's requests have all been confirmed without the same requirement to match. Tenaska asserts that Midwest ISO should have started at the bottom of its queue of competing requests and worked its way up the queue. Tenaska states that, thus, the last entity to request rollover service should be the first to match the Cargill requests.

17. In addition, Tenaska argues that twenty-four hours is not sufficient time to evaluate whether to match Cargill's request. Tenaska states that extending a transmission service request from one year to seven years is a major change to the request for service, and the customer being asked to match the longer term request needs sufficient time to evaluate whether the extended term makes sense in light of projected market conditions. Moreover, Tenaska argues that the twenty-four hour period is especially unreasonable in light of the fact that a competing customer has fifteen days to decide whether or not to confirm its request. Tenaska requests that customers being asked to match a competing request be given at least seventy-two hours in which to make a decision.

### **Cargill's Complaint**

18. Cargill argues that Midwest ISO's requirement in its October 31 Notice that a competing request be later-queued was an eleventh-hour, unilateral policy change that conflicts with both its OATT and Business Practices. Cargill states that under section 2.2 of Midwest ISO's OATT, an incumbent customer "must agree to accept a contract term at least equal to a competing request by any new Eligible Customer and to pay the current just and reasonable rate, as approved by the Commission, for such service," if there is insufficient ATC to accommodate other eligible customers' transmission service requests when an incumbent customer's contract expires.

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<sup>5</sup> Citing Order No. 638 at 31,429.

19. Cargill states that under section 13.2 of Midwest ISO's OATT, long-term firm transmission service requests are processed on a first-come, first-served basis and that the incumbent customer has a right of first refusal to match a competing transmission service request, but if the incumbent customer does not exercise this right, then the new eligible customer, whose transmission service request was submitted first-in-time, is awarded the capacity.

20. Furthermore, Cargill states that Midwest ISO's Business Practices clearly contemplate competing requests being filed before an incumbent customer exercises its rollover rights. Cargill cites to section 9.3 of the Business Practices which state: "in considering subsequent requests for long-term firm service, the [Midwest ISO] will not remove capacity associated with a potential rollover from its OASIS, but will instead post this capacity. When evaluating the subsequent request, MISO will assume that rollover rights will be exercised by all prior confirmed service with such rights." Cargill states that there would be no reason to assume under the logic of the October 31 Notice since subsequent requests would only be considered if queued after the rollover rights were exercised.

21. Cargill maintains that, taken to its extreme, Midwest ISO's October 31 Notice only encourages an incumbent customer with rollover rights for service ending December 31, 2003, to wait until the last second before midnight on November 1 to exercise its rollover rights, thereby thwarting any attempts to compete.

22. In addition, Cargill argues that Midwest ISO's October 31 Notice conflicts with Commission policy and precedent. Specifically, Cargill cites to El Paso Electric Company, 102 FERC ¶ 61,060 at P 22-23, reh'g denied in relevant part, 103 FERC ¶ 61,289 (2003) (El Paso), where the Commission found that, by refusing to entertain competing requests until after the incumbent customer exercised its rollover rights, El Paso did not implement its OATT. Cargill cites to the Commission statement that "El Paso's OATT neither established a time frame for submitting a competing request nor limits the time period within which a competing request may be submitted."<sup>6</sup> Cargill claims that the Commission explained in El Paso that the submission of an eligible customer's competing transmission service request before the day that the incumbent customer must exercise its right of first refusal is actually necessary because an incumbent transmission customer "must have notice of what competing offers are outstanding prior to the 60<sup>th</sup> day in order to make an economic decision on whether to

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<sup>6</sup> El Paso, 102 FERC ¶ 61,060 at P 23.

roll-over the contract,”<sup>7</sup> and that El Paso’s process “makes it impossible to ever have a competing request.”<sup>8</sup>

23. Cargill further argues that Midwest ISO’s October 31 Notice was, in fact, a policy change that should be rejected because Midwest ISO failed to: (1) file the necessary revision to its OATT in order to demonstrate that the proposed change was either consistent with, or superior to, the Commission’s pro forma OATT; and (2) to vet such changes through its stakeholder process. Cargill states that if Midwest ISO wishes to implement this change in its Business Practices, it should propose amendments to its OATT and Business Practices and seek stakeholder consensus on such changes before filing them with the Commission.

24. Cargill requests that the Commission order Midwest ISO to reprocess its queue and require those that submitted rollover requests after Cargill’s May requests to either match Cargill’s requests or surrender their rights to capacity over the MI-IMO interface, and to apply first-come, first-served principles as it determines which of those rollover requests will be required to match Cargill’s May requests. In addition, it requests that the Commission find that Cargill’s confirmation of the use of the seven-year Cargill May request is subject to termination if the Midwest ISO is required to reprocess the queue and/or a shorter-term reservation becomes available to Cargill as a result of this proceeding.

### **Notice of Complaints, and Responsive Pleadings**

25. Notice of Tenaska’s complaint in Docket No. EL04-43-000 was published in the Federal Register, 69 Fed. Reg. 63 (2003), with the answer to the complaint and all comments, interventions or protests due on or before January 20, 2004.

26. Notice of Cargill’s complaint in Docket No. EL04-46-000 was published in the Federal Register, 69 Fed. Reg. 1712 (2003) with the answer to the complaint and all comments, interventions or protests due on or before January 20, 2004.

27. Midwest ISO filed an answer to both Tenaska’s and Cargill’s complaints and a separate motion to consolidate.<sup>9</sup> A timely motion to intervene and comments in support

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<sup>7</sup> See id. at P 22.

<sup>8</sup> Id.

<sup>9</sup> On December 31, 2003, Midwest ISO filed a request for extension of time to answer Tenaska’s complaint. Tenaska filed a motion in opposition to the request. On January 9, 2004, the Commission’s Secretary issued a notice granting Midwest ISO’s extension from January 12 to January 20, 2004.

of Midwest ISO's motion to consolidate was filed by Cargill in Docket No. EL04-43-000. A timely motion to intervene and comments was filed by Tenaska in Docket No. EL04-46-000. Timely motions to intervene in both Docket Nos. EL04-43-000 and EL04-46-000 were filed by Wisconsin Electric Power Company, Midwest ISO Transmission Owners, Dynegy Power Marketing, Inc. and Dynegy Midwest Generation, Inc., and Ontario Power Generation Inc. Timely motions to intervene and comments were filed in both dockets by TransAlta, DTET, Split Rock, Wisconsin Public Service Corporation (WPS) and Conectiv. PSEG Energy Resources & Trade LLC (PSEG ER&T) filed a timely motion to intervene, comments and a motion to consolidate in both dockets. Tenaska and Cargill each filed separate answers to Midwest ISO's answer to their complaints.

### **Midwest ISO's Answer**

28. Midwest ISO states that in March 2003, when Tenaska submitted its rollover requests, Midwest ISO was engaged in a review of Commission orders, its OATT and Business Practices to determine how best to process the transmission queue. Midwest ISO states that by October 2003, it had concluded its review. According to Midwest ISO, it had determined that queue processing should be based upon the following principles: (1) an assumption that existing customers with rollover rights would exercise those rights, leaving zero Available Transmission Capacity (ATC) at the MI-IMO interface until November 1, 2003, which was the last day to exercise rollover rights; (2) any new request for transmission service submitted prior to an exercise of rollover rights would be rejected due to the absence of ATC; (3) only new transmission service requests for longer-term transmission service received after a rollover request was exercised would be allowed to compete with exercised rollover rights; (4) an existing customer with rollover rights would be allowed to match the durational term of new transmission service requests filed after its exercise of rollover rights; and (5) if an existing customer declined to exercise its right of first refusal, the capacity would be awarded to the customer who submitted the longer-term new transmission service request, and the existing customer would fall out of the queue upon confirmation of the request by the customer with the longer-term new transmission service request.

29. Midwest ISO explains that as a consequence of these principles, on October 31, 2003, it issued a notice "reminding" transmission customers of its policy that, in order to be considered a "competing request," a new longer-term transmission service request must be submitted after the relevant incumbent has submitted its rollover requests to Midwest ISO. Midwest ISO states that in December 2003, it began to process the queue for service to the MI-IMO interface as if it had been actively processing the queue in real-time since January 2003 according to these principles.

### A. Response to Tenaska's Complaint

30. In response to Tenaska's complaint, Midwest ISO argues that it processed requests pursuant to section 2.2 of its OATT. Midwest ISO alleges that it followed Commission policy that requires it to maintain ATC for existing long-term transmission customers with rollover rights until the time expires for those customers to exercise their rollover rights (i.e., sixty days prior to the expiration of the existing contract)<sup>10</sup> by setting ATC at the MI-IMO interface at zero beginning on January 1, 2003, since all of that capacity was subject to existing transmission service agreements with rollover rights.<sup>11</sup> In addition, Midwest ISO states that it allowed new transmission service requests to compete with rollover requests. Midwest ISO asserts that the only novel feature of the instant case was that Midwest ISO was evaluating how to process a queue consisting of inchoate rollover rights and requests for new service until October 2003. It points out that in order to maintain the integrity of the queue during this evaluation process, it placed both rollover requests and requests for new service in a study status pending a final determination of queue procedures. Midwest ISO explains that once a final determination was reached, Midwest ISO processed the queue applying the policies that would have been in effect throughout the year had the final determination been in place when the first requests were filed. It asserts that it did not process the queue on a last-come, first-served basis, but rather, Tenaska's first requests for rollover competed with the first later-queued request for new service (i.e., Cargill's seven-year May request).

31. Midwest ISO continues that Tenaska wants the best of both worlds. It maintains that Tenaska wants: (1) Midwest ISO to maintain adequate capacity to accommodate its rollover rights; (2) a right of first refusal; and (3) to exercise first-come, first-served rights under section 13.2, if those rights are more advantageous. Midwest ISO asserts that its OATT is not structured in that way and that existing customers have the rights provided under section 2.2, and the priority of new transmission service requests are governed by section 13.2.<sup>12</sup> With regard to section 2.2, it asserts that queue position is a secondary consideration and that the first issue is whether the preexisting customer is willing to match competing offers to retain capacity rights. Moreover, Midwest ISO states that if an existing customer's rollover request must be granted immediately upon its

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<sup>10</sup> Citing Tenaska Power Service Co. v. Southwest Power Pool, Inc., 102 FERC ¶ 61,140 (2003).

<sup>11</sup> Midwest ISO states that under section 6.6 of its Business Practices, a request for transmission service submitted under section 13.2 of the OATT is denied upon receipt if there is no ATC over the requested path and existing service is deemed unconditional.

<sup>12</sup> Midwest ISO states that Order No. 638 makes clear that those requesting new service and those seeking to extend existing service have fundamentally different rights.

tender under the provisions of section 13.2, then that capacity would be committed and the rollover holder would not be required to match a subsequent longer term offer. It concludes that because such an outcome would be inconsistent with the competition provisions of section 2.2 of its OATT, it does not treat rollover requests as akin to requests for new transmission service.

32. Midwest ISO further argues that it properly placed Tenaska's rollover requests in study mode. It states that the study status is not restricted only to those circumstances requiring a system impact study. Midwest ISO points out that Order No. 638 defines "study" as a value "assigned by Provider or Seller to indicate some level of study is required or being performed to evaluate the service requested."<sup>13</sup> It states that since under section 2.2 a rollover customer cannot acquire unconditional acceptance without matching a later filed request for new service of longer term, the study designation was the proper treatment of such requests.

33. With regard to Tenaska's argument that it did not have sufficient time to evaluate whether to match Cargill's request, Midwest ISO states that this argument should be directed to the Commission. It states that Standard 4.20 of Order No. 638 establishes twenty-four hours as the interval in which rights of first refusal must be exercised and that section 6.9.1 of Midwest ISO's Business Practices provides that "the transmission customer with the right of first refusal will have up to 24 hours to agree to match the competing interests."

#### **B. Response to Cargill's Complaint**

34. Midwest ISO argues that Cargill's complaint should be dismissed for lack of aggrievement. It asserts that Cargill's only aggrievement is that Cargill confirmed its award of the capacity that it had requested through its seven-year request.

35. Midwest ISO further argues that while the methodology it employed had not been previously reduced to writing in a single document, its October 31 Notice did not represent a unilateral change in an existing tariff provision or a specific business practice. Midwest ISO states that there is not a methodology set forth in section 2.2 on how to process the queue and that there were a number of competing interests that must be balanced through de novo procedures.

36. Midwest ISO distinguishes El Paso stating that El Paso posted capacity associated with inchoate rollover rights, but rejected new service requests until rollover rights were exercised or expired. It states that it rejects new requests only when ATC is zero, and accepts new requests when ATC becomes positive through the exercise of rollover rights.

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<sup>13</sup> Order 638 at 17,406.

37. Midwest ISO also states that Cargill's assertion that having later-filed new service requests compete with rollover requests may defeat rights of competition if all existing holders wait until the last day permitted to exercise their rights is, to an extent, an accurate observation. However, it also states that this is a natural result of Commission policy, which is to allow existing holders to retain capacity, and the right to compete is the exception to the preference in favor of rollover rights.

#### **Comments and Motions to Consolidate**

38. Conectiv and WPS support the complainants' assertions that Midwest ISO has processed requests for rollover transmission service in a manner that is inconsistent with Midwest ISO's OATT and Commission precedent. Conectiv further states that: (1) the transmission queue should be reprocessed; (2) twenty-four hours is an unreasonable time to match competing requests; and (3) the Commission should set these complaints for hearing and refer them to a settlement judge. PSEG ER&T generally supports Tenaska's complaint.

39. In contrast, DTET argues that Midwest ISO properly processed the transmission queue for many of the reasons presented in Midwest ISO's answer.

40. DTET and Split Rock state that any remedial action granted by the Commission can only be prospective and should in no way retroactively affect transmission service requests granted by Midwest ISO from March 2003 through December 2003.

41. Split Rock further states that it cannot be determined from section 2.2 of Midwest ISO's OATT whether the queue time of a competing request can be prior to a renewal request, subsequent to a renewal request, or both. It states that without additional detail added to section 2.2, it may continue to be interpreted in different ways. Split Rock suggests that the current processing procedures should be considered either through a stakeholder process or through such other process as the Commission may specify. It also argues that customers should have at least seventy-two hours to evaluate whether to match a competing request.

42. TransAlta argues that Cargill's proposed transmission allocation methodology is no better, and may be worse than Midwest ISO's current methodology, because the existence of over-subscription cannot be known until the deadline for submitting service requests (including rollover requests) has passed. TransAlta states that rather than adopting Cargill's proposal, the Commission should direct Midwest ISO to consult with its stakeholders and develop procedures for the 2005 service year.

43. TransAlta, Cargill and Conectiv support Midwest ISO's motion to consolidate these proceedings, and PSEG ER&T filed a separate motion to consolidate.

## **Discussion**

### **A. Procedural Matters**

44. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2003), the timely unopposed motions to intervene serve to make the entities that filed them parties to these proceedings.

45. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2003), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We are not persuaded to accept Tenaska's and Cargill's answers and will, therefore, reject them.

46. With regard to Midwest ISO's and PSEG ER&T's motions to consolidate, the Commission typically consolidates proceedings only for purposes of hearing and decision.<sup>14</sup> As we are not setting either of these proceedings for hearing, there is no need to formally consolidate the dockets. Accordingly, we will deny the motions to consolidate.

### **B. Analysis**

47. We will grant Tenaska's and Cargill's complaints, as discussed below.<sup>15</sup>

48. Section 2.2 of the pro forma OATT and Midwest ISO's OATT does not contain a process for handling rollover rights. In fact, the Commission has never found that there is only one way to process rollover requests. Rather, in Order No. 888-A, the Commission explained that it would not specify the mechanics by which the right of first refusal mechanism would be exercised, but would address the issue on a case-by-case basis. However, the Commission did encourage utilities and their customers to include specific procedures for exercising the right of first refusal in future transmission service agreements executed under the pro forma tariff. And of course, utilities are free to make Section 205 filings to propose additions to the pro forma tariff to generically specify

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<sup>14</sup> See, e.g., Arizona Public Service Company, 90 FERC ¶ 61,197 at P 14 (2000).

<sup>15</sup> We disagree with Midwest ISO's argument that Cargill's complaint should be dismissed for lack of aggrievement. Cargill was aggrieved by Midwest ISO's October 31 Notice and improper processing of its queue and properly raised its concerns in a complaint with the Commission.

procedures for dealing with the issue.<sup>16</sup> Thus, we agree with Split Rock that it cannot be determined from section 2.2 whether a competing request can be prior to a renewal request, subsequent to a renewal request, or both, and it is in this context that we address the complaints.

49. Rather than include specific procedures for processing rollover requests in transmission service agreements or in its OATT, Midwest ISO chose to set forth its procedures in its Business Practices, which it posted on its OASIS. Under section 9.3.1 of Midwest ISO's Business Practices, new transmission service requests that are filed before existing customers exercise their rollover rights are able to compete with later-submitted rollover requests. In particular, section 9.3.1 states that: "If the new request cannot be accommodated, the new customer will have the option of proceeding with an impact study to determine any upgrades necessary to accommodate the request, or holding its request in Study mode until such time as other customers exercise their rollover rights." (emphasis added).

50. Despite those Business Practices, on October 31, 2003, Midwest ISO posted a notice on its OASIS indicating that competing requests may be submitted only after a rollover request is submitted.<sup>17</sup> We conclude that this October 31 Notice resulted in a new policy, and was not reasonably noticed to Midwest ISO's customers nor properly vetted through Midwest ISO's stakeholder process. Midwest ISO's October 31 Notice provided customers only one day to decide whether to file competing requests for transmission service. Under the circumstances, this was unreasonable. Indeed, Midwest ISO has a stakeholder process in place and using it could have avoided the complaints that are now before us.

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<sup>16</sup> Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, FERC Stats. & Regs. Regulations Preambles January 1991-June 1996 ¶ 31,036 (1996), Order No. 888-A, FERC Stats. & Regs., Regulations Preambles July 1996-December 2000 ¶ 31,048 at 30,198 (1997), order on reh'g, Order No. 888-B, 81 FERC ¶ 61,248 (1997), order on reh'g, Order No. 888-C, 82 FERC ¶ 61,046 (1998), aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC, 225 F.3d 667 (D.C. Cir. 2000), aff'd sub nom. New York v. FERC, 535 U.S. 1 (2002).

<sup>17</sup> The October 31 Notice states that: "A renewal request is subject to pre-emption (with right of first refusal) by competing later-queued, longer duration requests, provided the later-queued, longer duration request is queued prior to 11/2/2003 00:00:00 EST. Existing customers exercising renewal rights by submitting a request for renewal will have the option to match competing requests of longer duration."

51. In any event, even if the methodology expressed in the October 31 Notice were reasonably noticed and vetted through the stakeholder process, we conclude that the approach announced by Midwest ISO in its Notice is inconsistent with our policy and precedent. As Cargill explains in its complaint, Midwest ISO's October 31 Notice would allow a rollover customer to wait until the last moment before the deadline to exercise its rollover rights and thus eliminate any competing requests. Indeed, Midwest ISO argues that this is an "accurate observation," but claims that this is a "natural result of Commission policy."<sup>18</sup> We disagree with Midwest ISO. Our right of first refusal is a tie-breaker that gives priority to existing firm transmission customers. As we explained in Order No. 888-A:

The objective of a right of first refusal is to allow an existing firm transmission customer to continue to receive transmission service under terms that are just, reasonable, not unduly discriminatory, or preferential. Absent the requirement that the customer match the contract term of a competing request, utilities could be forced to enter into short-term arrangements that could be detrimental from both an operational standpoint (system planning) and a financial standpoint.<sup>19</sup>

Thus, an approach that could result in the elimination of competing requests is contrary to our policy and we find it unacceptable. In an analogous circumstance, we found fault with a transmission provider's rollover mechanism because it "makes it impossible to ever have a competing request."<sup>20</sup> As Midwest ISO's methodology may lead to similar results, such a methodology would be inconsistent with section 2.2 and our precedent.

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<sup>18</sup> Midwest ISO Answer at 22.

<sup>19</sup> Order No. 888-A at 30,197-98.

<sup>20</sup> El Paso, 102 FERC ¶ 61,060 at P 22. We find that Midwest ISO's arguments distinguishing the circumstances in El Paso reflect a misreading of El Paso. In that case, El Paso posted the existing customer's capacity as available on OASIS prior to the customer exercising its rollover rights. The Commission cited the fact that the capacity was posted as available as reason that El Paso should have expected customers to submit competing requests. However, Midwest ISO turns the decision in El Paso on its head when it suggests that El Paso would allow it to prevent earlier queued requests for new service from competing with existing customers' rollover requests by simply not posting capacity subject to rollover rights on OASIS. Moreover, whether or not capacity over the MI-IMO interface that was subject to rollover rights beginning January 1, 2004 was posted as available on OASIS, as noted above, section 9.3.1 of Midwest ISO's Business Practices provides customers whose requests cannot be accommodated the option to hold  
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52. We also agree with Tenaska's assertion that Midwest ISO's methodology is discriminatory because it allows rollover requests received subsequent to Tenaska's March rollover requests to be confirmed without requiring them to match any of Cargill's requests as Tenaska was required to do.<sup>21</sup>

53. Accordingly, we direct Midwest ISO to reprocess the transmission queue following the methodology in its Business Practices. Although certain parties argue that any remedial action should be prospective only, we conclude otherwise. Certain parties should not be allowed to retain transmission capacity that they should not have received in the first place. Further, if Midwest ISO were to find that its methodology set forth in its Business Practices is inadequate and needs to be changed, it should vet any changes through its stakeholder process and, if necessary, file proposed tariff language with the Commission.

54. Furthermore, we agree with the arguments that twenty-four hours is an unreasonable time for rollover requests to match competing requests. While Midwest ISO cites to Standard 4.20 of Order No. 638<sup>22</sup> in support of its twenty-four hour requirement, this standard was not intended to apply to rollover requests under section 2.2 of the pro forma tariff, but to initial transmission service requests.<sup>23</sup> Indeed, in Order No. 638, the Commission explicitly stated that "[t]he rights-of-first-refusal shown in Table 4-3 should not be confused with the right-of-first-refusal available to a customer with a pre-existing expiring contract under Order No. 888."<sup>24</sup> Moreover, we disagree with Midwest ISO's assertion that section 6.9.1 of its Business Practices supports its twenty-four hour requirement. section 6.9.1 is similar to section 13.2 of the pro forma tariff and the relevant language in section 13.2 concerns conditional short-term transmission service only. The referenced longer-term competing requests refer only to

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their request in study mode until such time as other customers exercise their rollover rights.

<sup>21</sup> See supra P 10-11.

<sup>22</sup> Standard 4.20 of Order No. 638 states that "A customer who has been extended a right-of-first-refusal should have a confirmation time equal to the lesser of a) the Customer Confirmation Time Limit in Table 4-2 or b) 24 hours."

<sup>23</sup> See Order No. 638 at 31,429 (Table 4-3).

<sup>24</sup> See Order No. 638 at 31,428, n.114.

longer-term short-term requests.<sup>25</sup> Therefore, Midwest ISO should address through its stakeholder process, a reasonable time frame (or time frames) for customers with rollover rights to evaluate whether to match competing requests.

The Commission orders:

(A) Tenaska's complaint is hereby granted, as discussed in the body of this order.

(B) Cargill's complaint is hereby granted, as discussed in the body of this order.

(C) Midwest ISO is hereby directed to reconsider Tenaska's and Cargill's requests for transmission service, as well as other transmission service requests that were submitted from March 2003 through December 31, 2003, consistent with its Business Practices and OATT, as discussed in the body of this order.

(D) Midwest ISO is hereby directed to address, through its stakeholder process, a reasonable time frame (or time frames) for customers with rollover rights to evaluate whether to match competing requests.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.

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<sup>25</sup> See *Madison Gas & Electric Company v. Wisconsin Power & Light Company*, 80 FERC ¶ 61,331 at 62,103 (1997), reh'g denied, 82 FERC ¶ 61,009 (1998).