

111 FERC ¶ 61,076  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;  
Nora Mead Brownell, Joseph T. Kelliher,  
and Suedeem G. Kelly.

City of Holland, Michigan

Docket No. EL05-55-000

v.

Midwest Independent Transmission System Operator,  
Inc.

ORDER GRANTING COMPLAINT

(Issued April 18, 2005)

1. On January 14, 2005, the Holland Board of Public Works of the City of Holland, Michigan (Holland) filed a complaint under sections 206 and 306 of the Federal Power Act (FPA)<sup>1</sup> against the Midwest Independent Transmission System Operator, Inc. (Midwest ISO). In this order, the Commission grants Holland's complaint and orders Midwest ISO to refund charges assessed to Holland in excess of the Commission-approved rates in the Midwest ISO Open Access Transmission Tariff (OATT). This order benefits customers by ensuring that the Midwest ISO charges only the rates approved by the Commission in the Midwest ISO's OATT.

**I. Background**

2. Holland is a municipal electric utility that provides electric generation and distribution service in and around the City of Holland, Michigan. It is located in the Michigan Electric Transmission Company, LLC (METC) pricing zone. Holland states that it has contracted with Midwest ISO for firm point-to-point transmission service under the Midwest ISO OATT, and that all of the primary delivery points used under this reservation are in the METC pricing zone.

3. Holland states that before the start of Midwest ISO operations, Holland had a firm point-to-point transmission service reservation under the Joint OATT of METC and International Transmission Company. According to Holland, under that Joint OATT, it

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<sup>1</sup> 16 U.S.C. §§ 824e, 825e (2000).

was able to modify (or redirect) the receipt points of its transmission service from time to time to use secondary receipt points on a non-firm basis within the area governed by the Joint OATT at the same rate applicable to its primary reservation. Holland states that after the Midwest ISO became operational, Holland continued to occasionally modify the receipt points under its primary reservation, but paid increased costs because Midwest ISO was billing the redirected service at the hourly, non-firm point-to-point rate, which is higher than the firm point-to-point rate applicable to Holland's primary reservation.

4. Section 22.1 of the Midwest ISO OATT permits a firm point-to-point transmission service customer to request to redirect its scheduled transmission service over Receipt and Delivery Points other than those originally reserved (Secondary Receipt and Delivery Points) on a non-firm basis without incurring additional non-firm point-to-point transmission service charges, except as provided in section 22.1a (which later became section 22.2), subject to certain conditions.<sup>2</sup> If the customer requests to redirect service over a transmission path with a higher cost than the path the customer reserved, section 22.2 of the Midwest ISO OATT provided during the time period at issue in the complaint that the customer shall pay "the additional costs (*i.e.*, the difference in the zonal rates) associated with the new path."

5. Holland states that, on November 30, 2004, in Docket No. ER05-273-000, Midwest ISO filed proposed clarifying revisions to section 22.2 of its OATT under section 205 of the FPA.<sup>3</sup> Midwest ISO stated in this filing that its practice has been to charge redirecting customers the "higher of" the cost of their initial firm point-to-point service or the new non-firm point-to-point service they will receive. This is to prevent a Transmission Customer from "gaming" the transmission service reservation system by redirecting its firm reservations to acquire non-firm transmission service at discounted rates. Midwest ISO asserted that it was filing the clarifying revisions because it had become aware of some confusion among its transmission customers as to the authority to charge the "higher of" rate. Specifically, Midwest ISO proposed to revise the current language in section 22.2 of its OATT and add a new subsection (a) to that section. Holland and others filed protests in that proceeding.

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<sup>2</sup> The conditions in section 22.1 are that the redirected service must be non-firm only and does not displace any firm or non-firm service already scheduled, that the total amount of firm and non-firm service provided to the redirecting customer shall not exceed the amount reserved in the initial Service Agreement, and that the non-firm service is subject to the requirements of section II of the OATT, except as to rates.

<sup>3</sup> 16 U.S.C. § 824d (2000).

6. The Commission issued an order accepting and suspending Midwest ISO's revised tariff sheets, subject to refund, and setting them for hearing and settlement judge procedures.<sup>4</sup> The Commission stated that "[t]he protests raise[d] important issues regarding whether Midwest ISO's proposed charges for redirect service conform to the Commission's policy on pricing of redirected transmission, and in fact whether the Midwest ISO's proposed revised tariff language results in charges in excess of its tariff rates."<sup>5</sup> The Commission also stated that "Midwest ISO has not provided a clear explanation or adequate cost support for the redirect pricing reflected in the revised tariff sheets filed in this proceeding."<sup>6</sup>

## **II. The Complaint**

7. Holland asserts that Midwest ISO is improperly charging the hourly rate for non-firm point-to-point transmission service when Holland modifies (redirects) the receipt point of its firm transmission service under section 22.1 of the Midwest ISO OATT. Holland first states that redirected secondary service is not the same as non-firm point-to-point service, and that as a result, redirected secondary service should not be priced at the rates in schedule 8 of the Midwest ISO OATT. Holland notes that section 22.1(d) of the Midwest ISO OATT states that the transmission rate requirements of Part II of the OATT do not apply to redirected service, and that under section 22.1(a), redirected secondary service has a lower priority than non-firm transmission service.

8. Primarily, Holland argues that the plain language of former section 22.2 does not permit Midwest ISO to charge the higher hourly non-firm transmission rate for secondary non-firm redirect service like that taken by Holland. Holland contends that the "higher of" pricing permitted by former section 22.2 for redirected secondary service applies only to secondary service that is redirected to a higher cost pricing zone, because former section 22.2 states that the transmission customer "shall pay . . . the additional costs (*i.e.*, the difference between the zonal rates) associated with the new path." In support, Holland notes that Midwest ISO originally proposed section 22.2 as a deviation from the

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<sup>4</sup> *Midwest Independent Transmission System Operator, Inc.*, 110 FERC ¶ 61,081 (2005).

<sup>5</sup> *Id.* at P 12.

<sup>6</sup> *Id.* Because in Docket No. ER05-273-000, the Commission accepted and made subject to refund a revised section 22.2, this order will refer to the language in section 22.2 that was effective during the time period at issue in the instant complaint as "former" section 22.2.

*pro forma* OATT in Order No. 888.<sup>7</sup> At the time it proposed this deviation, Midwest ISO stated that the language was necessary to prevent a transmission customer from gaming the redirect service option by obtaining a firm transmission reservation into a low-cost zone and then redirecting the service to a higher cost zone to avoid the higher charges.<sup>8</sup> Holland asserts, therefore, that former section 22.2 was intended to address inter-zonal gaming, and would therefore not address redirect service within the same pricing zone. Furthermore, Holland states that Midwest ISO's Business Practice Manual confirms that any additional charges under former section 22.2 apply only when service is redirected to a higher cost pricing zone.

9. Thus, Holland asserts that Midwest ISO has violated its own tariff provisions and the filed rate doctrine by charging a rate that has not been approved by the Commission. Holland estimates that overcharges resulting from Midwest ISO's improper application of former section 22.2 are nearly \$390,000. It requests that the Commission order Midwest ISO to refund, with interest, the difference between the non-firm point-to-point transmission rates charged to Holland for secondary redirect service under section 22.1 and the rates that apply to Holland's primary firm point-to-point reservation.

### **III. Notice and Responsive Pleadings**

10. Notice of Holland's complaint was published in the *Federal Register*,<sup>9</sup> with comments, interventions or protests due on or before February 7, 2005. Timely motions to intervene were filed by Cargill Power Markets, LLC (Cargill), Constellation Energy Commodities Group, Inc. (Constellation), DTE Energy Trading, Inc. (DTE), International Transmission Company, METC, and the Midwest ISO Transmission Owners. Cargill

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<sup>7</sup> *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996) at 31,760-61 (Order No. 888), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 (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 (1997), *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>8</sup> See Complaint of Holland at 9, *citing* Answer of Midwest ISO Participants in Docket No. ER98-1438-000.

<sup>9</sup> 70 Fed. Reg. 3691 (2005).

filed comments generally supporting Holland's complaint, and arguing that all transmission customers assessed similar charges are entitled to refunds. Cargill also states that there is little risk of transmission customers gaming the non-firm redirect provisions of the Midwest ISO OATT because non-firm redirect service is afforded the lowest priority of any transmission service offered by the Midwest ISO.

11. Midwest ISO filed a timely answer in which it points out that when the Commission accepted former section 22.2 for filing, we noted certain ambiguities in how redirected transmission service would be priced under the tariff language. Midwest ISO explains that in our order conditionally authorizing the establishment of Midwest ISO and establishing hearing procedures regarding the OATT, we stated that protestors raising concerns about charges for secondary service could raise such concerns in the evidentiary hearing.<sup>10</sup> Midwest ISO further explains that "for reasons that do not appear in the record," this issue was not litigated in the hearing.<sup>11</sup>

12. More fundamentally, Midwest ISO argues that it has consistently interpreted former section 22.2 as requiring the application of the higher hourly non-firm rate when a customer redirects its primary reservation to a higher-priced non-firm peak hourly service. It says that the language of former section 22.2 supports this interpretation. Midwest ISO contends that the OATT makes clear that non-firm redirect is a "subspecies" of non-firm point-to-point transmission service because it defines "Transmission Service" as only point-to-point service on a firm or non-firm basis or Network Integration Transmission Service. Additionally, former section 22.2 of the OATT, which Midwest ISO contends permits the higher of pricing applied to Holland's redirect service, is a more specific tariff provision and thus controls over the more general section 22.1(d) language ("except as to transmission rates") relied upon by Holland.<sup>12</sup>

13. Midwest ISO further asserts that Commission precedent supports its interpretation. Former section 22.2 was proposed "to prevent transmission customers from improperly evading higher rates by choosing a low-cost transmission path and then electing a higher-

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<sup>10</sup> See Answer of Midwest ISO at 4, citing *Midwest Independent Transmission System Operator, Inc.*, 84 FERC ¶ 61,231 at 61,176 (1998).

<sup>11</sup> Answer of Midwest ISO at 4.

<sup>12</sup> *Id.* at 9-10, citing *Tennessee Gas Pipeline Co.*, 62 FERC ¶ 61,052, 61,278-79 (1993).

cost path under the flexible point-to-point option.”<sup>13</sup> Midwest ISO states that “[w]hile inter-zonal gaming was admittedly the focus” when former section 22.2 was initially proposed, the Commission recognized that the language addressed broader concerns in our order approving the initial Midwest ISO OATT.<sup>14</sup> Additionally, Midwest ISO suggests that the Commission understood that the “higher of” pricing method addressed “gaming broadly understood” when it approved the method in the Southwest Power Pool (SPP) OATT, even though zonal rate gaming is not possible in SPP, which uses the MW-mile principle for pricing transmission service.<sup>15</sup> Midwest ISO also notes that on rehearing of the order approving the SPP OATT, the Commission stated that “when a customer switches from its original receipt or delivery points to new, secondary points (however defined), it should pay the higher rate.”<sup>16</sup> Further, the Commission approved a similar provision in the Mid-Continent Area Power Pool (MAPP) OATT. There, the Commission rejected arguments that a customer using less expensive service when it redirects should only pay the charges associated with that service and stated that a redirecting customer “should pay the higher rate when the customer switches from its original points to new, secondary points.”<sup>17</sup>

14. Based on its contention that it has complied with the language of former section 22.2, Midwest ISO answers that it has not violated the filed rate doctrine. Additionally, Midwest ISO asserts that its application of the higher peak hourly non-firm rate under former section 22.2 complies with its Commission-approved *Appalachian Power Company*<sup>18</sup> rate design. Holland and other redirect customers are protected from any over-recovery by Midwest ISO under that rate design by the rate caps on hourly service in Schedule 8 of the OATT. Finally, Midwest ISO argues that imposing the

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<sup>13</sup> Answer of Midwest ISO at 10.

<sup>14</sup> Answer of Midwest ISO at 10-11, *citing Midwest Independent Transmission System Operator, Inc.*, 84 FERC ¶ 61,231 at 62,176.

<sup>15</sup> Answer of Midwest ISO at 11-12, *citing Southwest Power Pool, Inc.*, 82 FERC ¶ 61,267 (1998)

<sup>16</sup> Answer of Midwest ISO at 12, *citing Southwest Power Pool, Inc.*, 85 FERC ¶ 61,031, 61,102 (1998).

<sup>17</sup> Answer of Midwest ISO at 13, *citing Mid-Continent Area Power Pool*, 88 FERC ¶ 61,157 at 61,533 (1999).

<sup>18</sup> 39 FERC ¶ 61,296 (1987).

higher hourly rate for non-firm redirect service is equitable because transmission customers will pay a higher rate for a more valuable service when they choose to use it.

15. Lastly, Midwest ISO answers that even if it is found to have violated the filed rate doctrine, the Commission should exercise its discretion not to order refunds. First, Midwest ISO asserts that Holland has failed to substantiate its complaint with all documents supporting its allegations and has not provided invoices or other financial documents to support its claims for refunds. Midwest ISO also contends that refunds are not warranted because it has consistently applied its tariff even in the face of genuine ambiguity as to its application. Finally, Midwest ISO notes that Holland was aware of Midwest ISO's redirect charges in Fall 2002, but waited until January 2005 to file its complaint.

16. Holland filed an answer to Midwest ISO's answer. It challenges Midwest ISO's argument that the more specific provisions of former section 22.2 of the OATT should govern over the more general section 22.1(d). It says that the case relied upon by Midwest ISO for this assertion, *Tennessee Gas Pipeline Company*, was reversed by the United States Court of Appeals for the Fifth Circuit because the Commission's reading of the agreement at issue in that case would render other provisions of the agreement meaningless.<sup>19</sup> Holland also argues that Midwest ISO's reliance on the SPP and MAPP OATTs is misplaced because in approving those OATTs, the Commission never discussed how secondary redirect service would be priced, and because both the SPP and MAPP OATTs contain specific rate language permitting them to charge the "higher of" price for non-firm secondary redirect service.

17. On March 4, 2005, Midwest ISO filed a motion to consolidate this proceeding with the ongoing hearing and settlement judge procedures in Docket No. ER05-273-000 and a similar complaint by DTE Energy Trading, Inc. in Docket No. EL05-63-000. Midwest ISO argues that all of these proceedings have common issues of law and fact, involve the same parties, and are based upon Midwest ISO's interpretation of the same provision of its OATT. Midwest ISO also contends that consolidation will facilitate a comprehensive and simultaneous resolution of the issues and is thus consistent with the Commission's policy encouraging settlements. Constellation, DTE and Holland each filed answers opposing the motion to consolidate.

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<sup>19</sup> Answer of Holland at 3-4, citing *Tennessee Gas Pipeline Co. v. FERC*, 17 F.3d 98 (5th Cir. 1994).

#### IV. Discussion

18. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,<sup>20</sup> the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure<sup>21</sup> prohibits an answer to an answer unless otherwise ordered by the decisional authority. We will accept Holland's answer because it has provided information that assisted us in our decision-making process. Further, we will accept the answers of Constellation, DTE and Holland in response to Midwest ISO's motion to consolidate because they have provided information that assisted us in our decision-making process.<sup>22</sup>

19. In section 22.1 of the *pro forma* OATT in Order No. 888, the Commission provided that a transmission customer taking firm point-to-point transmission service can request service on a non-firm basis over receipt and delivery points other than those specified in its primary firm service reservation (secondary receipt and delivery points) without incurring additional charges.

20. When the entities forming Midwest ISO submitted the initial Midwest ISO OATT for filing, they proposed an additional section 22.1a (which later became former section 22.2) titled "Additional Charge to Prevent Abuse," which read as follows:

If a Transmission Customer making the modifications in Section 22.1 takes service over a transmission path that costs more than the path the Transmission Customer initially reserved, then for the service the Transmission Customer schedules, the Transmission Customer shall pay in addition to the amounts based on its initial reservation the additional costs (*i.e.*, the difference between the zonal rates) associated with the new path. In addition, the Transmission Customer shall pay for losses and any congestion relief costs (Attachment K) based on the actual transmission path used.

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<sup>20</sup> 18 C.F.R. § 385.214 (2004).

<sup>21</sup> 18 C.F.R. § 385.213(a)(2) (2004).

<sup>22</sup> Additionally, we will deny Midwest ISO's motion to consolidate. The Commission generally consolidates cases for purposes of hearing and decision. *See, e.g., Entergy Services, Inc.*, 108 FERC ¶ 61,107 at P 21 (2004). Since we are not setting this case for hearing, consolidation is not warranted.

The entities forming Midwest ISO argued that this provision was necessary to ensure that customers did not reserve service based on lower cost local service area rates and then use secondary service to switch to higher cost transactions.

21. We find that Midwest ISO violated former section 22.2 of its OATT by assessing the higher hourly non-firm rate to non-firm redirect service taken by Holland under section 22.1 in the same transmission pricing zone. Former section 22.2 of the Midwest ISO OATT, which was on file with the Commission at the time Midwest ISO charged Holland the “higher of” non-firm hourly rate, unequivocally provided that “the Transmission Customer shall pay in addition to the amounts based on its initial reservation the additional costs (*i.e., the difference between the zonal rates*) associated with the new path” (emphasis added). Thus, a transmission customer with a firm reservation who redirects that service under section 22.1 to secondary receipt and delivery points in the same pricing zone as initially reserved in its firm reservation should not incur additional charges; former section 22.2, outlining the additional costs the transmission customer must pay, stated directly that any additional costs would be “the difference between the zonal rates.” Furthermore, as Holland notes, section 22.1(d) of the Midwest ISO OATT states that the transmission rate requirements of Part II of the OATT do not apply to redirected service. We agree with Holland that accepting Midwest ISO’s reading of former section 22.2 would render section 22.1(d) meaningless.<sup>23</sup>

22. Midwest ISO’s reference to our approval of a “higher of” pricing policy for non-firm redirect service in the SPP and MAPP OATTs is not persuasive. As Holland notes, both SPP and MAPP had in their OATTs specific provisions allowing them to charge a higher hourly rate when a transmission customer redirects its service to a higher-priced hourly non-firm product. For example, the MAPP OATT specifically allows firm transmission customers to request *hourly* redirect service, and provides:

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<sup>23</sup> See, e.g., *Pandhandle Eastern Pipe Line Co.*, 74 FERC ¶ 61,109 (1996) (relying on contract interpretation principles in interpreting tariff provisions, including the principle that a contract should be interpreted to give an effective meaning to all of its terms); see also *Great Lakes Gas Transmission Ltd. Partnership and Ocean Energy Resources, Inc.*, 93 FERC ¶ 61,008 at 61,019 (2000).

During the time that the Transmission Customer is obtaining service over Secondary Receipt or Delivery Points, the Transmission Customer shall pay the higher of the charge for hourly Non-Firm Point-to-Point Transmission Service for service over the secondary path or the original charge for service during the applicable period.<sup>24</sup>

We agree with Holland that had Midwest ISO intended to charge the higher hourly rate in an effort to prevent hourly intra-zonal gaming, it could have done so when it proposed former section 22.2 or could have made a filing proposing to do so at any time. The revised tariff language proposed by Midwest ISO in Docket No. ER05-273-000 is very similar to the MAPP OATT language noted above and supports our conclusion that former section 22.2 did not permit Midwest ISO to charge a higher hourly rate in an effort to prevent hourly intra-zonal gaming. Otherwise, the proposed revised tariff language would not be necessary.

23. We are also not persuaded by Midwest ISO's assertion that non-firm redirect service under section 22.1 is merely a "subspecies" of non-firm transmission service and thus should be charged non-firm hourly rates. First, we note that the status of non-firm redirect service as a lower priority service under the Midwest ISO OATT than other forms of transmission service makes it a distinct service from non-firm service, which is afforded a higher priority. Furthermore, section 22.1(d), by stating that such service is not subject to the transmission rate provisions of Part II of the OATT, makes clear that non-firm redirect is not simply a "subspecies" of non-firm transmission service, since the OATT dictates that it not be priced in the same manner.

24. The Commission may order refunds for past periods where a public utility has either misapplied a formula rate or otherwise charged rates contrary to the filed rate.<sup>25</sup> In accordance with our finding that Midwest ISO improperly charged Holland the higher hourly non-firm rate for redirect service under former section 22.2 of its OATT, we direct Midwest ISO to refund to Holland, with interest,<sup>26</sup> the difference between the non-firm hourly rate assessed to Holland for redirect service within the same pricing zone and the

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<sup>24</sup> See MAPP OATT, section 21.1 and section 21.1(a).

<sup>25</sup> See, e.g., *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services into Markets Operated by the California Independent System Operator and the California Power Exchange*, 93 FERC ¶ 61,121 (2000).

<sup>26</sup> Interest should be calculated pursuant to 18 C.F.R. § 35.19a (2004).

original firm transmission service rate contained in Holland's primary reservation. In addition, we direct Midwest ISO to refund to all Midwest ISO OATT customers who have been assessed the higher hourly non-firm rate for redirect service under former section 22.2, with interest, the difference between the non-firm hourly rate assessed for redirect service within the same pricing zone and the original firm transmission service rate contained in the primary reservation.<sup>27</sup> We will not exercise our discretion to decline to order refunds, as Midwest ISO requests, given our finding that the language of Midwest ISO's tariff on file during the time period at issue in the complaint did not permit the disputed charges for redirect services made by Midwest ISO.

The Commission orders:

- (A) Holland's complaint is hereby granted, as discussed in the body of this order.
- (B) Midwest ISO is hereby directed to refund, within 30 days of the date of this order, the difference between the non-firm hourly rate assessed to Holland for redirect service within the same pricing zone and the original firm transmission service rate contained in Holland's primary reservation, as discussed in the body of this order.
- (C) Midwest ISO is hereby directed to refund to all Midwest ISO OATT customers who have been assessed the higher hourly non-firm rate for redirect service under former section 22.2, within 30 days of the date of this order, the difference between the non-firm hourly rate assessed for redirect service within the same pricing zone and the original firm transmission service rate contained in the primary reservation, as discussed in the body of this order.
- (D) Midwest ISO is hereby directed to submit a refund report no later than 15 days after the date refunds are made.

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<sup>27</sup> See, e.g., *North Carolina Electric Membership Corp. and Brunswick Electric Membership Corp. v. Carolina Power & Light Co.*, 57 FERC ¶ 61,332 at 62,067 (1991).

(E) Midwest ISO's motion to consolidate is hereby denied, as discussed in the body of this order.

By the Commission.

( S E A L )

Linda Mitry,  
Deputy Secretary.