

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

DTE Energy Trading, Inc.

Docket No. EL05-63-000

v.

Midwest Independent Transmission System Operator,
Inc.

ORDER GRANTING COMPLAINT

(Issued April 18, 2005)

I. Introduction

1. On February 16, 2005, DTE Energy Trading, Inc. (DTET) filed a complaint under sections 206 and 306 of the Federal Power Act (FPA)¹ against Midwest Independent Transmission System Operator, Inc. (Midwest ISO). In this order, we will grant DTET's complaint and direct Midwest ISO to refund charges assessed in excess of the rates in the Midwest ISO Open Access Transmission Tariff (OATT). This order benefits customers by ensuring that Midwest ISO's charges conform to the rates approved by the Commission in the Midwest ISO OATT.

¹ 16 U.S.C. §§ 824e, 825e (2000).

II. Background

2. In Order No. 888² the Commission held that public utilities contracting for firm point-to-point transmission service under a transmission provider's OATT had the right to redirect, on a non-firm basis, firm transmission service over secondary paths within the transmission provider's control area by changing either the receipt points or the delivery points under those firm reservations.³

3. To that end, the initial Midwest ISO OATT incorporated section 22.1 of the *pro forma* OATT. 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 (that later became section 22.2), subject to certain conditions.⁴ If the customer requests to redirect service over a transmission path with a higher cost than the path the customer initially reserved, section 22.2 of the Midwest ISO OATT provides during the time period at issue in the instant complaint, that the customer shall pay "the additional costs (*i.e.*, the difference in the zonal rates) associated with the new path."

² See *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).

³ See also section 22.1 of *pro forma* OATT.

⁴ The conditions in section 22.1 provide that redirected service is 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 transmission rates.

4. In addition to incorporating section 22.1 of the *pro forma* OATT, Midwest ISO added a section 22.1a (which later became 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.

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.⁵

5. According to Midwest ISO, it became aware that some of its Transmission Customers questioned its authority to charge the “higher-of” rate for redirect service even though this was its “long-standing” practice. On November 30, 2004, Midwest ISO filed proposed clarifying revisions to section 22.2 of its OATT by adding a new subsection (a).⁶ The proposed revisions were designed to clarify the charges that Midwest ISO will assess when a transmission customer elects to redirect its firm point-to-point transmission service pursuant to section 22.2. The proposed clarifying revisions stated that a redirecting customer would be charged the “higher of” the cost of its initial firm point-to-

⁵ The Commission accepted the initial Midwest ISO OATT with these provisions for filing in *Midwest Independent Transmission System Operator, Inc., et al*, 84 FERC ¶61,231, *order on reconsideration*, 85 FERC ¶61,250, *order on reh'g*, 85 FERC ¶61,372 (1998) (*MISO*).

⁶ The proposed subsection (a) states:

(a) During the time that the Transmission Customer is obtaining Non-Firm Transmission Service over Secondary Receipt or Deliver Points, the Transmission Customer shall be charged the higher of: (1) the rate associated with the original Firm reservation that was redirected; or (2) the rate for the Non-Firm Transmission Service obtained over the Secondary Receipt or Delivery Points. Any portion of the original Firm reservation not redirected will be charged the original Firm reservation rate.

point service or the new non-firm point-to-point service it will receive. Midwest ISO justified this practice of charging the “higher-of” rate as a deterrent to a Transmission Customer “gaming” the transmission service reservation system by redirecting its firm reservations to acquire non-firm transmission service at discounted rates.

6. On January 28, 2005, 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.⁷ In suspending Midwest ISO’s proposed tariff language, 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.”⁸ 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.”⁹

III. DTET’s Complaint

7. DTET¹⁰ asserts that Midwest ISO is improperly charging the hourly rate for non-firm point-to-point transmission service when DTET elects to modify the receipt point of its firm transmission service (*i.e.* redirect) under section 22.1. According to DTET, redirected secondary service is qualitatively different from non-firm point-to-point service, thus redirected secondary service should not be priced at the rates contained in Schedule 8 of Midwest ISO’s OATT. DTET notes that section 22.1(d) of the Midwest ISO OATT provides that the transmission rate requirements of Part II of the tariff do not apply to redirected service and that under section 22.1(a), redirected secondary service is afforded a lower priority than non-firm transmission service.

⁷ *Midwest Independent Transmission System Operator, Inc.*, 110 FERC ¶ 61,081 (2005) (January Order).

⁸ *See* January Order at P 12.

⁹ *Id.*

¹⁰ DTET, a direct wholly-owned subsidiary of DTE Energy Company, is engaged in the brokering and marketing of electric energy and other energy-related services at wholesale in North America. DTET is authorized to make wholesale sales of electric energy and power at market-based rates. To this end, DTET contracts for firm point-to-point transmission service under Midwest ISO’s OATT.

8. DTET also argues that the plain language of section 22.2 provides no basis for Midwest ISO to charge the higher hourly non-firm transmission rate for secondary non-firm redirect service. DTET contends that the “higher-of” pricing permitted by section 22.2 for redirected secondary service applies only to redirected secondary service to a higher cost pricing zone, because 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.” According to DTET, section 22.2 was intended to address inter-zonal gaming therefore it did not address redirect service within the same pricing zone. Furthermore, DTET states that Midwest ISO’s Business Practice Manual confirms that any additional charges under section 22.2 apply only when service is redirected to a higher cost pricing zone.

9. Based on its contention that section 22.2 does not permit Midwest ISO to assess a higher, non-firm rate for redirect service that takes place wholly within the same pricing zone, DTET asserts that Midwest ISO has violated the OATT provisions and the filed rate doctrine by charging a rate that has not been approved by the Commission. DTET estimates that overcharges resulting from Midwest ISO’s improper application of section 22.2 total nearly \$3.5 million. DTET requests that the Commission order Midwest ISO to refund, with interest, the difference between the non-firm point-to-point transmission rates charged to DTET for secondary redirect service under section 22.1, and the rates that apply to DTET’s primary firm point-to-point reservation.

IV. Notice and Responsive Pleadings

Interventions and Comments

10. Notice of DTET’s Complaint was published in the *Federal Register*,¹¹ with comments, interventions or protests due on or before March 9, 2005. Timely motions to intervene were filed by Constellation Energy Commodities Group, Inc. (Constellation), The Holland Board of Public Works (Holland), the Midwest ISO Transmission Owners, and The Midwest Stand-Alone Transmission Companies (MSAT).¹²

11. Constellation also filed comments generally supporting DTET’s complaint, and also contends that Midwest ISO violated the filed rate doctrine and section 22 of its

¹¹ 70 Fed. Reg. 9063 (2005).

¹² The MSATs include American Transmission Company LLC, International Transmission Company, and Michigan Electric Transmission Company, LLC.

OATT. Constellation states that it has also been overcharged by Midwest ISO and requests that any investigation and relief ordered also encompass Constellation.

Midwest ISO's Answer to DTET's Complaint

12. Midwest ISO argues that it has consistently interpreted 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 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, section 22.2 of the OATT, which Midwest ISO contends permits the higher of pricing applied to DTET’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 DTET.¹³

13. Midwest ISO asserts that Commission precedent supports its interpretation. According to Midwest ISO, 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-cost path under the flexible point-to-point option.”¹⁴ Midwest ISO further states that “[w]hile inter-zonal gaming was admittedly the focus” when section 22.2 was initially proposed, the Commission recognized that the language addressed broader concerns in its order approving the initial Midwest ISO OATT.¹⁵ Additionally, Midwest ISO suggests that the Commission understood that the “higher-of” pricing method addresses “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.¹⁶ Midwest ISO also notes that on rehearing of its order approving the SPP OATT, the Commission stated that “when a customer switches from its original receipt or delivery points to new,

¹³ See Midwest ISO Answer at 9-10, citing *Tennessee Gas Pipeline Co.*, 62 FERC ¶ 61,052, 61,278-79 (1993).

¹⁴ See Midwest ISO Answer at 9.

¹⁵ See Midwest ISO Answer at 2, citing *MISO*, 84 FERC ¶ 61,231 at 62,176.

¹⁶ See Midwest ISO Answer at 11-12, citing *Southwest Power Pool, Inc.*, 82 FERC ¶ 61,267 (1998) (*SPP*).

secondary points (however defined), it should pay the higher rate.”¹⁷ Further, Midwest ISO points to the Commission’s approval of a similar provision in the Mid-Continent Area Power Pool (MAPP) OATT. There, Midwest ISO notes that 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.”¹⁸

14. According to Midwest ISO, DTET and others submit thousands of transmission service requests for non-firm hourly redirect service each year, many of which are for the more valuable (and, therefore, more expensive) on-peak service. Consequently, Midwest ISO argues that its action, charging the higher rate for redirected service, is consistent with Commission policy that discourages “gaming.”

15. Midwest ISO denies that it has violated the filed rate doctrine because it has fully complied with the language of section 22.2. In addition, Midwest ISO asserts that its application of the higher peak hourly non-firm rate under section 22.2 is consistent with the rate design that the Commission approved in *Appalachian Power Company*, 39 FERC ¶ 61,296 (1987). According to Midwest ISO, DTET and other redirect customers are protected from over-recovery by the rate caps on hourly service included in Schedule 8. Midwest ISO also argues that charges of the higher hourly rate for non-firm redirect service are equitable, because transmission customers will pay a higher rate for a more valuable service when they choose to use it.

16. Midwest ISO maintains that even if it is found to have violated the filed rate doctrine, refunds are not warranted, and the Commission should exercise its discretion and not order refunds in this case. Midwest ISO asserts that DTET 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.

¹⁷ See Midwest ISO Answer at 12, citing *SPP*, 85 FERC ¶ 61,031 at 61,102.

¹⁸ See Midwest ISO Answer at 13, citing *Mid-Continent Area Power Pool*, 88 FERC ¶ 61,157, 61,533 (1999).

DTET's Answer to Midwest ISO's Answer

17. DTET filed an answer to Midwest ISO's answer. DTET states that Midwest ISO is assessing DTET a separate, higher transmission rate any time DTET changes either the receipt point or the delivery point of a transaction even if the transaction is entirely intra-zonal thus ignoring its own zonal-based transmission pricing construct. DTET also points out that Midwest ISO's rate, imposed on all redirect transactions, significantly exceeds the higher of rate authorized under section 22, a rate specifically disallowed by section 22.1.¹⁹

18. DTET also argues that Midwest ISO's reliance on the SPP and MAPP OATTs is misplaced. DTET contends that the Commission accepted those OATTs without discussing 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.

Motion to Consolidate and Answers

19. Midwest ISO filed a motion to consolidate this proceeding with the ongoing hearing and settlement judge procedures in Docket No. ER05-273-000 and the complaint filed by The City of Holland, Michigan in Docket No. EL05-55-000. Midwest ISO asserts that consolidation is appropriate because these proceedings implicate common issues of law and fact, involve the same parties, and are all based upon Midwest ISO's interpretation of the same OATT provision. Midwest ISO also contends that consolidation will facilitate a comprehensive and simultaneous resolution of the common issues in these proceedings, and is consistent with the Commission's policy encouraging settlements.

20. DTET filed an answer opposing the motion to consolidate. According to DTET, consolidation of these dockets would unfairly hamper a timely resolution of its complaint. DTET explains that the instant proceeding raises a single legal issue as opposed to Midwest ISO's tariff modifications in Docket No. ER05-273-000 which also raises issues of cost support underlying Midwest ISO's proposed charges.²⁰

21. Holland and Constellation also filed answers opposing the motion to consolidate. Both parties oppose consolidation because the issue of whether Midwest ISO can justify its tariff revisions as just and reasonable in Docket No. ER05-273-000 on a going-

¹⁹ See DTET Answer at 5-6.

²⁰ See DTET Answer at 3.

forward basis involves different questions of fact and law from those related to this proceeding where the primary issue is whether Midwest ISO's past practice of charging higher rates for redirected service is consistent with its OATT.

V. Discussion

A. Procedural Matters

22. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,²¹ 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 Procedure²² prohibits an answer to an answer unless otherwise ordered by the decisional authority. We will accept DTET's answer because it has provided information that assisted us in our decision-making process.

23. We agree with DTET and the intervenors that consolidation of the pending dockets is not appropriate here. This proceeding is concerned with the appropriateness of Midwest ISO's past rate behavior. The proceeding in Docket No. ER05-273-000 involves cost justification, among other things, for proposed future rate behavior. In addition, the proceeding in Docket EL05-55-000 is being addressed in an order that is being issued contemporaneously. We will, therefore, deny Midwest ISO's motion to consolidate.

B. Substantive Issues

24. In Order No. 888, in section 22.1 of the *pro forma* OATT, the Commission provided that a transmission customer taking firm point-to-point transmission service could 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.

25. We find that Midwest ISO violated the provisions of section 22.2 of its OATT by assessing the higher hourly non-firm rate to non-firm redirect service taken by DTET under section 22.1 within the same transmission pricing zone. Section 22.2 of the Midwest ISO OATT, on file with the Commission at the time Midwest ISO charged DTET the "higher of" non-firm hourly rate, unequivocally provided that "the Transmission Customer shall pay in addition to the amounts based on its initial

²¹ 18 C.F.R. § 385.214 (2004).

²² 18 C.F.R. § 385.213(a)(2) (2004).

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 seeks to redirect that service under section 22.1 to secondary receipt and delivery points within the same zonal pricing zone as initially reserved in its firm reservation would expect to incur no additional charges, because 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.” We agree with DTET that Midwest ISO’s interpretation of section 22.2 is in error because such a reading would render section 22.1(d) meaningless.²³

26. Midwest ISO’s reference to our approval of “higher-of” pricing policies for non-firm redirect service in the SPP and MAPP OATTs is not persuasive. As DTET notes, both SPP and MAPP included 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:

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.²⁴

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

²³ 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).

²⁴ See MAPP OATT, section 21.1 and section 21.1(a).

27. 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 service is not simply a "subspecies" of non-firm transmission service, since the OATT dictates that it not be priced in the same manner.

28. 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.²⁵ In accordance with our finding that Midwest ISO improperly charged DTET the higher hourly non-firm rate for redirect service under section 22.2 of its OATT, we direct Midwest ISO to refund to DTET, with interest,²⁶ the difference between the non-firm hourly rate assessed to DTET for redirect service within the same pricing zone and the original firm transmission service rate contained in DTET'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 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.²⁷ 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.

²⁵ 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).

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

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

The Commission orders:

(A) DTET'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 DTET for redirect service within the same pricing zone and the original firm transmission service rate contained in DTET's primary reservation, as discussed in the body of this order.

(C) Midwest ISO is hereby directed to refund 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.

(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.