

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, and Nora Mead Brownell.

Midwest Independent Transmission System
Operator Inc.

Docket Nos. RT01-87-005,
RT01-87-006,
ER02-106-001,
ER02-108-002 and
ER02-108-004

ORDER ON REHEARING AND COMPLIANCE FILING

(Issued May 14, 2003)

1. In an order issued on December 20, 2001,¹ the Commission, among other things, found that the proposal by Midwest Independent Transmission System Operator, Inc. (Midwest ISO) satisfied the requirements set forth in Order No. 2000² to qualify as a Regional Transmission Organization (RTO). Various entities seek rehearing of the December 20 Order. For the reasons discussed below, the Commission denies rehearing, but provides clarification and invites further comment on the allocation of filing rights pursuant to Section 205 of the Federal Power Act (FPA)³ between Midwest ISO and its transmission-owning members. The Commission also accepts in part and rejects in part the January 28, 2002 compliance filing submitted by Midwest ISO in Docket Nos. RT01-87-

¹Midwest Independent Transmission System Operator, Inc., 97 FERC ¶ 61,326 (2001) (December 20 Order).

²Regional Transmission Organizations, Order No. 2000, 65 Fed. Reg. 809 (January 6, 2000), FERC Stats. & Regs. ¶ 31,089 (1999) (Order No. 2000), order on reh'g, Order No. 2000-A, 65 Fed. Reg. 12,088 (March 8, 2000), FERC Stats. & Regs. ¶ 31,092 (2000) (Order No. 2000-A), aff'd sub nom. Public Utility District No. 1 of Snohomish County, Washington v. FERC, Nos. 00-1174, et al. (D.C. Cir. 2001) (Snohomish).

³16 U.S.C. § 824d (2000).

006 and ER02-108-004, in response to the December 20 Order, and directs further filings. This order furthers the Commission's goal of creating a robust electricity market in the Midwest region.

Background

2. The December 20 Order, among other things, found that Midwest ISO's RTO proposal satisfied the criteria required under Order No. 2000 for RTO status. The Commission did, however, require Midwest ISO to make certain modifications to its proposal, including its Open Access Transmission Tariff (OATT) and the Agreement of the Transmission Facilities Owners To Organize The Midwest Independent Transmission System Operator, Inc. (Midwest ISO Agreement). On January 28, 2002, Midwest ISO tendered for filing a compliance filing addressing the directives given by the Commission in the December 20 Order.

Rehearing Requests

3. Alliance Companies,⁴ the Illinois Commerce Commission (Illinois Commission) and the Midwest ISO Transmission Owners (TOs)⁵ filed timely requests for rehearing and

⁴For purposes of this request for rehearing, the Alliance Companies are Ameren Services Company (on behalf of Union Electric Company and Central Illinois Public Service Company) (Ameren); American Electric Power Service Corporation (on behalf of Appalachian Power Company, Columbus Southern Power Company, Indiana Michigan Power Company, Kentucky Power Company, Kingsport Power Company, Ohio Power Company and Wheeling Power Company); The Dayton Power and Light Company; Exelon Corporation (on behalf of Commonwealth Edison Company and Commonwealth Edison Company of Indiana (ComEd)); FirstEnergy Corp. (on behalf of American Transmission Systems, Inc., The Cleveland Electric Illuminating Company, Ohio Edison Company, Pennsylvania Power Company and the Toledo Edison Company); Illinois Power Company (Illinois Power); Northern Indiana Public Service Company; and Virginia Electric and Power Company. Consumers Energy Company did not join in this request for rehearing.

⁵The Midwest ISO Transmission Owners at the time the rehearing request was filed consist of: Alliant Energy Corporate Services, Inc. as agent for IES Utilities Inc. and Interstate Power Company; American Transmission Company, L.L.C.; Central Illinois Light Company; Cinergy Services, Inc. (for Cincinnati Gas & Electric Company; PSI Energy, Inc., and Union Light Heat & Power Company); City Water, Light & Power of Springfield, Illinois; Hoosier Energy Rural Electric Cooperative; International Transmission Company; Indiana Municipal Power Agency; Indianapolis Power & Light Company; LG&E

(continued...)

or clarification of the December 20 Order. On February 19, 2002, Midwest ISO filed an answer to the requests for rehearing or clarification.

Compliance Filing

4. On January 28, 2002, Midwest ISO tendered for filing a compliance filing addressing the directives given by the Commission in the December 20 Order. As discussed in more detail below, in its compliance filing, Midwest ISO has: (1) revised the Midwest ISO Agreement to eliminate the TOs' veto privileges regarding pricing; (2) revised Appendix B of the Midwest ISO Agreement, Planning Framework, to give full consideration to all market perspectives in identifying expansion projects critically needed to support competition as well as to meet reliability needs and to make it possible for third-parties (i.e., merchant transmission projects) to participate in the construction and ownership of new transmission facilities; (3) amended its OATT to require that ancillary services be procured at least cost; (4) re-filed its Market Monitoring Plan as a properly formatted attachment to its OATT; and (5) added a 45-day deadline in the Market Monitoring Plan for Midwest ISO to either agree to implement a recommendation made by the Independent Market Monitor (IMM) or disagree with recommendations made by the IMM.⁶ Finally, Midwest ISO proposed what it characterizes as minor modifications to the Midwest ISO Agreement and the Midwest ISO OATT, which are intended to correct typographical errors and minor inconsistencies.

5. Notice of the compliance filing was published in the Federal Register, 67 Fed. Reg. 6,515 (2002), with comments, protests, or interventions due on or before February 19, 2002. Interventions, comments or protests were filed by Calpine Corporation (Calpine), Duke Energy North America, LLC (DENA), the TOs, PPL EnergyPlus, LLC, Sunflower Electric Power Corporation, Wisconsin Public Service Corporation and Upper Peninsula

⁵(...continued)

Corporation (for Louisville Gas & Electric Company and Kentucky Utilities Company); Lincoln Electric System; Minnesota Power Company (and its subsidiary, Superior Water, Light & Power Company); Montana-Dakota Utilities Company; Northern States Power Companies; Otter Tail Power Company; Southern Illinois Power Cooperative; Southern Indiana Gas & Electric Company; and Wabash Valley Power Association.

⁶The compliance filing does not address those aspects of the December 20 Order related to Midwest ISO's real-time balancing market proposal and posting system as Midwest ISO subsequently withdrew its proposal. See Midwest Independent Transmission System Operator, Inc., 98 FERC ¶ 61,075 at 61,215, order denying reh'g, 99 FERC ¶ 61,198 (2002).

Power Company, and Wisconsin Public Power, Inc. (WPPI). Untimely comments were filed by the Illinois Commission. Answers to the protests and comments were filed by the TOs and Midwest ISO.

I. Procedural Matters

6. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2002), the timely, unopposed motions to intervene and the notices of intervention by state Commissions serve to make the intervenors in Docket Nos. RT01-87-006 and ER02-108-004 parties to this proceeding. Further, we find good cause to accept the comments by the Illinois Commission because they do not prejudice any party or cause undue delay in the proceeding. Although the Commission's Rules of Practice and Procedure normally do not permit answers to protests or answers to requests for rehearing,⁷ the answers help us to clarify certain issues. Therefore, we will grant the motions to answer.

II. Discussion

A. Rehearing Requests, Docket No. RT01-87-005

1. Alliance Companies

a. The December 20 Order

7. While the December 20 Order found that Midwest ISO met the scope and configuration requirements of Order No. 2000, it also found that the configuration along Midwest ISO's eastern seam was not ideal. However, the Commission noted that, in an order issued concurrently with the December 20 Order, in Docket No. RT01-88-000, *et al.*,⁸ the Commission: (1) rejected Alliance Companies' proposal to form a separate RTO in the Midwest; (2) found that the public interest is best served by a single RTO in the Midwest and that Midwest ISO, because it was further along in its development and more fully compliant with the requirements of Order No. 2000, should serve as the foundation of a single Midwest RTO; and (3) directed Alliance Companies to explore how their business plan (including the proposal for National Grid to become the managing member of Alliance) could be accommodated within Midwest ISO. The December 20 Order found that successful integration of some or all of the Alliance Companies into Midwest ISO would greatly improve Midwest ISO's scope and configuration along its eastern seam.

⁷See 18 C.F.R. § 385.213(a)(2) (2002).

⁸See Alliance Companies, *et al.*, 97 FERC ¶ 61,327 (2001).

b. Rehearings

8. Alliance Companies argue that the December 20 Order is inconsistent with Order No. 2000. According to Alliance Companies, the Commission was wrong to view the Midwest ISO and Alliance RTO proposals as competing, as each of the RTO filings was voluntary and intended to apply to separate transmission facilities. Moreover, Alliance Companies note that Order No. 2000 does not establish specific regions, including the Midwest, for RTO formation.⁹

9. Next, Alliance Companies argue that the December 20 Order fails to give effect to the Illinois Power Settlement, which the Commission approved and to which, according to Alliance Companies, the Commission is bound.¹⁰ Alliance Companies claim that the purpose of the Illinois Power Settlement was to allow for the development and operation of both RTO proposals. Alliance Companies argue that for the Commission to ignore this fact is arbitrary, capricious and an abuse of its discretion.

10. Finally, Alliance Companies argue that there is no basis for the Commission to conclude that the proposed Alliance RTO lacks the proper scope or configuration as the proposed Alliance RTO is larger than any other proposed RTO. Moreover, the Illinois Power Settlement provides for a seamless region that is far larger than any approved or proposed RTO.

c. Analysis

⁹Alliance Companies also argue that the December 20 Order is insufficient to repeal or modify Order No. 2000. According to Alliance Companies, changing Order No. 2000 to establish a single RTO for the Midwest requires a formal notice and comment rulemaking under the Administrative Procedure Act.

¹⁰See Illinois Power Company, 95 FERC ¶ 61,183 (2001), reh'g denied, 95 FERC ¶ 61,026 (2001) (Illinois Power). The Illinois Power Settlement, among other things, allowed Illinois Power, Ameren and ComEd to withdraw from Midwest ISO and, in conjunction with the Inter-RTO Cooperation Agreement (IRCA), provided guidance to facilitate the development of a seamless Midwest market. The IRCA required Alliance Companies and Midwest ISO to coordinate activities for transmission and transmission-related services, and outlines steps to assist the parties in complying with Order No. 2000 requirements.

11. We will deny Alliance Companies' request for rehearing for the reasons set forth in Alliance Companies, et al., 100 FERC ¶ 61,137 (2002) (July 31 Order).¹¹ Such subsequent events have changed the RTO landscape in the Midwest. In the July 31 Order, the Commission conditionally accepted the compliance filings of the Alliance Companies under which the participants in Alliance Companies proposed to join either Midwest ISO or PJM Interconnection, L.L.C. (PJM).

12. While Alliance Companies argue that the December 20 Order fails to give effect to the Illinois Power Settlement, subsequent events involving the former Alliance Companies and actions by the Commission have created an environment superior to that called for under the seams management arrangement in the Illinois Power Settlement. We believe that the commitments made by, among others, the former Alliance Companies, that were accepted in the July 31 Order, will eliminate seams between the two RTOs with the advent of the common market rather than merely manage an inter-RTO seam. In the July 31 Order, we expressed concern at the RTO choices of the former Alliance Companies; however, an extensive review of the record indicates that the expeditious creation of a single market, spanning a geographic area from New Jersey in the East to the Rocky Mountains in the West, would more than offset any impacts on the RTO choices of the former Alliance Companies.¹²

13. We disagree with Alliance Companies' argument that the Commission erred in viewing the RTO proposals as competing with each other and in essentially mandating a single RTO in the Midwest. Our actions in the December 20 Order were based on the substantial record before us and the principles regarding regional scope and configuration established in Order No. 2000, not on any preconceived notions as to a specific geographical footprint of an RTO. The Commission's decision in the December 20 Order sought to provide an RTO that could most effectively perform its required functions and support efficient and non-discriminatory power markets. The driving force behind our goals and analysis of RTO formation under Order No. 2000 has always been and continues to be the efficient and reliable operation of the transmission grid and the continued development of competitive electricity markets.

2. Illinois Commission

a. The December 20 Order

¹¹See July 31 Order at n.15.

¹²See July 31 Order at P 37.

14. The December 20 Order found that Midwest ISO's existing design satisfies our independence requirements. In this regard, we relied upon, among other things, the fact that Midwest ISO is self-financing and not owned by any market participant and Midwest ISO's Board of Directors was specifically structured to be independent of control by any market participant. Additionally, we found that Midwest ISO had adequate scope and configuration to meet the requirements of Order No. 2000, relying upon, among other things, the recent growth of Midwest ISO with the addition of several new individual members, as well as the TRANSLink proposal to form an Independent Transmission Company (ITC) under Midwest ISO. As discussed above, the December 20 Order also directed Alliance Companies to explore membership in Midwest ISO and found that the successful integration of some or all of these companies (particularly the Illinois companies) into Midwest ISO would greatly enhance operational efficiency in the Midwest market.

b. Rehearings

15. The Illinois Commission argues that the Commission erred in its decision to grant RTO status to Midwest ISO as it believes Midwest ISO, in its current form, fails to satisfy the Order No. 2000 criteria for independence, scope and configuration, and market monitoring. The Illinois Commission requests that the Commission convene a public mediation process in order to identify and adopt the most beneficial features of each RTO to form a single RTO for the Midwest.

16. With regard to independence, the Illinois Commission argues that the Commission erred in concluding that since Midwest ISO is self-financed and not owned by any market participant it satisfies the Order No. 2000 independence requirements. The Illinois Commission argues that the Midwest ISO governance and business structure fails to satisfy the requirements of Order No. 2000. The Illinois Commission argues that as certain TOs will still retain generation and marketing interests, it is unreasonable to expect that Midwest ISO will be able to ignore market interests of its transmission-owning members when making transmission operating and planning decisions.¹³ The Illinois Commission claims that under Midwest ISO's business structure, the class of TOs that are market participants will always exercise greater influence over the RTO decision-making process than will any other member without market interests. Additionally, the Illinois Commission is concerned that certain TOs which are strategically situated, so as to allow Midwest ISO to satisfy the Order No. 2000 requirements, will exercise greater influence over Midwest ISO. The Illinois Commission submits that for true RTO independence, it

¹³The Illinois Commission offers as an example Midwest ISO's offer to change its business structure in its January 16, 2001 supplemental Order No. 2000 compliance filing to accommodate the return of the three Illinois Companies.

may be necessary to require the separation of transmission ownership from generation and marketing interests.

17. With regard to RTO configuration, the Illinois Commission requests that the Commission reverse its finding that Midwest ISO meets the Order No. 2000 scope and configuration requirements until a proper means of coordination between Alliance Companies and Midwest ISO can be implemented. The Illinois Commission argues that the Commission's actions approving Midwest ISO as an RTO and denying Alliance Companies RTO status fail to take into consideration how proper coordination will take place between Midwest ISO and Alliance Companies.¹⁴

18. Next, the Illinois Commission argues that the Commission erred in finding that Midwest ISO's market monitoring plan generally satisfies Order No. 2000 requirements. The Illinois Commission argues that the IMM, as a contract agent of the RTO, cannot be expected to impartially monitor and act independently of Midwest ISO. The Illinois Commission further requests clarification as to whether sellers into the Midwest ISO market will be exempt from the Commission's Supply Margin Assessment (SMA) screen.¹⁵ Finally, the Illinois Commission argues that the market monitoring proposal approved in the December 20 order thwarts state commission access to needed data and information.

c. Answer

19. Midwest ISO argues that the Illinois Commission's request for rehearing should be denied as the December 20 Order reflects reasoned decision-making and is consistent with Order No. 2000. Midwest ISO argues that in the area of independence, the Commission allowed wide latitude in Order No. 2000 for transmission owners in determining how they would relinquish ownership or control to an RTO. Moreover, Midwest ISO asserts that the Illinois Commission's suggestion that transmission owners can exercise influence over the RTO by threatening to withdraw from the RTO is unfounded as the Commission must

¹⁴For instance, the Illinois Commission concludes that the Commission's actions effectively eliminate the coordination called for under the Illinois Power Settlement and instead replace it with the hope that Alliance Companies will join Midwest ISO in such a manner as to address the need for necessary coordination between Alliance Companies and Midwest ISO.

¹⁵The Illinois Commission is concerned that the December 20 Order approved a market monitoring plan void of penalties and sanctions and thus does not contain mitigation provisions sufficient to allow sellers to be shielded from the SMA screen.

approve any such withdrawal.¹⁶ Midwest ISO also disagrees with the Illinois Commission's assertion that it does not satisfy the scope and configuration requirements of Order No. 2000. Midwest ISO believes that the mandates for addressing seams issues in the December 20 Order are reasonable in light of the change in circumstances created by the denial of RTO status to Alliance Companies. Finally, regarding the market monitoring plan, Midwest ISO argues that the plan complies with Order No. 2000. Midwest ISO contends that Order No. 2000 allows either the RTO or an independent monitor to perform this function.¹⁷ Midwest ISO also argues that while it agrees that state commissions should have access to information from the market monitor, the information policy in its market monitoring plan is necessary to ensure that sensitive information is shared only with the appropriate consent. Lastly, Midwest ISO notes that the SMA screen is not applicable until such time as markets for real-time balancing and congestion management are in place.

d. Analysis

20. We will deny the Illinois Commission's request for rehearing. Regarding independence, we disagree with the Illinois Commission's argument that Midwest ISO is not truly independent since certain TOs could exercise influence over transmission operating and planning decisions; namely TOs with generation and marketing interests, and TOs whose continued participation may be necessary to continue to sustain adequate RTO configuration for Midwest ISO. After careful review of the Midwest ISO Agreement, we concluded in the December 20 Order that, subject to certain modifications, (e.g., elimination of certain TO veto rights), Midwest ISO's governance structure satisfied the independence requirements as it is a self-financing organization and not owned by any market participant. Moreover, we concluded that Midwest ISO's Board of Directors was structured to be independent of control by any market participant. Given the commitments set forth in the Midwest ISO Agreement, the Illinois Commission offers no valid reason or convincing arguments in support of its position that Midwest ISO will somehow favor certain classes of members. We also disagree with the Illinois Commission's assertion that the TOs could threaten to withdraw from Midwest ISO in an attempt to influence Midwest ISO's decisions. The TOs have committed to remain in Midwest ISO for a specified period and, in any event, withdrawal would require prior Commission authorization. We specifically provided for this option as a means of flexibility for TOs in RTO formation

¹⁶Additionally, Midwest ISO argues that any accommodations offered to the Illinois companies is not evidence of undue influence but shows that Midwest ISO is doing what the Commission encouraged it to do by striving to obtain broad membership over a large area.

¹⁷Midwest ISO notes that the fact that its market monitor is under contract with it in no way conflicts with Order No. 2000 as the RTO could itself perform this function.

under Order No. 2000. We find that the Illinois Commission's argument that transmission owners' continued interests in generation may taint certain TOs' relationship with Midwest ISO is misplaced. The Illinois Commission's argument amounts to a collateral attack on Order No. 2000, in which we declined to mandate divestiture to achieve independent RTOs.

21. With respect to the Illinois Commission's arguments regarding configuration, as we indicated above, subsequent actions by the former Alliance Companies and the Commission have changed the RTO landscape since the December 20 Order. Concerns regarding proper coordination between Alliance Companies and Midwest ISO are now moot as the former Alliance Companies have opted to join either Midwest ISO or PJM and both organizations have committed to form a common market spanning both footprints and are required to file a joint operational plan detailing how they will operate at the seams during the transition to the common market.¹⁸

22. Finally, with regards to the Illinois Commission's arguments concerning the independence of the IMM and access to information, we disagree and deny rehearing. We find these arguments represent a collateral attack on Order No. 2000 and, in any event, are moot due to subsequent proceedings. In Midwest Independent Transmission System Operator, Inc., 101 FERC ¶ 61,228 (2002), we held that it is possible for the IMM to remain independent regardless of the fact that it has signed a contract with Midwest ISO to provide market monitoring services. In that order, the Commission explained that the mere existence of a contractual agreement with Midwest ISO, in and of itself, does not threaten the IMM's independence. In the same order, we also held that the market monitoring proposal gave the state regulatory agencies the appropriate access to this market data and information.¹⁹ Finally, we grant clarification that sellers into the Midwest ISO market at present are not exempt from the SMA screen. In LG&E Capital Trimble County LLC, 98 FERC ¶ 61,261 (2002), we held that Midwest ISO does not currently have a Commission-approved market monitoring and market power mitigation program in place of the type needed to exempt sellers from the SMA screen.²⁰

3. Midwest ISO Transmission Owners

¹⁸See July 31 Order at P 48.

¹⁹ 101 FERC ¶ 61,228 at 61,994.

²⁰We note that this will change with the commencement of the Midwest ISO market and accompanying market power mitigation measures. In a recent order, Midwest Independent System Operator, Inc., 102 FERC ¶ 61,280 (2003), we conditionally accepted Midwest ISO's proposed market power mitigation measures.

a. The December 20 Order

23. In the December 20 Order, the Commission agreed with various intervenors that the TOs cannot be permitted to have veto privileges regarding filings that affect pricing. Accordingly, we required the modification to the Midwest ISO Agreement to eliminate the TOs' veto privileges regarding pricing. We did, however, find that the TOs have a valid right to protect themselves against potentially unreasonable changes to the proposed revenue distribution methodology and thus permitted them to maintain that right.

b. Rehearings

24. The TOs seek rehearing regarding certain portions of the December 20 Order involving rate filing responsibility and authority. The TOs argue that the Commission erred in departing from its prior approval of provisions allowing the TOs rate setting authority without any explanation or finding that the provisions are unjust or unreasonable. According to the TOs, in Midwest Independent Transmission System Operator, Inc. 84 FERC ¶ 61,231 (1998), the Commission approved provisions which essentially allowed the TOs to control pricing and revenue distribution methods and left to Midwest ISO the responsibility to revise other areas of the OATT or Midwest ISO Agreement. The TOs argue that the restriction on Midwest ISO's ability to change the pricing structure was intended to prevent Midwest ISO from upsetting the compromises that resulted in the pricing structure agreement which, they contend, was one of the most difficult issues in the formation of Midwest ISO.

25. The TOs also argue that in Order No. 2000, while the Commission indicated that transmission owners should retain Section 205 filing rights, with respect to the level of their revenue requirement, some confusion was created by the statement that the RTO will make Section 205 filings to recover from transmission customers the cost of the payments it makes to transmission owners. The TOs contend that in Order No. 2000, the Commission appeared to separate filings concerning rate design from filings made by transmission owners for recovery of their revenue requirement. The TOs state that, in Order No. 2000-A, the Commission clarified that it was not making findings with regard to filing rights in the context of a generic proceeding but would do so under Order No. 2000 compliance filings.²¹

²¹The TOs note that their efforts in seeking judicial review were thwarted, as the court decided that since Order No. 2000 did not mandate RTO participation, the TOs would not suffer any injury due to loss of filing rights unless they actually participated in an RTO. See Snohomish, *supra* note 2.

26. The TOs advance three arguments in support of their request. First, the TOs argue that the Commission has not shown that the previously-accepted pricing provisions of the Midwest ISO Agreement are unjust or unreasonable. Moreover, the TOs assert that, as this represents an important term of a previously accepted contract, the Commission cannot abrogate this absent a showing that such abrogation is in the public interest. Second, they argue that they are exposed to unreasonable risk with the Commission's attempt to divorce rate design from revenue recovery. The TOs contend that this not only goes against long-standing Commission policy, it makes no sense, as the level of the rate will determine whether the required revenue is recouped, and rarely do rates generate the exact amount of the revenue requirement. The TOs argue that denying them control over proposed rates and rate design denies them control over the single most important factor for determining whether they will recover their revenue requirement.²²

27. Finally, the TOs argue that allowing them to retain their rate filing rights is consistent with the independence requirements of Order No. 2000 and will promote the development of ITCs and performance-based rate mechanisms. The TOs contend that retention of rate filing rights takes nothing away from Midwest ISO having the operational independence necessary to efficiently manage the transmission system. The TOs also assert that any concerns about potential discrimination are unfounded as the Commission will, as it has done historically, review and remedy any alleged discrimination in rate proposals.

c. Analysis

28. We will deny the TOs' request for rehearing but provide clarification.²³ We disagree with the TOs that our rulings approving the Midwest ISO Agreement and the subsequent ruling in the December 20 Order are inconsistent and not supported. As we clarified in *Alliance Companies*, 91 FERC ¶ 61,152 (2000), our approval of certain Section 205-related veto rights, under the Midwest ISO Agreement, took place in the context of ISO principles and prior to our issuance of Order No. 2000.

²²The TOs also argue that Midwest ISO, as a not-for-profit organization, cannot make up any short fall in the revenues.

²³Likewise, we reject as moot the TO's comments in which they reserve their rights regarding their opposition to the removal of Article Two, Section IX, Paragraph C(7) of the Midwest ISO Agreement filed in Docket Nos. RT01-87-006 and ER02-108-004.

29. As we explained in a recent remand order involving PJM Interconnection,²⁴ we have been faced with the need to better clarify our obligation in the context of RTO development "[t]o balance and apportion statutorily-conferred rights and responsibilities among different public utilities that need to work cooperatively to effectuate non-discriminatory transmission service."²⁵ In the PJM Order, we explained that in the RTO/ISO context there are two "public utilities" which are vested with Section 205 filing rights. First, transmission owners continue to be public utilities even after formation of the RTO/ISO as they continue to own the transmission facilities that are subject to our regulation under the FPA.²⁶ Second, the RTO/ISO, as a result of the voluntary action of the transmission owners in creating the RTO/ISO, is also a public utility as it, and not the transmission owners, "operates" jurisdictional facilities, as encompassed in the very definition of a public utility in Section 201(e) of the FPA.²⁷ Therefore, we noted that as a public utility that operates jurisdictional transmission facilities and is also the transmission service provider, the RTO/ISO has the same right under Section 205 to make filings with respect to its public utility functions as the transmission owners have under Section 205 to make filings with respect to their public utility functions.²⁸

30. After determining that both entities are "public utilities," albeit different classes of public utilities, the PJM Order explained the need to respect and balance the filing rights and responsibilities between the two classes.²⁹ We explained that we continue to believe that the transmission owners have an absolute right to make Section 205 filings to recover their revenue requirements from the RTO/ISO but that this must recognize the fact that the rates charged to transmission customers under the RTO/ISO tariff include the costs incurred by the RTO/ISO in operating facilities and administering the tariff, as well as a component to reflect the flow through of the transmission owners' revenue requirements. We stated that we remained concerned that if the individual transmission owners were in charge of filing rates for the regional transmission services that the RTO/ISO provides,

²⁴PJM Interconnection, 101 FERC ¶ 61,318 (2002) (PJM Order); order on reh'g and compliance filing, 103 FERC ¶ 61,170 (2003).

²⁵Id. at 62,298.

²⁶Id.

²⁷Id.

²⁸Id.

²⁹In doing so, we explained that the Commission cannot force either class to cede their filing rights under Section 205 of the FPA. Id. at 62,299.

independence and discrimination issues may arise as individual transmission owners lack a regional perspective and the obligation to plan for regional reliability.³⁰

31. The PJM Order further noted that in recent orders, we afforded further flexibility with regard to Section 205 filing rights of certain transmission owners that are members of RTOs.³¹ We then concluded that the PJM transmission owners should be given another opportunity to explain the reasonableness of their originally proposed allocation of filing responsibilities. We based this decision on our belief that as their initial proposal was now more than five years old, it did not reflect the type of flexibility we are now willing to afford to ISO and RTO filings.³²

32. We believe that the Midwest ISO Agreement is likewise dated and thus, consistent with our decision in the PJM Order, we will permit the TOs to either file with us, within 45 days, an explanation as to how and why their originally proposed allocation of filing rights ensures the independence of the regional entity and does not result in undue discriminatory rates and practices. Alternatively, based on their further consideration of the matters at issue and after taking into consideration recent orders on Section 205 filing rights, as described above, the TOs may consider another model; if so, they must file their alternative model in a new Section 205 filing and an explanation as to why that allocation of filing responsibilities ensures independence and avoids undue discrimination or

³⁰*Id.* at 62,300.

³¹*Id.* at 62,301. We cited the following orders; Commonwealth Edison Company, *et al.*, 90 FERC ¶ 61,192 (2000), *reh'g denied*, 91 FERC ¶ 61,178 (2000) (permitting the ITC to file, without Midwest ISO approval, under Section 205 for rate design or rate changes for service solely within the ITC, including incentive rates, based upon our belief that the independence of the ITC would ensure that any proposal would not unduly discriminate among particular market participants); Avista Corp., *et al.*, 95 FERC ¶ 61,114 at 61,338-39 (2001), *reh'g denied*, 96 FERC ¶ 61,058 at 61,177 (2001); (permitting the ITC to file, unilaterally under Section 205, incentive rates so long as the ITC consults with the RTO prior to filing and, in the event of a dispute, the RTO position would govern); and TRANSLink Transmission Company 99 FERC ¶ 61,106 (2002) (approving a provision allowing the ITC to maintain a separate schedule within the Midwest ISO tariff to facilitate a different rate design and different rates, as long as the ITC could justify differences and explain how regional uniformity is not harmed).

³²In an order on the PJM transmission owners' compliance filing, being issued concurrently with this order, the Commission finds that the PJM transmission owners' proposal inappropriately limits the PJM Board's authority to vetoes of the transmission owners' initiatives. See PJM Interconnection, 103 FERC ¶ 61,170 (2003).

preference.³³ As discussed below, we will, however, accept Midwest ISO's compliance filing which deletes Article Two, Section IX, Paragraph C(7) of the Midwest ISO Agreement regarding the consent needed of the TOs for changes to the pricing protocols.

B. Compliance Filing, Docket Nos. RT01-87-006 and ER02-108-004

1. Veto Rights of the TOs

a. The December 20 Order

33. In the December 20 Order we agreed with certain intervenors that the TOs cannot be permitted to have veto privileges regarding filings that affect pricing.³⁴ We therefore required modification of the Midwest ISO Agreement to eliminate the TOs' veto privileges regarding pricing. However, we found that the TOs have a valid right to protect themselves against potentially unreasonable changes to the proposed revenue distribution methodology.

b. Compliance Filing

34. In the compliance filing, Midwest ISO has deleted Article Two, Section IX, Paragraph C(7) of the Midwest ISO Agreement which provided that there be unanimous consent of all of the TOs in order to change the pricing protocols during the transition period (i.e., the veto rights). In addition, Midwest ISO has added Article VI to Appendix C of the Midwest ISO Agreement to specifically preserve the TOs' rights with respect to control in determining their revenue requirements. As revised, Article VI essentially provides that Midwest ISO shall not file under Section 205 or 206 of the FPA filings which adversely impact the revenues received by the TOs. It further provides that, if Midwest ISO makes such a filing (or fails to make a filing) and such action causes a TO not to recover its revenue requirement or the revenues provided under the Midwest ISO Agreement (or

³³Any such filing must specifically address our concerns regarding potential independence and discrimination issues which may arise as individual transmission owners lack regional perspective and the obligation to plan for regional reliability. While not prejudging any such filing, it is this independent approach that has led to our flexibility in the context of ITCs and thus it may be difficult for transmission owners that are also market participants to overcome the potential that their parochial interests, in the context of individual Section 205 filings, will not somehow adversely affect the independence of the RTO.

³⁴Accord, Alliance Companies, 91 FERC ¶ 61,152 at 61,579 (2000) and 94 FERC ¶ 61,070 at 61,305 (2001).

separate agreement), then Midwest ISO shall file with the Commission an adjustment in rates to allow such recovery. Finally, Midwest ISO has added Article VII which states that Midwest ISO will have exclusive authority under Section 205 to propose rates, terms and conditions of transmission service under its OATT unless otherwise permitted by the Commission.

c. Comments

35. DENA, WPPI and Calpine protest the addition of Article VI to Appendix C of the Midwest ISO Agreement. Both DENA and Calpine protest language in Article VI that refers to filings by Midwest ISO that "adversely impact" the TOs' revenues. DENA argues that this general prohibition places much greater restrictions on Midwest ISO's ability to make rate filings. Calpine further argues that Midwest ISO will lack exclusive authority over rates if the TOs are permitted to alternatively constrain Midwest ISO's ability to make certain filings or direct that Midwest ISO make certain filings.³⁵ Calpine requests that the proposed language be rejected. DENA requests that Article VI be revised to delete the sentence which provides that Midwest ISO shall not file under Section 205 or 206 of the FPA filings which adversely impact the revenues received by the TOs.

36. WPPI argues that the proposed new language in Articles VI and VII may be read to leave residual filing rights with the TOs. Like DENA and Calpine, WPPI is concerned that Article VI may be read to permit the TOs to enjoin a Midwest ISO rate filing that has the potential to reduce revenues.³⁶ Moreover, according to WPPI, Article VI seems to contemplate a continued TO role in rate filings, with the TOs individually or as a group requesting Midwest ISO to make rate filings, and Midwest ISO obliged to make and fully pursue rate filings that the TOs request. Finally, WPPI argues that the addition of Article VII falls short of the Commission's requirement in the December 20 Order that MISO have exclusive authority under Section 205 to propose rates, terms and conditions of transmission service by the addition of the phrase "unless otherwise permitted by the Commission."

37. WPPI suggests that, if the Commission does not reject the proposed language in Article VII, in the alternative, the Commission should require Midwest ISO to strike the phrase "unless otherwise permitted by the Commission" in Article VII, and add language at the end of Article VII stating that the rates filed by Midwest ISO must permit full recovery

³⁵Both Calpine and DENA argue that this language would prevent Midwest ISO from making a 205 filing to reduce excessive rates.

³⁶WPPI is also concerned that this language fails to take into account the possibility that the revenue requirements may be accepted subject to refund.

of the then-effective revenue requirement, subject to any refund obligation, plus the cost of Midwest ISO performing its duties under the Midwest ISO Agreement.

38. The TOs filed comments noting that while they do not disagree with Midwest ISO making the compliance filing, they note their opposition to removal of Article Two, Section IX, Paragraph C(7) of the Midwest ISO Agreement. Additionally, the TOs state that the new language of Article VI is consistent with the requirements of the December 20 Order and Order No. 2000 with respect to the TOs' control over their revenue requirements.

39. In its answer, Midwest ISO argues that DENA, Calpine and WPPI point to no inconsistency between the provisions of Order No. 2000 and the provisions submitted by Midwest ISO, and their protests should be rejected. Midwest ISO also notes that there is a benefit with the additional language to the extent that the TOs appreciate that their rights are explicitly set forth in Midwest ISO Agreement. Moreover, Midwest ISO argues that any concerns that Midwest ISO will be precluded from lowering transmission rates if it is over-collecting the TOs' revenue requirements rests on a strained interpretation of the language. According to Midwest ISO, the entire concept of the new provision is to address the TO's revenue requirements and thus the clear construct of the provision is that Midwest ISO will not take action that adversely impacts the opportunity of the TOs to receive revenue sufficient to meet their requirements.

40. The TOs answer that the Commission should reject the protests of DENA, Calpine and WPPI regarding the addition of Article VI as the proposed language is appropriate because it recognizes the division of responsibility between Midwest ISO and the TOs as provided in Order No. 2000 where the TOs were given revenue requirement responsibility. According to the TOs, the protests should be dismissed in that they seek to take away that which the Commission has already given to the TOs. The TOs argue that allowing Midwest ISO to seek to reduce rates because it believes that the TOs are recovering more than their revenue requirements would violate the division of responsibilities detailed in Order No. 2000. That, according to the TOs, is clearly a revenue requirement matter which the TOs continue to control under Order No. 2000, not the RTO. In any event, the TOs claim that under the Midwest ISO OATT, there should not be over-recoveries as the owners are using rate formulas to calculate their revenue requirements and the corresponding rates. Finally, they argue that over-recovery can be addressed under the Section 206 complaint process by either customers or the Commission.

d. Analysis

41. We will accept the compliance filing to the extent that it complies with our ruling on veto rights and accept the deletion of Article Two, Section IX, Paragraph C(7) of the Midwest ISO Agreement. We will reject those aspects of the compliance filing which add Article VI and VII to Appendix C of the Midwest ISO Agreement as being outside the scope of what we ordered in the December 20 Order.³⁷ Even if we were to entertain the addition of Article VI, we are concerned that the condition that Midwest ISO not make any filings which "adversely impact" the revenues to be received by the TOs is simply too broad and open to wide interpretation. While the December 20 Order was very clear that we believe that the TOs have a valid right to protect themselves against potentially unreasonable changes to the proposed revenue distribution methodology, the proposed language is too restrictive of Midwest ISO's filing rights. As discussed above, we are allowing the TOs an opportunity to file additional support for their originally proposed allocation of filing rights. Therefore, our acceptance here of the elements of the compliance filing that comply with our directives in the December 20 Order concerning the elimination of the TOs' veto rights is subject to the outcome of any further action should the TOs take advantage of this opportunity.

2. Planning

a. The December 20 Order

42. The December 20 Order expressed concern that it was not completely clear that the Midwest ISO planning process included as a goal the fostering of competitive markets. Thus we directed Midwest ISO to modify the planning process to reflect that it will give full consideration to all market perspectives, including demand-side options, and identify expansions that are critically needed to support competition as well as reliability needs.

43. We also found that the planning process appeared to limit construction and ownership of new transmission facilities identified by the plan to TOs only. We found that our goal of competitive markets is better served by RTO expansion plans that allow for third party participation as well as permit merchant projects outside the plan. Accordingly, we directed Midwest ISO to allow for third parties to participate in the construction and ownership of new transmission facilities identified by the plan.

b. Compliance Filing

³⁷See Consumers Energy Company, 97 FERC ¶ 61,209 at 61,913 (2001).

44. Midwest ISO has added language in Section VI of Appendix B of the Midwest ISO Agreement, Planning Framework, to require that planning staff develop plans to meet expected use patterns and to analyze the performance of the transmission system in meeting both reliability needs and the needs of the competitive bulk power market under a variety of contingency conditions. Additionally, Midwest ISO states that it commits that its planning process will give full consideration to all market participants, including demand-side programs and reliability expansions necessary to both support competition in the bulk power markets and maintain reliability.

45. Finally, Midwest ISO has added language to Appendix B to allow and encourage third parties (including merchant transmission) to fully participate in the planning process including participation in the financing, construction and ownership of new transmission facilities.

c. Comments and Midwest ISO's Answer

46. WPPI argues that the compliance filing falls short of implementing the Commission's intent in the December 20 Order by relegating projects needed to foster competitive markets to second tier status. According to WPPI, in amending Section I of Planning Framework, Midwest ISO proposes to expand the TOs' planning obligation only to include "pursu[ing] projects that will promote expanded trading in generation markets." WPPI argues that this amendment only addresses one of the three related objectives that the December 20 Order identified for infrastructure investment that will make generation markets more competitive: (1) expanding trading opportunities; (2) better integrating the grid; and (3) alleviating congestion that may enhance market power.

47. Additionally, WPPI contends that Midwest ISO's proposed amendment to Section VI does not fully comply with the December 20 Order because it fails to require consideration of competitive market needs in the TOs' plans that are to be integrated into the Midwest ISO plan.

48. In addition, WPPI submits that, while Midwest ISO has added language requiring its plan to identify expansions critical to support competition, there is no obligation to follow through and ensure construction of such projects. WPPI contrasts the treatment of reliability needs (which are to be "met") and the needs to foster competitive markets (which are merely to be "identified"). WPPI submits proposed changes to the Midwest ISO Agreement language filed on compliance by Midwest ISO which WPPI claims will conform the Midwest ISO Agreement to the requirements of the December 20 Order.

49. In its answer, Midwest ISO states that it believes that the amendments to its planning process fully comply with the requirements of the December 20 Order. Midwest ISO

contends that the planning process is centered around grid integration and congestion management, but that if the Commission considers it necessary to explicitly state these objectives in the Midwest ISO Agreement, Midwest ISO would have no objection to the specific revisions proposed by WPPI.

d. Analysis

50. We agree that the language proposed by WPPI helps to clarify that one of the goals of the Midwest ISO planning process, including the planning performed by the TOs, is to foster competitive markets; therefore, we will direct Midwest ISO, as it agreed to in its answer, to revise the planning protocol accordingly. With respect to including third parties in the planning process, we find that the revision proposed by Midwest ISO complies with our directive in the December 20 Order.

C. Other Compliance Issues

51. In compliance with the December 20 Order, Midwest ISO has also: (1) amended its OATT to require that ancillary services be procured at least cost; (2) re-filed its Market Monitoring Plan as a properly formatted attachment to the Midwest ISO's OATT; (3) added a 45-day deadline in the market monitoring plan for Midwest ISO to either agree to implement a recommendation made by the IMM or disagree with recommendations made by the IMM; and (4) proposed what it characterizes as minor modifications to the Midwest ISO Agreement and the Midwest ISO OATT, which are intended to correct typographical errors and minor inconsistencies.

52. No parties raised concerns regarding these revisions. We will accept the above modifications

The Commission orders:

(A) The requests for rehearing are hereby denied, and clarification is provided, as discussed in the body of the order.

(B) The Commission hereby allows the TOs, within 45 days of the date of this order, to explain how and why their originally proposed allocation of Section 205 filing rates, among the public utility transmission owners and the public utility RTO (i.e., the TOs and Midwest ISO), ensures the independence of the RTO and does not result in unduly discriminatory rates and practices, as discussed in the body of this order.

(C) Midwest ISO's compliance filing is hereby accepted, as modified, as discussed in the body of this order, effective February 1, 2002.

(D) Midwest ISO is directed, within 30 days of the date of issuance of this order, to make a compliance filing consistent with the discussion in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.