

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. ER03-86-001, and
ER03-86-002

ORDER ON REHEARING AND COMPLIANCE

(Issued May 21, 2003)

1. On January 21, 2003, Nebraska Public Power District (NPPD) and TRANSLink Development Company, LLC (TRANSLink) filed timely requests for rehearing of the Commission's December 19, 2002 order.¹ On February 19, 2003, the Midwest Independent Transmission System Operator, Inc. (Midwest ISO) submitted its compliance filing in response to the December 19 Order.

2. In this order, the Commission accepts the Midwest ISO's compliance filing, provides clarification, and addresses related rehearing requests. This order benefits customers in the Midwest region by ensuring that the Midwest ISO's open access transmission tariff (OATT) specifies the terms and conditions of services thereunder.

I. Background

3. On October 24, 2002, the Midwest ISO filed proposed revisions to its OATT to allow independent transmission companies (ITCs) to participate within its footprint. Among the revisions, the Midwest ISO proposed to allow ITCs to assume certain functions that would otherwise be performed by the regional transmission organization (RTO). One intervenor argued that the Commission had already held that the Midwest ISO, rather than an ITC, must provide certain services, and contended that the Midwest ISO should modify its schedule of unbundled RTO services for ITCs, under Schedule 10, to clarify that such services are mandatory rather than optional.

¹Midwest Independent Transmission System Operator, Inc., 101 FERC ¶ 61,317 (2002) (December 19 Order).

4. On November 27, 2002, the Midwest ISO clarified that the services provided under Schedule 10, Sections III.A.1 through III.A.3, are, in fact, mandatory services that must be taken from the Midwest ISO.¹⁰ Moreover, the Midwest ISO agreed that the market monitoring function should also be among the mandatory services and stated that it was not opposed to revising Section III.A to clarify the mandatory nature of this service. In the December 19 Order, the Commission found that the Midwest ISO's clarification and offer to revise Section III.A satisfied the intervenor's concerns and directed the Midwest ISO to make these revisions.¹¹

5. In its filing, the Midwest ISO also proposed to add a new Section 41 to its OATT to address any possible conflicts that may arise between state laws and the Midwest ISO OATT.¹² The Midwest ISO explained that this provision was added at the request of public power entities wishing to participate in an RTO through an ITC.

6. However, in the December 19 Order, the Commission stated that it could not accept the proposed language in Section 41 without additional clarification. While the Commission stated that it welcomes the participation of public power entities, and understands their desire to avoid unexpected adverse outcomes in those limited instances where state law or regulation could potentially conflict with the terms of the Midwest ISO's OATT, the Commission expressed concern that the proposed language in Section 41 was overly broad. The Commission, therefore, directed the Midwest ISO to revise Section 41 to provide more specific information relating to public power entities' obligations and to the limited instances when a conflict with the OATT could adversely affect a public power entity's ability to participate in an ITC or the RTO.¹³

II. Requests for Rehearing

¹⁰Sections III.A.1, II.A.2, and III.A.3 provide for the Midwest ISO's provision of Tariff Administration Services, Business Services, and Reliability Services, respectively.

¹¹December 19 Order at P 31.

¹²Proposed Section 41 states: "[t]he participation in this Tariff by an ITC Participant that is not a public utility under the Federal Power Act is subject in all respects to the laws and regulations of the state of its creation and to rate schedules adopted by its governing board under state law. In the event of a conflict between such state law, regulations or rate schedules with any provisions in this Tariff, such state law, regulations or rate schedules shall govern with respect to the application of this Tariff to said ITC Participant."

¹³December 19 Order at P 21.

7. On January 21, 2003, Nebraska Public Power District (NPPD) and TRANSLink Development Company, LLC (TRANSLink) filed timely requests for rehearing.

8. In its request for rehearing, NPPD argues that the Commission erred in the December 19 Order by failing to accept, without modification, the Midwest ISO's proposal to revise its OATT to include language in Section 41 that addresses conflicts with state laws and regulations. NPPD states that the Commission's determination that the proposed Section 41 is "overly broad" is problematic since the Commission has already approved an identical provision in Section 39.1 of the Midwest ISO's OATT for federal participants. NPPD states that the December 19 Order fails to explain why federal and state public power participants should be treated differently, and submits that there is no justification for treating state entities and federal entities differently.

9. In its motion for clarification or, in the alternative, request for rehearing, TRANSLink questions the December 19 Order's directive to the Midwest ISO to revise Schedule 10, Sections III.A.1 through III.A.3, to clarify that Tariff Administration Services, Business Services, and Reliability Services are mandatory services that must be taken from the Midwest ISO. TRANSLink states that the Commission has previously allowed ITCs to perform many of the functions included in these unbundled services; TRANSLink argues that the Commission's determination that such services must now be taken from the Midwest ISO appears to be substantially at odds with prior determinations regarding the allocation of functions between an RTO and an ITC.¹⁴ Accordingly, TRANSLink seeks clarification that the allocation of functions between the Midwest ISO and ITCs that the Commission has previously approved remains unchanged by the Commission's directive in the December 19 Order.

10. On January 31, 2003, the Midwest ISO filed a late motion for clarification in order to modify its response filed on November 27, 2002 and referred to above. The Midwest ISO claims that it had intended to respond to the intervenor by stating that Schedule 10, Section III.A.3 (Reliability Services) is mandatory, but that Schedule 10, Section III.A.1 (Tariff Administration Services) and Section III.A.2 (Business Services), should be optional, not mandatory, for an ITC. The Midwest ISO states that it did not immediately recognize the significance of this clerical error; the Midwest ISO states that it was only after reviewing the request for rehearing filed by TRANSLink that it recognized the significance of this clerical error.

¹⁴Citing TRANSLink Transmission Company, LLC, 99 FERC ¶ 61,106, order on rehearing, 101 FERC ¶ 61,140 (TRANSLink); TRANSLink Transmission Company, LLC, 101 FERC ¶ 61,320 (2002).

11. The Midwest ISO explains that Reliability Services are mandatory services that must be taken from the Midwest ISO. However, the Midwest ISO believes that Tariff Administration Services and Business Services should be voluntary for transactions that both source and sink in the footprint of an ITC. The Midwest ISO states that it believes that such a delineation of functions between an RTO and an ITC is consistent with prior Commission determinations. Accordingly, the Midwest ISO requests that the Commission clarify that the December 19 Order did not intend to alter or modify the previously allowed delineation of functions between TRANSLink and the Midwest ISO, as approved in prior orders, and that Tariff Administration Services and Business Services should be optional, not mandatory.

12. Wisconsin Electric Power Company (WEPCO) and the Joint Defense Group¹⁵ filed responsive pleadings in opposition to the Midwest ISO's motion for clarification. WEPCO argues that the Midwest ISO's motion rises well above a request to remedy a "clerical error," and, instead, modifies a substantive position that it presented in its November 27, 2002 response. WEPCO further states that the Commission has previously held that an ITC must take several of these services from the Midwest ISO. Specifically, with respect to Tariff Administration Services, WEPCO states that the Commission has previously decided that it would not allow TRANSLink to maintain its own tariff.¹⁶

13. Joint Defense Group also urges the Commission to reject the Midwest ISO's motion for clarification. Joint Defense Group states that its experts expressly relied upon the Midwest ISO's response, and the Commission's directive in the December 19 Order, when preparing testimony that was filed on December 20, 2002 in Docket Nos. ER02-111-003 and ER02-652-002. As such, Joint Defense Group contends that if the Commission permits the Midwest ISO to modify its earlier response, its testimony will be undermined and its litigation position in this other proceeding will be prejudiced. Moreover, Joint Defense Group states, prior Commission determinations have made clear that an ITC may not have its own separate tariff, which is inconsistent with the Midwest ISO's current position that an ITC need not purchase Tariff Administration Services from the Midwest ISO.

III. Compliance Filing

¹⁵The Joint Defense Group consists of: Wisconsin Public Service Corporation, Upper Peninsula Power Company, Madison Gas & Electric Company, Wisconsin Public Power, Inc., Wisconsin Electric Power Company, Coalition of Midwest Transmission Customers, and Industrial Energy Users-Ohio.

¹⁶TRANSLink, at 61,464.

14. On February 19, 2003, the Midwest ISO filed to comply with the December 19 Order. In its compliance filing the Midwest ISO seeks to: (1) clarify that the revisions to Attachment M were consistent with the Commission's understanding of the use of historical control area boundaries; (2) clarify that a revised Attachment P listing TRANSLink's grandfathered contracts and specifying the grandfathered determination date will be filed sixty days prior to TRANSLink becoming operational; (3) commit that the ITC Control Area Services and Operations Tariff will be filed sixty days prior to TRANSLink becoming operational, but clarify that TRANSLink, not the Midwest ISO, may file the ITC Control Area Services and Operations Tariff after the Midwest ISO's review of the document; and (4) make revisions to Schedule 10, Section III.A (in light of its motion for clarification) that Tariff Administration Services and Business Services are optional services and that Reliability Services and Market Monitoring Services are mandatory services that must be taken from the Midwest ISO. The Midwest ISO also proposes revisions to Schedule 10 to clarify that it will administer the OATT on behalf of the ITC (i.e., an ITC will not maintain its own separate tariff).

15. Finally, the Midwest ISO did not submit any tariff revisions to comply with the Commission's directive to revise its proposed public power provision in Section 41 and instead requests that the Commission accept the language in Section 41, as originally proposed in its October 24, 2002 filing. The Midwest ISO states that since the Commission has not ruled on NPPD's request for rehearing, making any revision to Section 41 in its compliance filing would be both impractical and in conflict with a similar Commission-approved provision of its OATT (Section 39.1). Additionally, in defense of its proposed Section 41, the Midwest ISO states that this language is broad by necessity, and it will only apply, if ever, in the rare instance of conflict between the OATT and state law. The Midwest ISO states that the Commission's request for greater specificity is impracticable because of the vast range of unique situations in which conflicts between the OATT and state law could arise.

16. The Midwest ISO adds that the proposed Section 41 is merely defensive, and neither impacts the Commission's jurisdiction over the Midwest ISO nor grants public power entities any authority to usurp the Commission's power. The Midwest ISO contends that the proposed language merely accommodates public power entities' desire to ensure that RTO participation will not place them in violation of state law.

17. Notice of the Midwest ISO's compliance filing was published in the Federal Register, 68 Fed. Reg. 10,007 (2003), with motions to intervene and protests due on or before March 12, 2003. Timely comments or protests were filed by Public Service Electric and Gas Company and PSEG Energy Resources & Trade LLC (collectively, PSEG), Lincoln Electric System, and TRANSLink. Numerous parties filed answers in response to PSEG's protest. Finally, Omaha Public Power District (OPPD) and the Large

Public Power Council (LPCC) filed late motions to intervene after the December 19 Order was issued.

18. In its protest, PSEG states that the Midwest ISO failed to comply with the Commission's directive to modify the proposed language in Section 41 to supply greater specificity with respect to the handling of conflicts between state law and the OATT. PSEG contends that the Midwest ISO has not demonstrated that providing greater specificity is "impractical," and states that Section 41, as proposed, would be an open invitation to public power entities to selectively comply with the OATT. PSEG suggests, however, revising Section 41 to provide that state law would prevail only to the extent necessary for a public power entity to maintain its jurisdictional status.

19. TRANSLink, in its comments, states that it supports the Midwest ISO's clarification of Section III.A of Schedule 10 of the OATT with respect to the intended delineation of functions between an RTO and an ITC. TRANSLink states that the Midwest ISO's clarification is consistent with prior Commission orders. Additionally, TRANSLink supports the Midwest ISO's proposed Section 41 in its current form and urges the Commission to accept the language without modification. TRANSLink states that proposed Section 41 is consistent with the principle that the Commission should accommodate the unique needs of non-public utility entities who seek to participate in ITCs and RTOs because of the important benefits that are likely to accrue from expanding the geographic scope of markets to include public power entities.

IV. Discussion

20. Rule 213 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2002), generally prohibits answers to protests, and we are not persuaded to waive this prohibition. Accordingly, these answers are rejected.

21. We will deny, pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, OPPD and LPCC's motions to intervene in this proceeding.¹⁷ Among other things, Rule 214 requires that a person seeking late intervention must show good cause for the delay.¹⁸ When late intervention is sought after the issuance of an order, the prejudice to the other parties and burden can be substantial. Thus, movants bear a higher burden to

¹⁷18 C.F.R. § 385.214 (2002).

¹⁸18 C.F.R. § 385.214(b)(3) (2002).

demonstrate good cause for granting such late intervention.¹⁹ The Commission finds that OPPD and LPCC have not met that burden.

1. Section 41 - Public Power Participation

22. Proposed Section 41 is applicable "in the event of a conflict." As proposed Section 41 would be part of the OATT, a jurisdictional tariff, it is for the Commission to interpret proposed Section 41 and decide when, and to what extent, there is, in fact, a conflict.²⁰ On this basis, and upon further consideration, we will accept proposed Section 41, as originally filed.

23. With regard to NPPD's request for rehearing, NPPD argues that the Commission has already approved a similar provision in Section 39.1 of the Midwest ISO's OATT for federal entities.²¹ The Commission agrees with NPPD to the extent that there may be no justification for treating state and federal public power entities differently. However, like proposed Section 41 discussed above, Section 39.1 is triggered by a conflict and it is for the Commission to interpret and decide when, and to what extent, an actual conflict exists. As such, NPPD's request for rehearing is hereby granted.

2. Section III.A of Schedule 10

24. Upon review of the Midwest ISO's November 27, 2002 response, it did not seem implausible that the Midwest ISO would propose that services such as Tariff Administration Services and Business Services be taken from the Midwest ISO. However, we also recognize that the parties are currently addressing the Midwest ISO's proposal to unbundle its Schedule 10 administrative cost adder for ITCs, including this very issue, *i.e.*, which services an ITC must take from the Midwest ISO, in a proceeding in Docket Nos. ER02-111-003 and ER02-652-002. Therefore, upon reconsideration, we will accept the

¹⁹North Baja Pipeline, L.L.C., 99 FERC ¶ 61,028 (2002).

²⁰The Commission cannot allow participants in an RTO, including public power entities, unfettered discretion to unilaterally disregard the terms of the OATT because they may believe that, from time to time, some provision of the OATT is inconsistent with state law.

²¹Section 39.1, in pertinent part, states: "[i]n the event of a conflict between these Federal Participation provisions and any other provision of this Tariff, these provisions shall have precedence with respect to the application of this Tariff to the United States."

revisions to Schedule 10 originally proposed by the Midwest ISO in its filing in this proceeding, subject to the outcome of Dockets Nos. ER02-111-003 and ER02-652-002.

25. In response to TRANSLink's concerns, we clarify that our acceptance of the Midwest ISO's proposed revisions to Schedule 10 is not intended to affect, in any way, our prior decisions regarding the performance of RTO functions by ITCs. Resolution of issues concerning the administrative cost adder applicable to ITCs should be informed by our decisions regarding the performance of RTO functions by ITCs, not determinative of what RTO functions can be performed by an ITC.

3. Filing of the Control Area Services and Operations Tariff

26. Finally, in response to the Midwest ISO's request for confirmation that it is acceptable for TRANSLink, not the Midwest ISO, to file the Control Area Services and Operations Tariff sixty days prior to its operational date (and following the Midwest ISO's review of the document), we find this procedure to be acceptable.

The Commission orders:

(A) The Midwest ISO's compliance filing of February 19, 2003 is hereby accepted as discussed in the body of this order.

(B) TRANSLink's request for clarification is hereby granted, as discussed in the body of this order, and its request for rehearing is hereby dismissed as moot.

(C) NPPD's request for rehearing is hereby granted, as discussed in the body of this order.

(D) The Midwest ISO's motion for clarification of January 31, 2003 is hereby denied, for the reasons discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

