103 FERC ¶ 61,282

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 No. ER03-727-000

ORDER ACCEPTING TARIFF REVISIONS FOR FILING,
AS MODIFIED, AND DIRECTING COMPLIANCE FILING

(Issued June 5, 2003)

I. Introduction

1. On April 8, 2003, the Midwest Independent Transmission System Operator, Inc. (Midwest ISO) filed proposed revisions to Midwest ISO Open Access Transmission Tariff (Midwest ISO OATT). In this order, we accept the proposed revisions for filing, as modified, and we direct Midwest ISO to make a compliance filing. This order benefits customers by ensuring just and reasonable rates under Midwest ISO OATT.

II. Background

A. Relevant Matters Preceding the Instant Filing

2. On November 1, 2002, in anticipation of the then-prospective merger between Midwest ISO and the Southwest Power Pool (SPP), Midwest ISO filed a proposed Resulting Company Open Access Transmission Tariff (Resulting Company Tariff) and a proposed agreement of the Transmission Facilities Owners to organize the new entity (Midwest ISO/SPP Agreement), which were conditionally accepted for filing by Commission order issued on December 19, 2002 (December 19 Order).[1] On March 30,

[1] Midwest Independent Transmission System Operator, Inc., 101 FERC ¶ 61,319 (2002). In an order being issued concurrently with this order, the Commission dismisses

(continued...)

2003, the respective Boards of Directors for Midwest ISO and SPP agreed to terminate their proposed merger. On April 4, 2003, in Docket No. ER02-1420-009, Midwest ISO made a filing pursuant to Section 205 of the Federal Power Act[2] to withdraw the Resulting Company Tariff and Midwest ISO/SPP Agreement in view of the termination of the merger. The Commission accepted the withdrawal filing by letter order issued on June 2, 2003.[3]

B. The Instant Filing by Midwest ISO

3. Midwest ISO states that it proposes to re-adopt certain of the proposed provisions, which were included in the now-withdrawn Resulting Company Tariff, for the Midwest ISO OATT. It states that these proposed revisions of the now-withdrawn Resulting Company Tariff are viewed as necessary by certain Midwest ISO stakeholders. Midwest ISO further states that it proposes certain other revisions to the Midwest ISO OATT at the request of the Midwest ISO Transmission Owners and other stakeholders, based on the recommendations of a consultant, The Prime Group, LLC (Prime Group), which was engaged by the Midwest ISO Transmission Owners Audit Working Group to review Midwest ISO's internal business procedures and systems.

4. Specifically, the penalty provision of Section 13.7 (Scheduling of Firm Point-to-Point Service) of the now-withdrawn Resulting Company Tariff included the following parenthetical language; "(in addition to the applicable charge for all of the firm capacity actually used),"[4] in order to clarify that the base transmission charge and the 200 percent penalty charges apply in those instances where a Transmission Customer's schedule exceeds its reserved capacity. Midwest ISO proposes to adopt this language in the Midwest ISO OATT.

5. Upon the recommendation of the Prime Group, Midwest ISO proposes to add additional language to Section 23.2 (Limitations on Assignment or Transfer of Service) to recognize that additional charges may apply when transmission service is assigned or

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[1](...continued)
requests for rehearing and clarification of the December 19 Order, as moot, citing the withdrawal of the Resulting Company Tariff and Midwest ISO/SPP Agreement. Midwest Independent Transmission System Operator, Inc., 103 FERC ¶ 61,283 (2003).

[2]16 U.S.C. § 824d (2000).

[3]Midwest Independent Transmission System Operator, Inc., 103 FERC ¶ 61,267 (2003).

[4]Section 14.5 (Scheduling of Non-Firm Point-to-Point Service) contained similar language for non-firm service.

transferred. These additional charges may include costs for Ancillary Services, Congestion, Losses and other Midwest ISO charges. Additionally, the Transmission Customer changing its service would also be responsible for supplying any additional losses required under Attachment M (Losses) if the Transmission Customer is not purchasing transmission losses under Attachment M.

6. Midwest ISO also proposes to revise Section 37.3 (Limitations on Charges and Cost Responsibilities) to include language from the now-withdrawn Resulting Company Tariff to address instances where multiple Transmission Owners occupy a single pricing zone. This is to prevent a Transmission Owner from receiving transmission service, ancillary services or losses to serve unbundled load without providing appropriate compensation to other Transmission Owner(s) or Control Area operator(s) actually providing the services. The revisions also address dispute resolution processes.

7. Midwest ISO proposes to revise Schedule 1 (Scheduling, System Control and Dispatch Service) based upon the current SPP Tariff, as approved for the now-withdrawn Resulting Company Tariff in the December 19 Order. Schedule 1 service would be provided at the effective rate for each control area operator that must take scheduling or dispatch action to implement transmission service. Under this approach scheduling activities are limited to the source and sink control areas of a transaction regardless of the span of the transmission service. To effectuate this revision, Midwest ISO will have to make certain software modifications.

8. Midwest ISO proposes to revise Schedule 3 (Regulation and Frequency Response Service) at the request of the Midwest ISO Transmission Owners to include language which recognizes the provision of generator regulation service by Control Area operators and Midwest ISO's obligation to pass through revenues for this service to the Control Area operator providing the service.

9. Midwest ISO proposes to revise Schedule 7 (Long-Term Firm and Short-Term Firm Point-to-Point Transmission Service) and Schedule 8 (Non-Firm Point-to-Point Transmission Service) to make the Midwest ISO OATT consistent with the provisions of Section 6.16 of Midwest ISO's Business Practices, which provides that there would be credits for transmission service in the event that Midwest ISO initiated a Transmission Loading Relief (TLR) event. The existing Midwest ISO OATT is silent on this point.

10. Midwest ISO proposes to revise Schedule 11 (Wholesale Distribution Service) to provide for the pass-through of specific line item charges and adjustments supplied to the Transmission Provider by individual Transmission Owners and Independent Transmission Company participants in addition to collection of Wholesale Distribution Adder Costs.

11. Midwest also ISO proposes non-substantive revisions to the Midwest ISO OATT to correct pagination errors and to update the table of contents to reflect certain rate schedules that have been filed with the Commission.

12. Midwest ISO requests an effective date of June 7, 2003, for the proposed revisions.

III. Notice of Filing and Pleadings

13. Notice of Midwest ISO's filing was published in the Federal Register, 68 Fed. Reg. 19,200 (2003), with comments, protests and interventions due on or before April 29, 2003. The Midwest ISO Transmission Owners filed a timely motion to intervene in support of Midwest ISO's filing. They reiterate Midwest ISO's view that the proposed revisions to the Midwest ISO OATT are necessary, because Midwest ISO and SPP are not combining and the Resulting Company Tariff will not become effective.

14. Duke Energy North America, LLC and Duke Energy Trading and Marketing, LLC (collectively, Duke Energy) filed a timely motion to intervene and protest. Duke Energy opposes the Unauthorized Use penalty and the change from a single postage stamp scheduling charge to pancaked zonal scheduling charges.

15. Timely motions to intervene, raising no substantive issues, were filed by: Consumers Energy Company; Sunflower Electric Power Corporation; Wisconsin Public Service Corporation; Illinois Municipal Electric Agency; Wolverine Power Supply Cooperative, Inc.; and Great River Energy.

16. On May 14, 2003, Midwest ISO filed an answer. We will discuss these pleadings in more detail below.

IV. Discussion

A. Procedural Matters

17. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,[5] the timely, unopposed motions to intervene serve to make the entities who filed them parties to this proceeding. Our Rules of Practice and Procedure prohibit answers to protests unless otherwise permitted by the decisional authority.[6] We will allow Midwest ISO's answer to the intervenors' protests, as it has provided information that has aided us in understanding matters at issue in this proceeding.

B. Analysis

1. Unauthorized Use Penalty

Midwest ISO's Proposal

18. In its Resulting Company Tariff filing, Midwest ISO proposed language in the penalty provisions in Sections 13.7 and 14.5 to clarify that the base transmission charge and the 200 percent penalty charge applied to the transmission service used by the Transmission Customer in excess of its reserved capacity.[7] The Commission accepted the proposed language for filing in the December 19 Order without comment.[8] Midwest ISO states that it proposes herein to adopt the same language for the Midwest ISO OATT in order to add clarity to the penalty provisions of Sections 13.7 and 14.5 of the Midwest ISO OATT.

Comments

19. Duke Energy argues that Midwest ISO has not justified its proposed clarification of the penalty for unauthorized use. According to Duke Energy, the Commission has permitted a charge based on no more than 200 percent of the standard rate for unauthorized

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[5] 18 C.F.R. § 385.214 (2003).

[6] 18 C.F.R. § 385.213 (2003).

[7] Midwest ISO would charge only the standard rate for the amount of transmission service the transmission customer reserves.

[8] In an exhibit in the Midwest ISO's November 1, 2002, Resulting Company Tariff filing ("Resulting Company Tariff Construction Non-Rate Terms and Conditions Development"), Midwest ISO stated that modifications resulting in this language had been accepted for filing as part of the SPP Tariff. See Southwest Power Pool, Inc., 89 FERC ¶ 61,284 (1999), order on reh'g, 98 FERC ¶ 61,038 (2002) (SPP).

use but has not found that this charge should be assessed in addition to the standard transmission charge.[9]

20. Duke Energy also compares unauthorized use to emergency service, since they are both unexpected and unscheduled. It argues that the Commission has found that it is appropriate to price emergency service so that: (1) such service is never an economic alternative to non-emergency purchases; and (2) the price will act as a disincentive to using emergency service as an economic alternative to non-emergency services, but at the same time, is not exorbitant or exploitive.[10] Duke Energy explains that in Indiana Michigan, the Commission found that the emergency rate should be priced higher than the maximum non-displacement rate that the utility would ever be in a position to quote. In that case, the quote was 50 mills/kWh. The Commission found that a rate only slightly above this 50 mills/kWh floor would meet only the first goal to ensure that emergency service is never an economic alternative to non-emergency purchases. The Commission approved a rate of twice the floor to meet both goals. Duke Energy contends the same goals should apply to unauthorized use charges, i.e., unauthorized use should be uneconomic, but the penalty should not be exorbitant.

21. In its Answer, Midwest ISO indicates that it interprets the Commission's policy in Allegheny Power as providing that the penalty charge for unauthorized use must be capped at 200 percent of the standard rate for the service at issue, and that that penalty is applied in addition to the standard rate for the unreserved capacity that is actually used so that the total charge for unauthorized use is capped at 300 percent of the standard rate. Midwest ISO states that its filing merely clarifies the penalty provisions for unauthorized use of the transmission system rather than modifying the amounts charged in the event of unauthorized use.

Commission Determination

22. We find that Midwest ISO's proposed modifications to the penalty provisions of its tariff are not consistent with Allegheny Power and that Midwest ISO has failed to justify its proposal to impose penalty charges in excess of those allowed in Allegheny Power.

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[9] Duke Energy cites Allegheny Power Systems, Inc., 80 FERC ¶ 61,143, at 61,545-46 (1997), order on reh'g, 85 FERC ¶ 61,235 (1998) (Allegheny Power).

[10] Duke Energy cites Indiana Michigan Power Company, 44 FERC ¶ 61,313 at 62,079 (1988) (Indiana Michigan); Sierra Pacific Power Co., 92 FERC ¶ 61,179 at 61,627 (2000) (Sierra Pacific); Entergy Services, Inc., 88 FERC ¶ 61,098 at 61,233-34 (1999), reh'g dismissed, 96 FERC ¶ 61,081 (2001).

Therefore, we will reject Midwest ISO's proposed modifications to the penalty provisions of its tariff.

23. In Allegheny Power, the Commission accepted penalty charges for unauthorized use of transmission service in Sections 13.7 and 14.5 of the OATT subject to a cap of 200 percent of the standard rate. Midwest ISO interprets Allegheny Power as providing that these penalty charges, in addition to the standard rate, would be applied to the unreserved capacity actually used, such that the customer experiences a penalty equal to 200 percent above the charge that otherwise would apply had it reserved sufficient capacity. Midwest ISO's interpretation is incorrect. The penalty charges accepted in Allegheny Power, subject to a cap of 200 percent of the standard rate, were intended to constitute the total charge for unauthorized use.[11] Midwest ISO apparently misinterprets our reference to the total charge as being 200 percent of the standard rate as a "penalty." Therefore, the Commission clarifies that this "penalty" charge for unauthorized use is actually the standard rate that would otherwise apply if sufficient capacity had been reserved, plus a penalty of 100 percent of the standard rate to discourage unauthorized use of the transmission service.[12]

24. The cap in Allegheny Power, of the standard rate plus a 100 percent penalty, was instituted in order to allow the Commission to gain experience regarding the wide variety of "penalty" provisions proposed in compliance tariffs, while preventing the imposition of excessive penalties. In Sierra Pacific, the Commission clarified that companies are required to adequately support the precise level of proposed penalties as being sufficient to discourage inappropriate practices without being exorbitant or exploitive.

25. We agree with Duke Energy that Midwest ISO has not adequately supported its proposal to impose penalty charges in excess of those allowed in Allegheny Power. Here, Midwest ISO has not demonstrated that a penalty of 200 percent of the standard rate (in addition to the standard rate) is necessary to deter unauthorized use without being exorbitant. Rather, Midwest ISO's only support for its proposed penalty charge is that the Commission accepted the same penalty charge for filing as part of the Resulting Company Tariff and the SPP Tariff. While the same penalty charge was included in the Resulting Company Tariff and the SPP Tariff, the previous orders addressing those filings were silent

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[11] Under Schedule 7 and Schedule 8 of the pro forma tariff and Midwest ISO's OATT, transmission customers are required to pay the appropriate rate, per KW of reserved capacity, for firm and non-firm transmission service. Unauthorized use of transmission service obviously excludes transmission service that has been reserved; therefore, transmission providers do not charge for unauthorized use of transmission service under Schedules 7 and 8 of their tariffs.

[12] See Indiana Michigan.

with respect to the penalty charge. The Commission's regulations expressly provide that acceptance for filing does not constitute approval of rate schedules or any part thereof.[13] Therefore, Midwest ISO's reliance on the past acceptance of the penalty charge for filing alone does not constitute adequate support for the proposed penalty charge in this case. We, therefore, reject Midwest ISO's unauthorized use penalty proposal and order it to revise its OATT in the compliance filing ordered below to reflect the guidance provided herein.

2. Schedule 1 - System Control and Dispatch Service

Midwest ISO's Proposal

26. Midwest ISO's current Schedule 1 provides for a single, systemwide postage stamp rate for Schedule 1 service at the average cost of the Midwest ISO Transmission Owners. Midwest ISO explains that this methodology is flawed in that each control area incurs its own unique costs to perform these functions. In addition, according to Midwest ISO, the methodology does not reflect the fact that action by two or more control area operators is necessary to effect service crossing over two or more control area boundaries, resulting in Transmission Owners being under-compensated for their costs.

27. Midwest ISO states that its proposal, made at the request of the Midwest ISO Transmission Owners, is consistent with what the Commission approved in the December 19 Order for the Resulting Company based on the SPP Tariff. Under the proposed Schedule 1, Midwest ISO would charge the effective rate[14] for each control area operator, limited to the source and sink control area operators, that must take scheduling or dispatch action to implement transmission service. Midwest ISO states that it will have to make certain software modifications, expected to be complete by July 1, 2003, in order to invoice and settle the new Schedule 1 methodology. The existing Schedule 1 methodology would continue to be used until the Commission approves the proposal and the software modifications are made.

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[13] 18 C.F.R. § 35.4 (2003). See also, e.g., Green Mountain Power Corp. and Northeast Utilities Service Co., 63 FERC ¶ 61,071 at 61,308, reh'g denied, 65 FERC ¶ 61,102 (1993) (Green Mountain); Southern Company Services, Inc., 22 FERC ¶ 61,047 at 61,084, order on reh'g, 22 FERC ¶ 61,340 (1983).

[14] The effective rate is calculated by dividing the total costs booked to Account 561, Load Dispatching, for the Midwest ISO Transmission Owner that operates the Control Area, less certain revenue credits, by the Midwest ISO Transmission Owner's Attachment O Zonal Rate Divisor.

Comments

28. Duke Energy disputes Midwest ISO's claim that the proposed revision would minimize costs to customers, arguing that Midwest ISO's proposal will always increase the cost to the transmission customers who cross more than one zone. Further, Duke Energy disputes Midwest ISO's claim that its proposal is consistent with the December 19 Order. Duke Energy contends that there was a difference between the rate structures of the merging entities, i.e., SPP's rate structure included pancaked rates, but Midwest ISO's rate structure did not include pancaked rates. The Commission had the option of (1) requiring SPP to adopt the existing Midwest ISO postage stamp approach leading to a revenue reduction when compared to the existing SPP OATT rate, (2) requiring SPP and Midwest ISO to develop a new rate method that eliminated pancaked charges but addressed cost shift issues related to the merger, or (3) adopting the SPP scheduling charge for both Midwest ISO and SPP. Duke Energy contends that the Commission chose the third option only "as a transition mechanism until a more appropriate long-term solution can be developed." Duke Energy states that it may have been reasonable given the need to reconcile the different rate structures in the then-effective SPP and Midwest ISO tariffs, but that predicate no longer exists because Midwest ISO and SPP called off their merger. Further, Duke Energy argues that the Midwest ISO Transmission Owners' desire to increase the amounts paid by customers for scheduling services is not adequate justification for the filing. Therefore, Duke Energy contends that Midwest ISO has not justified pancaked scheduling charges for Midwest ISO.

Commission Determination

29. We reject Midwest ISO's proposal to change the Schedule 1 charge. As with the penalty for unauthorized use, acceptance of the proposed Schedule 1 for filing, with modification,[15] as part of the Resulting Company Tariff in the December 19 Order did not constitute approval of the charge. In the December 19 Order, we stated that we would accept the proposed Schedule 1 with modification, only "as a transition mechanism until a more appropriate long-term solution can be developed."[16] The circumstances of this proceeding are not the same as the proceeding that resulted in the December 19 Order.

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[15] The December 19 Order directed Midwest ISO to revise Schedule 1 of the Resulting Company Tariff to provide that a Transmission Owner serving bundled load from resources outside its control area would pay the applicable Schedule 1 Charge. December 19 Order, 101 FERC ¶ 61,319 at P 34.

[16] Id.

30. As the Commission stated in the December 19 Order, we do not want service providers under this schedule to incur costs without reimbursement. However, Midwest ISO has not demonstrated that service providers are not recovering their costs. Under the current Midwest ISO OATT, customers are charged the average cost of providing Schedule 1 service by the Transmission Owners.[17] Midwest ISO's existing formula should recover the total costs booked to Account 561 for all the Transmission Owners that operate a control area, less certain revenue credits;[18] therefore, Midwest ISO has not explained adequately how the existing formula under-recovers the costs for providing the service.

31. Moreover, the Commission does not want to encourage pancaking of Schedule 1 charges which the proposal would institute.[19] Such pancaking could discourage load from purchasing power from other control areas to avoid a second Schedule 1 charge. Therefore, we reject Midwest ISO's proposal to change the Schedule 1 charge, and order Midwest ISO to revise its OATT accordingly in the compliance filing required below.

32. Midwest ISO is currently charging a regional postage stamp rate for Schedule 1 service, which, as discussed above, should recover the total costs of the Transmission Owners providing this service. If Midwest ISO finds that some Transmission Owners are not recovering their costs of providing service, then presumably other Transmission Owners are recovering more than their costs of providing the service. In that case, Midwest ISO may want to re-evaluate its methodology for distribution of Schedule 1 revenues to ensure that each Transmission Owner recovers its costs of providing the service.

3. <u>Proposed Modifications that No Party Opposes</u>

33. No party to this proceeding objects to the other revisions proposed by Midwest ISO.

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[17] Midwest ISO calculates this average cost, on a per Dollars/MW basis, by summing the amounts included in Account 561, Load Dispatching, for all the Transmission Owners, subtracting out all Schedule 1 revenues for transactions not included in the divisor and dividing the result by the sum of the Attachment O divisors for Drive-Out and Drive-Through transmission service. The rate is put into effect on June 1 of each year based on data for the prior calendar year.

[18] The time lag from basing the Schedule 1 charge on data from the prior calendar year could in some years cause an under recovery and in other years an over recovery, but we have no reason to expect that the time lag would result in systematic under recovery; indeed, Midwest ISO does not propose to eliminate the time lag.

[19] Midwest ISO proposes an average ($/MW) rate calculated for each source and sink control area providing the service.

34. Our preliminary analysis indicates that these unopposed proposed modifications are just and reasonable. Accordingly, we will accept these modifications, without suspension or hearing to become effective on June 7, 2003, as requested.

C. Conclusion

35. Based on the foregoing discussion, we will accept the Midwest ISO's proposed revisions for filing, as modified herein, to become effective on June 7, 2003, as requested. We will also direct Midwest ISO to make the revisions discussed above in a compliance filing within 30 days of the date of this order.

The Commission orders:

(A) Midwest ISO's proposed tariff revisions are hereby accepted for filing, as modified, without suspension or hearing, to become effective on June 7, 2003, as requested.

(B) Midwest ISO is hereby directed to make a compliance filing within 30 days of the date of this order, as discussed in the body of this order.[20]

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

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[20] The rate schedule designations are shown on the Appendix.

Appendix

Rate Schedule Designations

Effective June 7, 2003
FERC Electric Tariff, Second Revised Volume No. 1

Original Sheet Nos. 15A,143A,152B,196A
First Revised Sheet Nos. 7,8,12A,49B,49C,152A,175,238F,610A,611A,619N,624,626,
631H,637,638,639,640,641,642,643,644A,645,
Second Revised Sheet Nos. 2,3,4,10,12,13,14,15,24A,49A.63,68,69,106,143,150,152,
159,188,230,235A,238L.1,319,644,646

Supersedes:
Original Sheet Nos. 7,8,12A,49B,49C,152A,175,238F,610A,611A,619A,624,626,631H,
637,638,639,640,641,642,643,644A,645
First Revised Sheet Nos. 2,3,4,10,12,13,14,15,24A.49A,63,68,69,106,143,150,152,159,
188,230,235A,238L.1,319,644,646