

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

MidAmerican Energy Company

Docket Nos. ER06-847-000 and
ER05-1235-001

ORDER CONDITIONALLY ACCEPTING TRANSMISSION SERVICE
COORDINATOR AGREEMENT AND COMPLIANCE FILING

(Issued June 15, 2006)

1. In this order, we conditionally accept MidAmerican Energy Company's (MidAmerican) filing. MidAmerican's filing consists of an executed Transmission Service Coordinator (TSC) Agreement with TranServ International, Inc. (TranServ) filed under Federal Power Act (FPA) section 205,¹ and modifications to Attachment K of MidAmerican's Open Access Transmission Tariff (OATT) required by the Commission's order dated December 16, 2005.²

Background

2. On July 22, 2005, MidAmerican filed to add Attachment K to its OATT to implement a proposal to contract with a TSC that would administer various OATT-related functions with respect to transmission service provided over MidAmerican's transmission system.³ Generally, MidAmerican's filing proposed that the TSC would assume responsibility for, among other things: (1) evaluation and approval of all transmission service requests; (2) calculation of total transfer capability (TTC) and available transmission capacity (ATC) not otherwise calculated by the Midwest Independent Transmission System Operator, Inc. (Midwest ISO); (3) operation and

¹ 16 U.S.C. § 824d (2000).

² *MidAmerican Energy Company*, 113 FERC ¶ 61,274 (2005) (December 16 Order).

³ MidAmerican will remain the owner and operator of the transmission system, and will continue to have ultimate responsibility for providing transmission service under its OATT, including sole authority to amend its OATT pursuant to Federal Power Act section 205, and for providing transmission service under grandfathered agreements.

administration of MidAmerican's Open Access Same-Time Information System (OASIS); (4) evaluation, processing and approval of all generation interconnection requests, and performance and/or oversight of related interconnection studies;⁴ and (5) coordination of transmission planning.

3. Since MidAmerican had not yet contracted with anyone to become its TSC, MidAmerican's filing contained a draft agreement intended to serve as the basis for negotiations with parties interested in becoming MidAmerican's TSC. MidAmerican stated that the filing would address any residual concerns about the exercise of transmission market power that were expressed by the Commission in an order dated June 1, 2005 regarding MidAmerican's updated market power analysis⁵ and would address concerns as to compliance with its standards of conduct raised in an audit report in Docket No. PA04-18-000.⁶

4. In the December 16 Order, the Commission conditionally accepted MidAmerican's proposal subject to MidAmerican making certain modifications to Attachment K to its OATT to address concerns regarding the TSC's independence and MidAmerican's compliance with the audit report. These modifications included, among other things, having the TSC perform the system impact studies from the date it commences service, modifying the reporting requirements to eliminate prior review by MidAmerican of TSC reports, continuing all third party audits identified in the audit report for at least the first twelve months of TSC operation, and ensuring that all employees and directors of the TSC are independent of any market participant and adhere to the Commission's Standards of Conduct. The Commission required that MidAmerican make these changes in a compliance filing.

5. Additionally, because MidAmerican only submitted a draft TSC Agreement in its July 22 filing, the Commission required MidAmerican file the final TSC Agreement with the Commission pursuant to FPA section 205 after it has selected an entity to be its TSC. The Commission also explained that the executed TSC Agreement would be made a part of MidAmerican's OATT.

⁴ As an independent entity, the TSC would administer generator requests to interconnect with the MidAmerican system. The TSC would be responsible for implementing and applying MidAmerican's generator interconnection procedures in accordance with MidAmerican's OATT, queuing all such requests, performing studies necessary for such requests, and providing all notices related to such requests.

⁵ *MidAmerican Energy Company*, 111 FERC ¶ 61,320 at P 28-29 (2005).

⁶ *MidAmerican Energy Company*, 112 FERC ¶ 61,346 (2005).

6. On April 7, 2006, MidAmerican filed under FPA section 205 executed TSC Agreement with TranServ and a compliance filing addressing the modifications to Attachment K to MidAmerican's OATT that were required by the December 16 Order. MidAmerican's filing is discussed in more detail below.

Notice and Responsive Pleadings

7. Notice of MidAmerican's filing was published in the *Federal Register*, 71 Fed. Reg. 21,008 (2006), with protests and interventions due on or before April 28, 2006. Dairyland Power Cooperative (Dairyland), Participants in the TSC Project – Western MAPP Region (the Participants),⁷ and TranServ filed timely motions to intervene and comments in support of the filing. Additionally, the Municipal Energy Agency of Nebraska (MEAN) and the Midwest Municipal Transmission Group (MMTG) filed a joint motion to intervene and comments in support. Great River Energy (Great River) filed a motion to intervene out-of-time raising no substantive issues.

8. The Midwest ISO protested the filing⁸ and subsequently supplemented its protest on June 5, 2006. MidAmerican, TranServ and the Participants filed answers to the Midwest ISO's protest. The Midwest ISO filed a further response on May 26, 2006.

Discussion

A. Procedural Matters

9. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2005), the timely, unopposed motions to intervene in Docket No. ER06-847-000 serve to make the entities that filed them parties to this proceeding. We will also grant the untimely motion to intervene filed by Great River given the early stage of this proceeding, its interests, and the absence of any undue burden or delay.

10. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2005), prohibits an answer to a protest unless otherwise ordered by the

⁷ The Participants in the TSC Project – Western MAPP Region are: Basin Electric Power Cooperative, Corn Belt Power Cooperative, Dairyland Power Cooperative, Heartland Consumers Power District, Lincoln Electric System, MidAmerican Energy Company, Minnkota Power Cooperative, Muscatine Power and Water, Nebraska Public Power District, NorthWestern Energy, Omaha Public Power District, Rochester Public Utilities, and the Western Area Power Administration.

⁸ We note that Midwest ISO did not move to intervene in Docket No. ER06-847-000. The filing of its protest does not make Midwest ISO a party in that docket. *See* 18 C.F.R. § 385.211(a)(2) (2005).

decisional authority. We will accept the answers of MidAmerican, TranServ, and the Participants because their answers have provided information that assisted us in our decision-making process. We are not persuaded to accept the Midwest ISO's May 26, 2006 answer, dealing exclusively with an issue we do not consider in this order, and will, therefore, reject it.

B. Selection of TranServ as TSC

1. Proposal

11. In its filing, MidAmerican describes the Request for Proposals (RFP) process by which it selected TranServ to serve as the TSC. MidAmerican states that the criteria in the RFP included: independence from MidAmerican and other market participants, having experience in the areas covered by Attachment K, and being able to provide the Attachment K services on an efficient and cost-effective basis. MidAmerican found that TranServ's proposal provided the best combination of expertise and cost effectiveness. Following the selection of TranServ as the TSC, MidAmerican has been meeting with key stakeholders, including wholesale transmission customers, neighboring transmission owners, the Midwest ISO and MAPP COR,⁹ to address any concerns with the selection of TranServ and to coordinate the transfer of obligations to TranServ.

12. MidAmerican states that TranServ is affiliated with Open Access Technology Inc. (OATI), a software company, but is not affiliated with any market participant or transmission provider. MidAmerican contends that TranServ staff has experience developing computer systems used by control area and transmission operators to calculate ATC, to schedule and curtail transactions and to manage E-tags, energy accounting and OASIS.

13. Regarding personnel, MidAmerican states that as of the date that TranServ begins providing services under Attachment K, those responsible for the day-to-day management of TranServ will not provide any other services to any market participant, as defined in Attachment K. Moreover, TranServ's directors, officers, employees and subcontractors shall be considered as employees engaged in transmission system operations or reliability functions of MidAmerican and will comply with all restrictions related to such status.

14. MidAmerican states that TranServ will utilize subcontractors to perform some of the work required of the TSC to augment its own expertise and to keep costs low. Specifically, TranServ intends to use OATI for hardware and software support, firms such as Siemens PTI, Excel Engineering, and Utility System Efficiencies to provide

⁹ MAPP COR is the contractor to MAPP that administers the MAPP Restated Agreement, the contract that governs the MAPP organization.

support for facilities studies and system impact studies, and specific MAPPCOR personnel to consult with in regard to transmission planning matters during the transition period prior to the TSC operations.¹⁰

2. Comments

15. TranServ states that it will use software automation to process transmission service requests and E-tags, thereby reducing the amount of human interaction in the MidAmerican OATT service request process and eliminating the opportunity for operating discretion. TranServ also states that it is committed to developing and managing an open stakeholder process that will solicit market participants' views on such issues as changes to business practices, sharing of benefits of economic facility upgrades, or voicing concerns about TSC or MidAmerican's performance. Further, TranServ states that it will also participate in regional processes to coordinate, monitor or attend MAPP, the Midwest ISO or Midwest Reliability Organization activities necessary to meet the open planning process and tariff administration requirements identified in MidAmerican's OATT Attachment K.

16. Dairyland, the Participants, MEAN and MMTG support MidAmerican's proposal to transfer its administrative functions to a TSC. They state in their comments that they are exploring the possibility of expanding the TSC to encompass other transmission systems in the region.

17. Dairyland, Participants, MEAN and MMTG are comfortable with the selection of TranServ as the TSC because they believe TranServ has the knowledge and experience to undertake the role of MidAmerican's TSC. Dairyland and Participants add that they believe TranServ has the necessary independence to undertake its role, while MEAN and MMTG state that they are generally supportive of the concept of independence that underlies the TSC proposal.

18. Additionally, Dairyland urges the Commission to recognize that MidAmerican's process and innovative choice of TranServ to be the TSC has the potential to address tariff administrative functions in a cost effective, reliable manner. Similarly, MEAN and MMTG state that they see the potential benefits of giving a new player in the field the opportunity to show that it can provide independent transmission coordinator services in a cost-effective manner. MEAN and MMTG add that, even though MidAmerican may terminate the TSC Agreement with TranServ at the end of the initial three year term, in

¹⁰ MidAmerican states that this arrangement to work with specific MAPPCOR personnel will be terminated as of the date that TranServ begins operation.

the meantime, “entry of a new supplier into the market for such services may spur existing providers of such services to improve their level of service and attendant costs.”¹¹

19. The Midwest ISO protests the terms and conditions of MidAmerican’s filing to the extent that the entity selected is not regulated under the FPA. The Midwest ISO contends that the activities of both TranServ and OATI are jurisdictional and that the interlocking officers and directors of both companies are subject to FPA requirements for Commission approval.

3. Answers

20. MidAmerican notes that not a single customer or neighboring transmission owner raised any concerns about the selection of TranServ as the TSC, and contends that the Midwest ISO protested the filing because it was not selected as the TSC. Notwithstanding the Midwest ISO’s protest, MidAmerican asserts that TranServ has the independence, expertise and confidence of the customers to be the TSC. MidAmerican states that the Midwest ISO has not relayed to it or to the Commission in the protest any functional, operational or reliability concerns with MidAmerican’s selection of the TSC.

21. In response to the Midwest ISO’s protest, the Participants note that the Commission required in the December 16 Order that the TSC Agreement be filed under FPA section 205, and, thus, the Commission retains authority over the provision of transmission service under MidAmerican’s OATT and over the terms and conditions of the executed TSC Agreement. Thus, the Participants conclude that it is unnecessary for the Commission to require that the TSC be a jurisdictional public utility. Moreover, the Participants assert that the Midwest ISO’s protest constitutes an untimely request for rehearing of the December 16 Order, and consequently the Commission should reject the Midwest ISO’s argument that the TSC should be a public utility subject to the Commission’s jurisdiction.

4. Commission Determination

22. We are not persuaded that TranServ lacks the required technical expertise to serve as MidAmerican’s TSC, and MidAmerican has also appropriately required TranServ to certify its readiness prior to actual commencement of service. We discuss the issue of TranServ’s independence below.

¹¹ MEAN and MMTG at 2, n.2 (noting the Commission’s concern about accountability of existing independent system operators (ISOs) and regional transmission organizations (RTOs) with respect to their administrative costs).

23. We find that we need not decide whether TranServ is a public utility in order to accept the TSC Agreement and the compliance filing, and thus we will not address that issue at this time.¹² Similarly, the activities of OATI (except as they may relate to TranServ's independence) are not relevant to the outcome of this proceeding, and we need not examine them here.

C. TranServ's Independence

1. Proposal

24. MidAmerican states that TranServ has been structured to meet the criteria for independence under MidAmerican's TSC proposal as required under Attachment K. For example, TranServ's directors, officers, employees and subcontractors shall be considered as employees engaged in transmission system operations or reliability functions of MidAmerican, and will be required to comply with all restrictions relating to information sharing and other relationships between employees engaged in merchant functions and those engaged in transmission functions.

2. Comments

25. TranServ states that it is independent operationally and financially from MidAmerican and market participants and has the necessary experience to perform the assigned tasks.¹³ To further ensure its independence, TranServ proposes to take various additional steps including having the certificate of incorporation of the company prohibit TranServ from owning electric transmission, generation and distribution facilities and precluding market participants from owning shares of TranServ. Additionally, TranServ's Bylaws will, among other things, require that directors of TranServ be independent from market participants and require TranServ to maintain separate office space from any customer or affiliate of a customer. Moreover, TranServ's Bylaws will require TranServ to retain an independent compliance auditor to ensure ongoing compliance with the requirements to maintain financial independence from any market participant. TranServ also states that it will establish a Code of Business Conduct and Ethics.

¹² MidAmerican did not seek such a ruling in its application. While TranServ's comments contain a brief footnote asserting that it is not a public utility, TranServ should file a petition for declaratory order if it seeks a ruling on this issue. *See* 18 C.F.R. §§ 381.302, 385.207 (2005).

¹³ TranServ states that it will augment its own capabilities by contracting with industry leading providers of services and that these contractors will be under direct TranServ oversight and contractually bound to comply with the TranServ Code of Business Conduct and Ethics.

26. The Midwest ISO argues that TranServ is not independent because TranServ is affiliated with OATI,¹⁴ which the Midwest ISO states should be considered a market participant. The Midwest ISO also asserts that OATI should be considered a market participant and public utility because it has assumed a position of power and control over the transmission systems of the Eastern Interconnection that exceeds that of any single transmission provider or transmission owner; it also claims that the reliability of the grid rests in private, unregulated hands unless the Commission claims jurisdiction.

27. The Midwest ISO states that OATI has attained this position of power because it is the sole software vendor that owns, maintains, and operates the North American Electric Reliability Council (NERC) Interchange Distribution Calculator (IDC) that is used to control tagged transmission transactions, and Transmission Loading Relief (TLR) responses to congestion in the Eastern Interconnection. The Midwest ISO also notes that OATI provides software development services to RTOs, such as the Physical Scheduling System provided to the Midwest ISO. The Midwest ISO states that OATI does not sell its software, but insists on retaining ownership of the software it develops for the industry which it can do because its monopoly position with regard to the IDC enables it to dominate the market for other key software applications used by the electric industry to provide transmission services.¹⁵

28. As an example of the potential conflict of interests, the Midwest ISO states that OATI has occasionally made changes to the tagging code in its IDC, and has simultaneously made changes to its software interface, but OATI did not notify competing software vendors or their customers of these changes. Consequently, the customers of competing software vendors found their tags rejected until the problem could be identified and changes made to the non-OATI software. The Midwest ISO argues that this is the software analogue of transmission owners selectively blocking access to the system to favor their own transactions, and the impact on the customer is the same whether the discrimination originates with the owner of the wires, or the owner of the software. The Midwest ISO maintains that this is similar to an example provided by the Commission as to what may constitute an unacceptable abuse:

¹⁴ Midwest ISO notes that the equity owners, principals, officers and (some) employees of TranServ are also equity owners, principals, officers and employees of OATI.

¹⁵ For example, OATI is able to dominate the software to interface with the IDC so that users can enter E-tags for transmission transactions and OATI is also a digital certificate authority responsible for generating certificates used to secure access to OASIS sites by transmission customers and to market portals by market participants.

However, in an investigation of Transco, the Commission learned that there are instances in which a shared information technology function provided a marketing affiliate an undue preference. Specifically, a shared IT employee designed a software program for the marketing affiliate that gave the marketing affiliate access to the pipeline's mainframe databases and used the pipeline's modeling information to optimize the marketing affiliate's nominations on the pipeline's transmission system. In these circumstances, the IT employees were no longer "support" employees, and gave the marketing affiliate unduly preferential access to valuable transmission information.^{16]}

29. The Midwest ISO also contends that OATI should be considered a public utility because, according to the Midwest ISO, OATI owns and operates jurisdictional facilities that are not only used for, but are vital to, the transmission of electric energy in interstate commerce. The Midwest ISO states that the IDC is a critical software application that enables transmission service and permits energy markets to function compatibly with non-market areas.¹⁷ For example, the Midwest ISO explains that when the IDC goes down, transmission transactions must be "frozen" and controlled locally. Moreover, new tags for badly needed power transfers cannot be entered and transmission operators are not able to manage congestion under their pro forma OATTs because they cannot calculate the appropriate curtailment priorities or megawatt amounts to relieve congestion in an orderly manner.

30. The Midwest ISO states that the Commission has determined that "facilities" subject to its jurisdiction include more than mere physical plant. For example, contracts for the purchase and sale of wholesale electric energy make those who trade energy

¹⁶ Midwest ISO at 7, *quoting Standards of Conduct for Transmission Providers*, Order No. 2004, FERC Stats. & Regs. ¶ 31,155 at P 119 (2003) (footnote omitted), *order on reh'g*, Order No. 2004-A, FERC Stats. & Regs. ¶ 31,161 (2004), *order on reh'g*, Order No. 2004-B, FERC Stats. & Regs. ¶ 31,166 (2004), *order on reh'g*, Order No. 2004-C, FERC Stats. & Regs. ¶ 31,172 (2004), *order on reh'g*, Order No. 2004-D, 110 FERC ¶ 61,320 (2005), *appeal docketed sub nom. Natural Gas Fuel Supply Corp. v. FERC*, No. 04-1183 (D.C. Cir.).

¹⁷ Midwest ISO states that initially the IDC was a NERC contract project designed to assist transmission operators with tagged transactions to respond to TLRs and after the market to non-market congestion management process was developed by PJM and Midwest ISO, the IDC incorporated market flows and tagged transactions into its calculations. Midwest ISO states that it does not have access to the contract between NERC and OATI, but believes that the actual software and computer systems are owned and operated by OATI.

commodities subject to the Commission's regulation. In support of finding such hardware and software to be "facilities," the Midwest ISO notes that the Commission has recently recognized the nature of hardware and software used for transmission services. The Midwest ISO states that in Order No. 668 the Commission discussed allocating such hardware and software by function, stating in part:

Commenters note that the RTOs' primary function in the administration of transmission systems and the use of their hardware, software and communication equipment is more easily identifiable as transmission related. . . . Therefore, we have decided...[to] require RTOs and non-RTO public utilities to record the costs of maintaining these assets that are related to providing transmission services in Accounts 569.1, 569.2 and 569.3 as proposed.^{18]}

31. The Midwest ISO argues that, if the activities engaged in are jurisdictional under the FPA, the Commission may not excuse from regulation small entities or transactions that are otherwise jurisdictional unless the burdens of regulation yield a gain of trivial or no value. Moreover, the Midwest ISO states that the Commission may not apply a *de minimis* exemption simply because the cost of regulation exceeds its benefits.¹⁹

3. Answers

32. TranServ states that the Midwest ISO's contention that it is not independent appears to rest on the premise that its affiliate, OATI, should be deemed to be a market participant. TranServ asserts that it complies with the independence requirements set forth in Attachment K. Moreover, TranServ notes that the definition of market participant in Attachment K, which is virtually identical to the definition of market participant adopted in Order No. 2000,²⁰ provides that a market participant is an entity that directly or indirectly purchases, sells or brokers electric energy or provides ancillary services. Since OATI is a software company, TranServ states that OATI does not fit the definition of market participant as used in Attachment K and the Commission's *pro*

¹⁸ *Accounting and Financial Reporting for Public Utilities Including RTOs*, Order No. 668, FERC Stats. & Regs. ¶ 31,199 at P 34, 39 (2005), *reh'g denied*, Order No. 668-A, FERC Stats. & Regs. ¶ 31,215 (2006).

¹⁹ Midwest ISO at 14 & n.12, *citing Alabama Power Co. v. Costle*, 636 F.2d 323, 357-58, 360-61 (D.C. Cir. 1979).

²⁰ *Regional Transmission Organizations*, Order No. 2000, FERC Stats. & Regs. ¶ 31,089 at 31,105 (1999), *order on reh'g*, Order No. 2000-A, FERC Stats. & Regs. ¶ 31,092 (2000), *aff'd sub nom. Public Utility District No. 1 of Snohomish County, Washington v. FERC*, 272 F.3d 607 (D.C. Cir. 2001).

forma OATT in Order No. 2000. Thus, TranServ concludes that the Midwest ISO's argument should be summarily rejected. With respect to the Midwest ISO's contention that OATI is also a public utility, TranServ argues that the allegation is without merit, noting OATI is not a party to this proceeding.

33. MidAmerican contests the Midwest ISO's assertion that TranServ should not be considered independent because of TranServ's affiliation with OATI. MidAmerican states that the Midwest ISO is not using the term market participant as defined in Attachment K or as vetted as part of Order No. 2000. MidAmerican states that using the Midwest ISO's definition of market participant would render all software companies market participants, and, as a practical matter, that it would make little sense for OATI to favor MidAmerican or TranServ at the risk of jeopardizing business relationships with its large base of other customers across the country.

34. MidAmerican also states that the Midwest ISO's allegations about OATI and its performance are beyond the scope of this proceeding because they have nothing to do with MidAmerican's selection of TranServ as the TSC, and have no bearing on TranServ's ability to perform as the TSC.

4. Commission Determination

35. We find that TranServ is independent of market participants. OATI is not a market participant. OATI neither purchases, sells, or brokers electric energy nor provides ancillary services, as provided in Attachment K.²¹ Further, the Midwest ISO has not persuaded us that OATI "has economic or financial interests that would be significantly affected by" MidAmerican's or TranServ's actions or decisions.²² The fact that OATI's software happens to be commonly used by transmission providers to control tagged transmission transactions and TLR responses does not impair TranServ's independence. Moreover, the restrictions on TranServ's activities, as provided in Attachment K and, by extension, the Commission's Standards of Conduct, should ensure that TranServ will evenhandedly carry out its responsibilities as TSC.

D. Other TSC Agreement Issues

36. We conditionally accept the proposed TSC Agreement subject to MidAmerican making the modifications identified in this order. We find that certain provisions will need to be modified to be consistent with Commission precedent²³ or to ensure the TSC's

²¹ Attachment K at section 1.5.

²² *Id.*

²³ See *Louisville Gas & Electric Company*, 114 FERC ¶ 61,282 (LG&E); *Entergy Services, Inc.*, 115 FERC ¶ 61,095 (2006) (*Entergy*).

independence. Specifically, in section 1.3 of the proposed TSC Agreement, TranServ will use certain “key personnel” listed on Attachment A to the TSC Agreement, which is signed by both MidAmerican and TranServ, in the performance of its duties under the TSC Agreement and Attachment K to the MidAmerican OATT. The Commission has expressed concern in other independent transmission coordinator proceedings with allowing the transmission provider to have veto authority over the key personnel used by the independent transmission coordinator as that may negatively affect the independence of the independent transmission coordinator.²⁴ Since no party has protested the key personnel agreed to by MidAmerican and TranServ, as currently provided in Attachment A, we conditionally accept Attachment A to the TSC Agreement subject to MidAmerican revising section 1.3 of the TSC Agreement and Attachment A to the TSC Agreement to state that, prospectively, MidAmerican will not have veto authority over any changes to the key personnel employed by TranServ to perform the functions under Attachment K and the TSC Agreement.²⁵

37. Section 2.1 of the TSC Agreement states that service will be performed by personnel of TranServ or any agent or sub-contractor that is independent of MidAmerican. We require modification of this section to require that such personnel, agents and sub-contractors are also independent of other market participants.

38. Section 3.2 of the TSC Agreement requires TranServ to serve as the TSC for the remainder of 2006 and all of 2007 at fixed prices. For subsequent periods, TranServ would prepare a budget by July 1 for review and approval by MidAmerican, and the parties will attempt to agree on the budget by September 30.²⁶ Section 3.2 of the TSC Agreement states that, if the parties are unable to agree, then the following year’s budget will be based on the TSC’s actual expenses during the preceding calendar year escalated by certain price indices. We note that, in *Entergy*, the Commission expressed concern that the budgetary provisions must ensure the independence of the TSC and not allow the independent transmission coordinator’s compensation to be affected by its treatment of

²⁴ *Entergy*, 115 FERC ¶ 61,095 at P 114.

²⁵ Section 19.2 of the TSC Agreement contains similar language providing MidAmerican with approval authority over the sub-contractors used by TranServ. We will require MidAmerican to modify section 19.2 to clarify that MidAmerican does not have veto authority over TranServ’s subcontractors. While it is understandable that MidAmerican would want to know the contractors working on its system, providing MidAmerican with veto authority over the sub-contractors used by TranServ could impair TranServ’s independence.

²⁶ Attachment K states that, if the parties are unable to agree, then either party may refer the matter to the Commission’s Dispute Resolution Service.

the transmission provider.²⁷ The Commission stated that no entity will perform the functions of an independent coordinator of transmission if the compensation is not adequate. Among other things, the Commission required that the transmission provider file with the Commission asking the Commission to resolve the dispute.²⁸ Accordingly, we clarify that, consistent with Attachment K, either party may refer the budgetary dispute to the Commission's Dispute Resolution Service at any time during the negotiation process. If the parties, even with the assistance of the Dispute Resolution Service, are unable to resolve the dispute by September 30 of a given year, we will require MidAmerican to file with the Commission by October 15 of the calendar year, a request that the Commission resolve the dispute. If the Commission is unable to resolve the dispute by the end of the calendar year, then the parties may utilize the provisions in section 3.2 of the TSC Agreement to fund the TSC Agreement until the Commission resolves the dispute. We direct MidAmerican to modify section 3.2 of the TSC Agreement to incorporate this clarification.²⁹

39. We will also require MidAmerican to modify section 7.3, "Dispute Resolution by Contract Managers," to provide that, if the MidAmerican and TranServ contract managers are not able to resolve a dispute, then either party may bring their dispute to the Commission. The provision, as currently stated, could be interpreted as precluding either party from exercising their rights. Such modification would harmonize section 7.3 with section 9(a) of Attachment K, which states that with a certain limited exception,³⁰ the Transmission Provider and any other entity (which we interpret to include the TSC) is not precluded from exercising its rights under the FPA, including the filing of a petition or initiating a proceeding before the Commission.

40. Section 8.2 of the TSC Agreement provides for data to be given by MidAmerican to TranServ.³¹ In *Entergy*, the Commission addressed language that was nearly identical to this provision. The Commission stated, in part:

²⁷ *Entergy*, 115 FERC ¶ 61,095 at P 105.

²⁸ *Id.*

²⁹ Similarly, any changes to the MidAmerican-approved budgets must also be approved by MidAmerican pursuant to section 3.3 of the TSC Agreement. We direct MidAmerican to clarify in section 3.3 that any budget-related dispute must be filed with the Commission within 15 days after negotiations between the parties end.

³⁰ The limited exception is the limitation of liability provisions agreed to by the TSC and MidAmerican.

³¹ Addendum A to Attachment K also contains a non-exclusive list of data the TSC may request from the transmission provider.

Although Entergy has provided a non-exclusive list of data and reports that the [Independent Coordinator of Transmission] ICT may request from Entergy in Addendum A to Attachment S and which Entergy must provide, we do not find this to be sufficient. In order for the ICT to perform its functions in an independent, transparent and reliable manner, it must have unfettered access to all information necessary to perform the functions it has undertaken under contract. Therefore, we will require Entergy to provide explicitly that the ICT will have full access to any data it requests in performing its functions in the executed ICT Agreement. Since the ICT will be independent of market participants, it will have no incentive to abuse this access to information. However, if Entergy believes that the ICT is making inappropriate use of this access to information, Entergy will be protected by its ability under the contract to bring the dispute to the Commission.^{32]}

41. We have the same concerns with respect to section 8.2 of MidAmerican's TSC Agreement. Accordingly, consistent with *Entergy*, we will require MidAmerican to make the same modifications required in Entergy and to reference section 7.2, as revised, and Addendum A of Attachment K in section 8.2 of the TSC Agreement.

42. Since the December 16 Order, we have issued other orders addressing independent transmission coordinator proposals, including the independent transmission coordinator for Entergy.³³ *Entergy* was the first time the Commission was faced with contested supply of data provisions in an independent transmission coordinator proceeding. The Commission determined in *Entergy* that in the case of a dispute over data between the ICT and Entergy, the independent transmission coordinator's position should prevail. This is in contrast to MidAmerican's Attachment K provision dealing with data, which states that MidAmerican's position shall prevail during a dispute. We note that, in the December 16 Order, we conditionally accepted Attachment K subject to a compliance filing and subsequent orders. Specifically, we recognized that the review of the final, executed TSC Agreement in conjunction with Attachment K, as revised by the compliance filing, may necessitate MidAmerican making further modifications to Attachment K and the TSC Agreement.³⁴ Accordingly, we will require MidAmerican to

³² *Entergy*, 115 FERC ¶ 61,095 at P 107.

³³ *See supra* note 21.

³⁴ December 16 Order, 113 FERC ¶ 61,274 at P 26 & n.25.

explicitly clarify in the TSC Agreement and to revise section 4.3(a) of Attachment K to state that, in the case of dispute between MidAmerican and TranServ over the supply of data, that TranServ's position controls in a dispute while the dispute is pending.³⁵

43. In the December 16 Order, the Commission stated that obtaining information within specified timeframes, including confidential information, is critical to the Commission's ability to monitor and address market power concerns and ensure that rates remain just and reasonable and not unduly discriminatory or preferential.³⁶ Accordingly, the Commission required MidAmerican to include specific language in Attachment K to ensure that the Commission could obtain the necessary information in a timely manner. However, the confidentiality provisions in section 11 of the TSC Agreement are more restrictive regarding the disclosure of confidential information to regulatory agencies than what the Commission required for Attachment K. For example, the confidentiality provisions in the TSC Agreement require a final order of a regulatory agency to disclose such information;³⁷ however, the Commission may conduct informal investigations that require access to confidential information in order to issue a final order. Consequently, the Commission requires MidAmerican to include the confidentiality language required by the December 16 Order for Attachment K to also be included in the TSC Agreement.

44. Section 20 of the TSC Agreement allows MidAmerican to change the scope of the work performed by TranServ, including decreasing the amount of work to be done by TranServ.³⁸ These provisions of the TSC Agreement are unclear as to the potential impact on the scope of the work performed by the TSC required in Attachment K and the remainder of the TSC Agreement. For example, it is unclear whether these provisions would allow MidAmerican to reduce the scope of the work for the TSC in performing ATC calculations (and have MidAmerican perform those functions) in a way that would compromise the TSC's independence. Accordingly, we require MidAmerican to modify

³⁵ *Id.* at P 134 (requiring a similar clarification).

³⁶ December 16 Order, 113 FERC ¶ 61,274 at P 49.

³⁷ We note that the confidentiality provisions of the TSC Agreement state that the TSC should also adhere to the confidentiality provisions of Attachment K; however, since the confidentiality provisions of the TSC Agreement are more restrictive on the release of confidential information to the Commission than the confidentiality provisions of Attachment K, it is unclear whether confidential information could be supplied to the Commission under those circumstances where disclosure is allowed under Attachment K but not the TSC Agreement.

³⁸ Similarly, section 17 allows MidAmerican to stop the work performed by TranServ, and section 18 allows MidAmerican to carry out the work not done by TranServ.

the TSC Agreement to state that, prior to any changes in the work under section 20 or any actions under sections 17 and 18, MidAmerican will file with the Commission for approval.³⁹

45. In the December 16 Order, we conditionally accepted Attachment K subject to a compliance filing and subsequent orders. Specifically, we recognized that the review of the final executed TSC Agreement in conjunction with Attachment K, as revised by the compliance filing, may necessitate MidAmerican making further modifications to Attachment K.⁴⁰ In this light, we will require MidAmerican to modify section 13.1 of the proposed TSC Agreement, as well as section 2.2 of Attachment K, to state that the TSC will notify the Commission of anything that may impair the TSC's independence⁴¹ or any concerns not remedied by MidAmerican over data, criteria, standards or policies developed by MidAmerican that may preclude the TSC from performing its duties including providing non-discriminatory open access transmission service. Additionally, the revisions should require reports detailing any concerns raised by stakeholders and the TSC's response to those concerns.⁴²

46. Finally, the Commission notes that Order No. 614⁴³ requires applicants to properly format and designate their proposed tariff sheets. Accordingly, we will conditionally accept for filing the revised TSC Agreement, provided MidAmerican properly formats and designates those sheets in accordance with Order No. 614 as an attachment to MidAmerican's OATT and otherwise modifies the TSC Agreement as provided for in this order.

³⁹ Additionally, in the December 16 Order, we stated that we would defer addressing regional coordination/seams issues and the splitting of functions because it would be premature to do so. We stated that protesters could raise their concerns when MidAmerican files its TSC Agreement, but that we, nonetheless, expect the TSC to manage the seams and coordinate regionally. We note that no party has raised these deferred issues in response to the instant submittal.

⁴⁰ December 16 Order, 113 FERC ¶ 61,274 at P 26 & n.25.

⁴¹ The independence of the TSC addresses the Commission's concerns regarding MidAmerican's noncompliance with its Standards of Conduct and other requirements raised in an audit report. *See Id.* at P 24.

⁴² *LG&E*, 114 FERC ¶ 61,282 at P 152.

⁴³ *Designation of Electric Rate Schedule Sheets*, Order No. 614, FERC Stats. & Regs. ¶ 31,096 at 31,505 (2000).

E. Attachment K Compliance Filing**1. Proposal**

47. MidAmerican states that it made all the changes to Attachment K that were required by the Commission in the December 16 Order. Specifically, MidAmerican states that it has revised section 7.1.2 of Addendum B to Attachment K to provide that the TSC will perform (or cause to be performed by an independent contractor) the system impact studies. MidAmerican also revised section 2.2 of Attachment K to require the TSC to file its periodic and ad hoc reports directly with the Commission without prior review by MidAmerican. Additionally, MidAmerican has revised section 2.3 of Attachment K to provide that not only employees (which would include officers) but also directors of the TSC may not have any financial interest in any market participant and will be subject to the Commission's Standards of Conduct and information sharing restrictions, and that the directors may not otherwise be affiliated with MidAmerican or its affiliates, any transmission customer or any market participant. Further, MidAmerican modified section 7.2.5 of Attachment K to provide that the TSC will timely file with the Commission, as comments in any contested proceeding, the Facility Study and identify all areas of dispute between the TSC and MidAmerican. Finally, MidAmerican also modified section 6.4 of Attachment K to include certain language required by the Commission's December 16 Order regarding the release of confidential information to the Commission and its staff.

48. MidAmerican also states that it incorporated into the final TSC Agreement with TranServ (as opposed to modifying Attachment K) the requirement in the Commission's December 16 Order to have the TSC continue all third-party audits identified in the audit report and use its periodic and ad hoc reports for the first twelve months after operation to, among other things, inform the Commission as to whether MidAmerican permitted its wholesale merchant function to use network service to import power into MidAmerican's system to make possible off-system sales.

2. Comments

49. The Midwest ISO states that the compliance filing notes that certain MAPP COR employees will be assisting during the transition period. The Midwest ISO also notes that the filing states that when TranServ begins operation, the MAPP COR relationship will be terminated.

50. The Midwest ISO states that MAPP COR was designated in the Commission-approved MAPP Restated Agreement to provide staff support and certain transmission reliability related service for MAPP and under the by-laws of MAPP COR, it is precluded from engaging in activities for profit or in other ventures inconsistently with its obligations to MAPP. The Midwest ISO contends that the compliance filing does not explain under what authority or contractual arrangement MAPP COR plans to provide

these services, or for how long, whether MAPPCOR employees will become TranServ employees upon startup, or whether the other MAPP members will share in revenues from this project.

51. The Midwest ISO also states that the compliance filing is silent with respect to the corporate form under which OATI and TranServ operate and that, if the Commission agrees that one or both of these entities should be classified as jurisdictional utilities under the FPA, then there is a possibility that a requirement to obtain prior approvals for interlocking officer or director applies. The Midwest ISO states that MidAmerican must provide more information before the Commission can accept the proposal.

3. Answers

52. TranServ states that it has contracted with MAPPCOR to provide certain specific services for a limited period of time ending no later than commencement of TSC operation. The purpose of the contract is to obtain the benefit of MAPPCOR's expertise and experience to ensure that TranServ provides MidAmerican transmission customers with high-quality transmission planning services and tariff administration services consistent with regional practices. TranServ notes that many MAPP members have intervened in this proceeding and not raised any concerns regarding the propriety of the arrangement with MAPPCOR, and comments that the Midwest ISO has not offered any facts to support its contention that MAPPCOR does not have the authority to perform these services.

53. MidAmerican reiterates that the arrangement with MAPPCOR is only during the period prior to commencement of operations. Moreover, MidAmerican states that TranServ is working with MAPPCOR, among others, to ensure a smooth transition and that any entity selected as TSC would have to do the same. MidAmerican also notes that the Midwest ISO does not provide any citation to MAPPCOR bylaws or any other authority to support its contention that MAPPCOR is precluded from engaging in activities for profit. MidAmerican argues that MAPPCOR, as a non-profit entity, is no more precluded from engaging in these limited services than is the Midwest ISO, also a non-profit company. MidAmerican also states that the filing contains sufficient information about TranServ and OATI.

4. Commission Determination

54. We find that MidAmerican has made most of the modifications to Attachment K required by the December 16 Order. However, the December 16 Order required MidAmerican to modify section 7.2 of Addendum B to Attachment K to require the TSC to timely file comments in any contested proceeding (pertinent to section 7.2) pertaining to the Facilities Studies. MidAmerican's compliance filing states that "[f]or any disputed Facilities Agreement, the TSC shall timely file with the Commission comments identifying and describing all areas of disagreement between the TSC and the

Transmission Provider.” The term “Facilities Agreement” is not defined in section 7.2 of Addendum B, in Attachment K or generally in section 1 of the OATT.⁴⁴ Moreover, the Commission required the TSC to file the Facilities Study and identification of all issues, yet MidAmerican’s compliance filing would only require the filing of the identification of all disputed issues. Accordingly, MidAmerican has not satisfactorily complied with the Commission’s requirements and MidAmerican is required to replace its proposed language with the following language, “For any dispute relevant to section 7.2, the TSC is required to file the Facilities Study with all documents related to the disputed issues, and identify and explain all areas of dispute between the TSC and the Transmission Provider.” We will require MidAmerican to modify Attachment K accordingly within 30 days of the date of this order.

55. MidAmerican has revised section 7.1.2 of Addendum B, Transmission System Protocols, to reflect that the TSC may perform or cause to be performed system impact studies by an independent contractor. The modifications to section 7.1.2 of Addendum B are accepted conditioned on MidAmerican making conforming changes to section 2.5 of Addendum B.⁴⁵ The conforming change to section 2.5 should define independent contractor so as to completely exclude MidAmerican and its affiliates, any transmission customer, and any other market participant.

The Commission orders:

(A) MidAmerican’s TSC Agreement is hereby conditionally accepted for filing, as discussed in the body of this order.

(B) The revisions to MidAmerican’s Attachment K are hereby conditionally accepted for filing, as discussed in the body of this order.

⁴⁴ Elsewhere in section 7.2.5, MidAmerican uses the term “Facilities Study” or “Facilities Study report.”

⁴⁵ Section 2.5 of Addendum B defines independent contractor as “a third party that the TSC and Transmission Provider agree is qualified to perform transmission system studies on behalf of the TSC. Except as provided in section 7.1.2 of this Protocol, an Independent Contractor cannot be the Transmission Provider or an affiliate of a Transmission Provider.”

(C) MidAmerican is hereby directed to make a compliance filing, as discussed in the body of this order, within 30 days after the date of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.