

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

City of Holland, Michigan

Docket No. EL05-55-001

v.

Midwest Independent Transmission
System Operator, Inc.

ORDER ON REHEARING AND CLARIFICATION

(Issued July 25, 2005)

1. On May 18, 2005, several parties submitted requests for rehearing and/or requests for clarification of the Commission's April 18, 2005 Order in these proceedings.¹ In the April 18 Order, the Commission granted a complaint against Midwest Independent Transmission System Operator, Inc. (Midwest ISO) filed by the City of Holland, Michigan (Holland) regarding Midwest ISO's charges for redirect service under the Midwest ISO Open Access Transmission Tariff (OATT). In this order, the Commission will deny rehearing, grant clarification, and deny Midwest ISO's motion for stay.

I. Background

2. Under section 22.1 of the Midwest ISO OATT, a firm point-to-point transmission service customer may request to redirect its scheduled transmission service on a non-firm basis over Receipt and Delivery Points (or source and sink points) other than those originally reserved without incurring additional non-firm point-to-point transmission service charges, except as provided in section 22.1a (which later became section 22.2). If the customer requested to redirect service over a transmission path with a higher cost than

¹ *City of Holland, Michigan v. Midwest Independent Transmission System Operator, Inc.*, 111 FERC ¶ 61,076 (2005) (April 18 Order).

the path the customer reserved, former section 22.2 of the Midwest ISO OATT provided that the customer shall pay “the additional costs (*i.e.*, the difference in the zone rates) associated with the new path.”²

3. In its January 14, 2005 complaint, Holland asserted that Midwest ISO had been improperly charging the hourly rate for non-firm point-to-point transmission service when Holland elected to modify the receipt point of its primary firm transmission service reservation pursuant to section 22.1 of the Midwest ISO OATT. Holland contended that former section 22.2 of the Midwest ISO OATT did not permit Midwest ISO to charge a “higher of” rate for non-firm redirected transmission service, unless the service was redirected to a higher cost pricing zone. As a result, Holland argued that Midwest ISO violated its own tariff and the filed rate doctrine by applying the hourly non-firm rate to non-firm redirect service requested by Holland with a delivery point in the same pricing zone as its primary firm transmission reservation.

4. In the April 18 Order, the Commission granted Holland’s complaint. Specifically, the Commission found that Midwest ISO violated former section 22.2 of its OATT by assessing the higher hourly non-firm rate to non-firm redirect service taken by Holland under section 22.1 in the same transmission pricing zone.³ The Commission noted that former section 22.2 “‘unequivocally’ provided that ‘the Transmission Customer shall pay in addition to the amounts based on its initial reservation the additional costs (*i.e.*, *the difference between the zonal rates*) associated with the new path.’”⁴ Accordingly, the Commission concluded that a firm transmission service customer who redirected its service under section 22.1 to secondary receipt and delivery points within the same pricing zone as originally reserved should not incur additional charges, because former section 22.2 stated directly that any additional costs would be the “difference between the zonal rates.”⁵ In accordance with its finding that Midwest ISO improperly charged Holland the higher non-firm hourly rate for redirect service within the same pricing zone,

² Because in Docket No. ER05-273-000 the Commission accepted and made subject to refund a revised section 22.2, this order will refer to the language in section 22.2 that was effective during the time period covered by the complaint in this case as “former” section 22.2. *See Midwest Independent Transmission System Operator, Inc.*, 110 FERC ¶ 61,081 (2005).

³ April 18 Order at P 21.

⁴ *Id.* (emphasis in original).

⁵ *Id.*

the Commission directed Midwest ISO to refund to Holland, with interest, the difference between the non-firm hourly rate assessed to Holland for redirect service within the same pricing zone and the original firm transmission service rate contained in Holland's primary reservation.⁶ Additionally, the Commission directed Midwest ISO to refund to all Midwest ISO OATT customers who have been assessed the higher hourly non-firm rate for redirect service under former section 22.2, with interest, the difference between the non-firm hourly rate assessed for redirect service within the same pricing zone and the original firm transmission service rate contained in the primary reservation.⁷

II. Discussion

A. Procedural Matters

5. On May 18, 2005, Midwest ISO submitted a request for rehearing and motion for stay. On the same date, Holland and Cargill Power Markets, LLC (Cargill) filed requests for clarification. Holland also filed an alternative request for rehearing. On June 2, 2005, Midwest ISO submitted an answer and motion for expedited consideration in the instant docket and Docket No. EL05-63-001. On June 6, 2005, DTET filed a motion for leave to answer and answer in the instant docket and Docket Nos. EL05-63-001 and ER05-273-000.

6. Rule 713(d) of the Commission's Rules of Practice and Procedure⁸ prohibits answers to requests for rehearing. Accordingly, we will reject the answers of Midwest ISO and DTET in the instant proceeding.

B. Request for Rehearing

7. On May 18, 2005, Midwest ISO submitted a request for rehearing and motion for stay. In its request for rehearing, Midwest ISO asks the Commission to modify the April 18 Order to provide refunds only to Holland, DTET (the complainant in Docket No. EL05-63-000) and "other similarly-situated parties . . . who pressed their overcharge claims" and intervened in these proceedings.⁹ Midwest ISO asserts that the

⁶ *Id.* at P 24.

⁷ *Id.*

⁸ 18 C.F.R. § 385.713(d)(1) (2005).

⁹ Request for Rehearing of Midwest ISO at 2.

Commission's direction that refunds be provided to all affected Midwest ISO customers is overbroad, unnecessary, not in the public interest and, given the circumstances involved, amounts to an abuse of discretion.

8. Specifically, Midwest ISO first notes that the Commission has no obligation, under the Federal Power Act (FPA), to order refunds for every departure from the filed rate. Midwest ISO asserts that the Commission may decline to order refunds "due to 'considerations of administrative practicality,'" and that in ordering refunds, the Commission must "consider 'relevant factors and . . . [strike] a reasonable accommodation among them' to ensure that its refund decision is 'equitable in the circumstances.'"¹⁰ According to Midwest ISO, the "relevant factors" require that the refunds be limited as it requests. Particularly, Midwest ISO states that it does not have the resources to calculate refunds for all potentially affected Transmission Customers and transactions. It notes that the refund direction in the April 18 Order will require Midwest ISO staff to review approximately 78,000 transmission reservations, and that much of this review and resettlement must be done manually due to the fact that the scheduling software was not in place between February 2002 and September 2002, and due to previous true-ups ordered by the Commission. Further, Midwest ISO states that the charges collected have already been distributed to the Midwest ISO's Asset Owners, making refund calculations more difficult.

9. Given these difficulties, and the small size of its settlement staff, Midwest ISO argues that the Commission should "balance the equities" and limit refunds to those who have submitted claims for refunds. According to Midwest ISO, the refunds that may be due to those entities that did not press their claims "could potentially be so small that it could ultimately cost more to research and perform the adjustments than these customers are due in refunds."¹¹ Midwest ISO asserts that if the refunds ordered in the April 18 Order are not limited, the heavy burden creates a potential for disruption of Midwest ISO settlement operations.

¹⁰ *Id.* at 7, citing *Towns of Concord, Norwood and Wellesley v. FERC*, 955 F.2d 67, 72 (D.C. Cir. 1992) and *Consolidated Edison Company of New York, Inc. v. FERC*, 347 F.3d 964, 972 (D.C. Cir. 2003).

¹¹ Request for Rehearing of Midwest ISO, Affidavit of Elaine Chambers at ¶ 16.

Commission Conclusion

10. The Commission will deny Midwest ISO's request for rehearing. We are not persuaded that Midwest ISO cannot provide the refunds required by the April 18 Order and continue to provide efficient settlement services to its Market Participants. Midwest ISO notes that based on its analysis of the reservations in a randomly selected month, the four parties to whom it would limit refunds represent about 65 percent of all reservations and dollar amounts.¹² Based on this analysis and Midwest ISO's assertions regarding its limited resources, we are not convinced that analyzing the remaining reservations will add an undue burden, given that Midwest ISO will already be analyzing more than half of its total reservations for the refund period. Furthermore, the Commission has already granted Midwest ISO an extension of the date by which it must provide the refunds to September 16, 2005, giving it additional time to perform the necessary analysis.¹³

11. In any event, the Commission believes that it would be inequitable to require Midwest ISO to provide a remedy to only four of its customers, when potentially many other customers were also impacted by its violation of the filed rate doctrine. While there is no statutory requirement that the Commission provide refunds for all violations of the filed rate, as Midwest ISO suggests, it does have an obligation under section 206 of the FPA to, upon finding a rate or charge by a public utility unlawful, fix the just and reasonable rate or charge by order.¹⁴ Here, any administrative difficulties Midwest ISO may face are outweighed by the need to ensure that public utilities charge their customers the filed rate.¹⁵

C. Requests for Clarification

12. Holland seeks clarification regarding the types of redirected transactions that, pursuant to the Commission's ruling in the April 18 Order, should not have been charged the higher non-firm rate. Specifically, Holland states that it interprets the Commission's

¹² Request for Rehearing of Midwest ISO at 11.

¹³ See Notice of Extension of Time, issued May 20, 2005 in Docket Nos. EL05-55-000 and EL05-63-000.

¹⁴ 16 U.S.C. § 824e (2000).

¹⁵ We note that the Commission's discretion is at its "zenith" when fashioning remedies. See, e.g., *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967).

order to require Midwest ISO to provide refunds for “any redirect transaction to which the same zonal rate as the original reservation would apply.”¹⁶ Holland notes that if it were to redirect its source point, but maintain the same sink point, or redirect its service to a sink point within the same pricing zone, under section 22.2 it should not incur any additional charges. In other words, Holland states that under the pricing structure of section 22.2, if the sink point of a transaction was not redirected to another pricing zone, no additional charges should apply. As a result, Holland asks that the Commission clarify that the April 18 Order intended that Midwest ISO would issue refunds for redirected transactions that maintained a sink point in the same pricing zone, even if the source point changed pricing zones. Alternatively, Holland seeks rehearing on this point, arguing that former section 22.2 of the Midwest ISO OATT only permits additional charges for non-firm redirect service when the new sink point is in a different, higher priced zone, and that no additional charges should apply when the source point is redirected to a different pricing zone, but the sink point remains the same, or remains in the same pricing zone.

13. Cargill also seeks clarification of the Commission’s direction in the April 18 Order to Midwest ISO to issue refunds. Specifically, Cargill asks for clarification that the refunds ordered by the Commission are for all yearly firm point-to-point transmission reservations that were redirected on a non-firm basis over secondary points of receipt and delivery, and not simply hourly non-firm redirects. According to Cargill, Midwest ISO interprets the April 18 Order as entitling Cargill to refunds only for redirects made within the same pricing zone on an *hourly* basis, and that no refunds are due for firm reservations that were redirected within the same pricing zone on a *monthly, weekly, or daily* basis. Cargill asserts that the refund obligation should extend to all redirects of firm point-to-point transmission on a non-firm basis. It notes that former sections 22.1 and 22.2 govern the pricing of all firm reservations that are redirected on a non-firm basis. Therefore, Cargill contends, any application of Midwest ISO’s “higher-of” methodology to redirected service with the same pricing zone, regardless of whether the redirect was hourly, daily, weekly or monthly, constituted a violation of the filed rate. Cargill argues that clarification is warranted, given that disagreements over the scope of the refunds to be provided to all affected customers could require additional litigation before the Commission, either by the parties to these cases or by other affected Transmission Customers, who could be required to file their own complaints without clarification.

14. Additionally, Cargill asks that the Commission clarify the base rate that Midwest ISO should apply when calculating refunds. Cargill asserts that the applicable base rate must be a restated calculation of the Transmission Customer’s original firm reservation,

¹⁶ Request for Clarification of Holland at 2.

and that any amount assessed over that base rate should be refunded. For example, Cargill contends that for a Transmission Customer with a yearly firm point-to-point transmission service reservation who elects to redirect on an hourly non-firm basis, the base rate should be the original yearly firm reservation rate recalculated on an hourly basis (divided by 8,760 hours).

Commission Conclusion

15. The Commission will grant Holland's requested clarification. In the April 18 Order, the Commission found that Midwest ISO had violated former section 22.2 of its OATT by charging a higher, hourly non-firm rate to redirect service taken by Holland "in the same pricing zone."¹⁷ We based this finding on the language of former section 22.2, which stated that when a transmission customer chose to redirect its primary firm reservation on a non-firm basis, it "shall pay in addition to the amounts based on its initial reservation the additional costs (*i.e.*, the difference between the zonal rates) associated with the new path."¹⁸ As Holland correctly points out, under the Midwest ISO pricing structure in effect during the time covered by the complaint, a different zonal rate would apply to a redirected transaction only if the sink point were moved to a higher priced zone. Accordingly, if only the source point of the firm reservation was redirected and the sink point remained the same, or the sink point was redirected to another point within the same pricing zone (or a pricing zone of the same cost), no additional costs should have been incurred.

16. The Commission will also grant Cargill's requested clarification regarding our refund order. We did not intend that Midwest ISO would grant refunds only for *hourly* non-firm redirects within the same pricing zone for which it charged the higher hourly non-firm rate. For any redirected transaction that did not result in a higher zonal rate (*i.e.*, did not sink in a higher priced zone), be it hourly, daily, weekly or monthly, Midwest ISO would have violated former section 22.2 by charging a higher non-firm rate. Accordingly, consistent with our findings in the April 18 Order, Midwest ISO should provide refunds for any higher non-firm charges imposed on redirected service within the same pricing zone, regardless of whether the non-firm redirect was hourly, daily, weekly or monthly.

¹⁷ April 18 Order at P 21.

¹⁸ *See Id.* (emphasis in original).

17. Finally, the Commission will clarify the base rate to be used in calculating the refunds, as requested by Cargill. As we have discussed and clarified elsewhere in this order, we found in the April 18 Order that former section 22.2 of the Midwest ISO OATT imposed an additional charge on a transmission customer that redirected its original firm reservation on a non-firm basis only when that redirect was to a higher cost pricing zone. To effectively calculate refunds for the inappropriate additional charges that Midwest ISO applied to redirect service that was not to a higher cost pricing zone, we agree with Cargill that the base rate to be used by Midwest ISO should be a restated calculation of the Transmission Customer's original firm reservation on a monthly, weekly, daily or hourly basis. This restated calculation will provide the clearest base from which to determine the amount of overcharge, and thus the amount of refund due.

D. Motion for Stay

18. Pending disposition of its request for rehearing, Midwest ISO requests that the Commission stay its order to the extent it requires refunds to any transmission customers other than the Complainants in the instant docket and Docket No. EL05-63-000, and the intervenors in these proceedings who "pressed their claims."¹⁹ Midwest ISO contends that it meets the Commission's standard for granting a stay.²⁰ First, it asserts that it may suffer irreparable injury in the absence of a stay because of the potential adverse effect the refund order may have on its ability to perform settlement functions. Additionally, Midwest ISO asserts that granting the stay will not harm any party in the current proceedings and is in the public interest, because it will ensure that Midwest ISO settlement operations remain undisrupted.

Commission Conclusion

19. To assure definiteness and finality in Commission proceedings, the Commission typically does not stay its orders.²¹ We are not persuaded to stay our order in this proceeding.

¹⁹ Request for Rehearing and Motion for Stay of Midwest ISO at 13.

²⁰ *Id.*, citing *Midwest Independent Transmission System Operator, Inc.*, 111 FERC ¶ 61,142 at P 18 (2005) (discussing the Commission's standard for granting a motion for stay).

²¹ See, e.g., *CMS Midland, Inc.*, 56 FERC ¶ 61,630 (1991), *aff'd sub nom. Michigan Municipal Cooperative Group v. FERC*, 990 F.2d 1377 (D.C. Cir. 1993); *Robin Pipeline Co.*, 92 FERC ¶ 61,217 (2000).

20. The Commission may stay its action when “justice so requires.”²² In addressing motions for stay, the Commission considers: (1) whether the moving party will suffer irreparable injury without the stay; (2) whether issuing the stay will substantially harm other parties; and (3) whether a stay is in the public interest.²³ The key element in the inquiry is irreparable injury to the moving party.²⁴ If a party is unable to demonstrate that it will suffer irreparable harm absent a stay, we need not examine the other factors.²⁵ The standard for showing irreparable harm is strict, as the D.C. Circuit has explained:

the injury must be both certain and great; it must be actual and not theoretical. Injunctive relief ‘will not be granted against something merely feared as liable to occur at some indefinite time.’ It is well established that economic loss does not necessarily constitute irreparable harm....[M]ere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough.²⁶

21. The Commission finds that Midwest ISO has not sufficiently demonstrated that it will suffer irreparable injury absent a stay. Midwest ISO’s allegations that calculating the refunds required by the April 18 Order “*may* greatly strain the Midwest ISO’s limited resources and *could* adversely affect its core ability to provide efficient settlement services” do not rise to the level of certain and actual injuries, and thus do not meet the standard for showing irreparable harm.²⁷ Furthermore, Midwest ISO’s main contention seems to be that processing refunds for all affected transmission customers will require significant time and effort. As noted above, injuries expressed in these terms, “however substantial,” are not enough to satisfy the irreparable harm standard and grant a stay.²⁸ Also, given Midwest ISO’s direct violation of the filed rate doctrine by charging the

²² 5 U.S.C. § 705 (2000).

²³ See, e.g., *CMS Midland, Inc.*, 56 FERC at 61,631.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985).

²⁷ Request for Rehearing and Motion for Stay of Midwest ISO at 13 (emphasis added).

²⁸ See *Wisconsin Gas Co. v. FERC*, 758 F.2d at 674, citing *Virginia Petroleum Jobbers Ass’n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958).

higher non-firm transmission service rate to non-firm redirects within the same pricing zone, we are not convinced that delaying refunds to all affected customers is in the public interest.

The Commission orders:

(A) The request for rehearing of Midwest ISO is hereby denied, as discussed in the body of this order.

(B) The requests for clarification of Holland and Cargill are hereby granted, as discussed in the body of this order.

(C) The motion for stay of Midwest ISO is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.