

104 FERC ¶ 61,147  
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. ER03-86-003

ORDER GRANTING REHEARING  
AND DEFERRING REHEARING

(Issued July 28, 2003)

1. On June 18, 2003 and June 20, 2003, respectively Nebraska Public Power District (NPPD) and Joint Defense Group (JDG)<sup>1</sup> filed requests for rehearing of the Commission's May 21, 2003 order.<sup>2</sup> In this order, the Commission grants NPPD's request for rehearing and defers addressing the issues raised by JDG. This order benefits customers by encouraging the participation of public power agencies in regional transmission organizations (RTOs).

**Background**

2. On October 24, 2002, the Midwest Independent Transmission System Operator, Inc. (Midwest ISO) submitted revised tariff sheets to allow independent transmission companies (ITCs) to participate within its footprint. Among the proposed revisions, the Midwest ISO included a new Section 41 to its Open Access Transmission Tariff (OATT) that was intended to address conflicts that might arise between state law and the OATT, and so encourage the participation of public power agencies in the Midwest ISO. The tariff sheets also proposed to revise Section III of Schedule 10 of the OATT to clarify which unbundled RTO services are mandatory and which are optional for ITCs. On December 19, 2002, the Commission accepted the Midwest ISO's proposed revisions to

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<sup>1</sup>JDG consists of: Wisconsin Public Service Corp., Upper Peninsula Power Co., Madison Gas & Electric Co., Coalition of Midwest Transmission Customers, Industrial Energy Users-Ohio, and Wisconsin Electric Power Co.

<sup>2</sup>Midwest Independent Transmission System Operator, Inc., 103 FERC ¶ 61,207 (2003) (May 21 Order).

its OATT, subject to modification (including modifications to Section 41.1).<sup>3</sup> Numerous parties filed requests for rehearing of the December 19 Order.

3. In the May 21 Order, the Commission acted on the requests for rehearing and on a Midwest ISO compliance filing. Among the issues addressed, the Commission revisited the Midwest ISO's proposal to incorporate a new Section 41 into the OATT. Upon reconsideration, the Commission accepted this provision, as originally proposed, but explained that the Commission would decide when, and to what extent, an actual conflict between state law and the Commission-jurisdictional OATT exists.<sup>4</sup> The May 21 Order also addressed apparent confusion regarding the revisions that the Midwest ISO intended to make to Section III of Schedule 10 of the OATT; the Commission ultimately decided to accept the delineation of mandatory and optional RTO services for ITCs, as originally proposed, subject to the outcome of a related proceeding in Docket Nos. ER02-111-003 and ER02-652-002.<sup>5</sup>

### **Requests for Rehearing**

4. With regard to Section 41.1, NPPD seeks rehearing of the Commission's conclusion that the Commission would decide when, and if, there is an actual conflict. NPPD explains that as an instrumentality of the state of Nebraska, NPPD's Board of Directors is analogous to a state regulatory commission and, as such, the decisions of NPPD's Board of Directors are subject to review in state court. Thus, NPPD states, because decisions concerning conflicts between state law and the OATT would be subject to review by state courts, the Commission should revise its May 21 Order and allow the governing boards of public power agencies to determine, subject to state court review, when a conflict exists. NPPD maintains that the language of Section 41.1 merely accommodates public power agencies' desire to ensure that voluntary RTO participation will not place them in violation of state law.

5. NPPD also states that if Section 41.1 is "used by any public power entity in any manner that the Commission finds to be creating unjust and unreasonable rates or terms and conditions of transmission service, the Commission has the full authority to exercise

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<sup>3</sup>Midwest Independent Transmission System Operator, Inc., 101 FERC ¶ 61,317 (2002) (December 19 Order).

<sup>4</sup>103 FERC ¶ 61,207 at P 22-23.

<sup>5</sup>Id. at P 24-25.

appropriate jurisdiction over the Midwest ISO . . . to ensure that the terms, and conditions of service provided are just and reasonable."<sup>6</sup>

6. In a separate request for rehearing, JDG argues that the May 21 Order erred by accepting the Midwest ISO's original proposal to revise Section III of Schedule 10 of the OATT. JDG argues that: (1) the May 21 Order accepted the Midwest ISO's compliance filing notwithstanding the fact that it did not comply with the December 19 Order; (2) the Commission failed to provide a reasoned basis for disregarding the December 19 Order's directive to make Tariff Administration Services and Business Services mandatory services that an ITC must take from the Midwest ISO; and (3) the Commission should issue an order in this proceeding deciding whether Tariff Administration Services and Business Services should be mandatory or optional. JDG states that the Commission's failure to make a merits-based decision on this issue will prevent the parties from implementing the settlement that was filed in Docket Nos. ER02-111-003 and ER02-652-000.

## Discussion

7. The Commission recognizes the concerns that public power entities have regarding their voluntary participation in an RTO and will grant rehearing as discussed below. In light of the fact that public power entities are not public utilities under the Federal Power Act (FPA)<sup>7</sup> and that the NPPD Board's decisions are subject to court review, we will reverse our earlier conclusion that only this Commission may determine whether a conflict exists between state law and the OATT.<sup>8</sup> Accordingly, we will adopt a new, revised Section 41.1:

[t]he participation in this OATT by an ITC participant that is not a public utility under the Federal Power Act, but rather is a public-power entity, is subject in all respects to the laws and regulations of the state of its creation and to rate schedules adopted by its governing board under state law. FERC has exclusive jurisdiction to interpret the provisions of the OATT and how they would apply to such non-public utility entities. However, in the event that the governing boards of such non-public utility entities, subject to state court review, determine that a conflict exists between applicable state law or

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<sup>6</sup>NPPD Rehearing at 6.

<sup>7</sup>See 16 U.S.C. § 824 (2000).

<sup>8</sup>We note that it is still for this Commission to interpret the OATT, however.

regulations or rate schedules and provisions of the OATT as interpreted by FERC, such state law, regulations or rate schedules shall govern with respect to the application of the OATT to such non-public utility entities. Should the governing board of such non-public utility entity determine that such a conflict exists, that entity must make a filing with FERC notifying FERC that the governing board has determined that such a conflict exists and explaining both what the conflict is (including what state law or regulations or rate schedules and what OATT provisions are at issue) and what actions the governing board is taking in response to that determination.

8. Moreover, as NPPD acknowledges, if Section 41 is used by any public power entity in any manner that the Commission finds unjust, unreasonable, or unduly discriminatory or preferential, the Commission retains the authority to exercise jurisdiction over the Midwest ISO to ensure that the rates, terms, and conditions of service provided are just, reasonable, and not unduly discriminatory or preferential.

9. Finally, the Commission will defer acting on JDG's request for rehearing at this time in order to further consider the issues raised.

The Commission orders:

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

By the Commission.

( S E A L )

Linda Mitry,  
Acting Secretary.