

109 FERC ¶ 61,185
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Midwest Independent Transmission
System Operator Inc.
Illinois Power Company

Docket No. ER04-1239-000

Docket No. ER04-1254-000
(Not Consolidated)

ORDER CONDITIONALLY ACCEPTING FOR FILING TARIFF REVISIONS AND
ACCEPTING AND SUSPENDING NOTICE OF SUCCESSION AND
ESTABLISHING HEARING AND SETTLEMENT JUDGE PROCEDURES

(Issued November 19, 2004)

1. In this order, in Docket No. ER04-1239-000, we accept for filing Midwest Independent Transmission System Operator, Inc.'s (Midwest ISO's) proposed Notice of Succession of certain Transmission Service Agreements and Network Integration Service and Operating Agreements entered into by and between Illinois Power Company (Illinois Power) and various transmission customers (collectively, Transmission Service Agreements), suspend it for a nominal period, to become effective October 1, 2004, subject to refund, and establish hearing and settlement judge procedures. In Docket No. ER04-1254-000, we conditionally accept for filing, subject to a compliance filing, Illinois Power's proposed revisions to its Open Access Transmission Tariff (OATT), to become effective on October 1, 2004, as requested. We also accept the reclassification of Illinois Power's transmission and local distribution facilities. The order benefits customers because it provides parties with a forum in which to address issues associated with the expansion of a regional transmission organization (RTO), which promotes competitive markets.

I. Background

2. On July 29, 2004, the Commission issued an order authorizing the merger of Illinois Power Company into Ameren Corporation (Ameren).¹ The merger order also approved Illinois Power's request to transfer functional control of its transmission facilities to Midwest ISO to facilitate Illinois Power's planned integration into Midwest ISO. Both the consummation of the merger and the transfer of functional control of Illinois Power's transmission facilities to Midwest ISO became effective on October 1, 2004. Midwest ISO's assumption of functional control of Illinois Power's transmission facilities required that the Transmission Service Agreements be transferred to Midwest ISO so that customers formerly receiving transmission service from Illinois Power could take service from Midwest ISO without interruption. Midwest ISO began providing service to these customers on October 1, 2004.

3. On September 24, 2004, in Docket No. ER04-1239-000, Midwest ISO submitted for filing, pursuant to section 205 of the Federal Power Act (FPA),² a Notice of Succession to succeed Illinois Power as the transmission provider under the Transmission Service Agreements. In order to ensure continuity of customers' service under the Midwest ISO OATT, Midwest ISO requests waiver of the Commission's prior notice requirement and any other applicable Commission rules and regulations so that the Notice of Succession can be made effective on October 1, 2004, the date it assumed functional control of Illinois Power's transmission system.

4. On September 29, 2004, in Docket No. ER04-1254-000, Illinois Power submitted for filing, pursuant to section 205 of the FPA, a revised OATT. The changes proposed to remove services from Illinois Power's OATT that are now provided under Midwest ISO's OATT. Illinois Power also requests that the Commission accept the proposed reclassification of Illinois Power's facilities between transmission and local distribution. Illinois Power requests waiver of the Commission's prior notice requirement and any other applicable Commission rules and regulations, and requests an effective date of October 1, 2004, the date it transferred functional control of its transmission system to Midwest ISO.

¹ *Ameren Corp., et al.*, 108 FERC ¶ 61,094 (2004).

² 16 U.S.C. § 824d (2000).

II. Notice, Comments and Protests

5. Notice of Midwest ISO's filing in Docket No. ER04-1239-000 was published in the *Federal Register*, 69 Fed. Reg. 59,915 (2004), with comments, interventions and protests due on or before October 15, 2004. Motions to intervene were filed by Archer-Daniels-Midland Company, Illinois Power Co. d/b/a AmerenIP (Illinois Power) and Exelon Corporation (Exelon). Dynegy Power Marketing, Inc. (Dynegy) filed a motion to intervene and protest, and MidAmerican Energy Company (MidAmerican) filed a motion to intervene out-of-time and protest. Midwest ISO filed a motion in support of Dynegy's request for settlement proceedings. On October 26, 2004, Dynegy filed an answer. On October 28, 2004, Exelon filed an answer. On November 1, 2004, the Midwest ISO and Illinois Power filed answers. Midwest ISO Transmission Owners filed a motion to intervene out-of-time and comments on November 1, 2004. On November 11, 2004, Dynegy filed an answer.

6. Notice of Illinois Power's filing in Docket No. ER04-1254-000 was published in the *Federal Register*, with motions to intervene and protests due on or before October 20, 2004. MidAmerican filed a motion to intervene. Exelon filed a motion to intervene and comments. Dynegy filed a motion to intervene and protest. The Midwest ISO filed a motion to intervene, and it filed a motion in support of Dynegy's request for settlement proceedings. On October 28, 2004, Exelon filed an answer, and on November 1, 2004, Illinois Power filed an answer. On November 1, 2004, the Midwest ISO Transmission Owners filed a motion to intervene out of time and comments. On November 11, 2004, Dynegy filed an answer.

7. Dynegy asserts in both of its protests that the rates it currently pays Illinois Power under its OATT for long-term firm point-to-point transmission service will increase by nearly 250 percent as a consequence of Illinois Power's transfer of the Transmission Service Agreements to the Midwest ISO OATT. Dynegy contends that such an increase effectively abrogates Dynegy's existing contracts with Illinois Power, which is contrary to the Commission's policy against abrogating existing transmission contracts of transmission owners that join a RTO and will penalize transmission customers. Dynegy also argues that Midwest ISO should file the proposed rate change as an increased rate and should submit data under Part 35 of the Commission regulations to explain the basis for the rate increase for the same service that was taken under the Illinois Power OATT. Finally, Dynegy contends that Dynegy and Midwest ISO had been discussing ways to mitigate the rate impact, but did not reach a final agreement before the instant filings were made. Dynegy requests that the Commission set these issues for hearing, but hold such hearing in abeyance pending settlement procedures to resolve these issues.

8. MidAmerican, in its protest in Docket No. ER04-1239-000, argues that individual settlement negotiations create the potential for unjust, unreasonable, and unduly

discriminatory charges for transmission service. To avoid an outcome that results in unjust rate discrimination among Illinois Power's customers, MidAmerican urges the Commission to ensure that, to the extent that it grants relief, non-discriminatory rate treatment is extended to all former Illinois Power customers.

9. Exelon, in its comments filed in Docket No. ER04-1254-000, states that Commission approval of Illinois Power's revised OATT should be contingent on clarifying section 9.3 of Schedule 4R – Retail Energy Imbalance Service – and section 5.3 of Schedule 4W – Wholesale Load Energy Imbalance – to make clear that “the Commonwealth Edison hourly [Locational Marginal Price (LMP)]” is the ComEd Zone LMP. Furthermore, Exelon argues that “Commonwealth Edison hourly LMP price” should be expressly defined in Schedule 4R, section 1.0 and Schedule 4W, section 1.0. Exelon contends that any Commission approval should also be contingent upon assurance that PJM Interconnection, L.L.C. (PJM) members will not bear any expense for Illinois Power to obtain the LMP values.

III. Discussion

A. Procedural Matters

10. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2003), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. The Commission will grant the motions to intervene out-of-time filed by Midwest ISO Transmission Owners (in Docket No. ER04-1239-000 and Docket No. ER04-1254-000) and MidAmerican (in Docket No. ER04-1239-000) given their interest in the proceeding, the early stage of the proceeding and absence of any undue prejudice or delay.

11. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2003), prohibits an answer to a protest and/or answer unless otherwise ordered by the decisional authority. The Commission is not persuaded to accept the answers filed by Dynegy, Exelon, and Illinois Power and will, therefore, reject them. We will, however, accept Midwest ISO's answer to the extent Midwest ISO agrees to settlement procedures in Docket No. ER04-1239-000.

B. Docket No. ER04-1239-000

12. Midwest ISO's filing raises issues of material fact that cannot be resolved based on the record before us, and are more appropriately addressed in the hearing and settlement judge procedures ordered below.

13. Our preliminary analysis indicates that the proposed Notice of Succession has not been shown to be just and reasonable, and may be unjust, unreasonable, unduly

discriminatory or preferential, or otherwise unlawful. Therefore, we will accept the proposed Notice of Succession for filing, suspend it for a nominal period, make it effective October 1, 2004,³ as requested, subject to refund, and set this matter for hearing and settlement judge procedures.

14. While we are setting this matter for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their dispute before hearing procedures are commenced.⁴ To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.⁵ If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding; otherwise, the Chief Judge will select a judge for this purpose.⁶ The settlement judge shall report to the Chief Judge and the Commission within 60 days of the date of this order concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

³ See *Central Hudson Gas & Electric Corp.*, 60 FERC ¶ 61,106, reh'g denied, 61 FERC ¶ 61,089 (1992).

⁴ With respect to the issue raised by Dynegy, in previous cases, the Commission has allowed an RTO's rates to replace pre-RTO rates under individual-company OATTs, even when the RTO rates represented a rate increase. However, in view of the Midwest ISO's ongoing discussions on this issue, and its agreement to settlement judge procedures, we encourage these parties to continue their discussions, and we will provide for settlement judge procedures, as ordered below. Furthermore, the Commission finds that MidAmerican's concern about the potential for unduly discriminatory rates as a result of the outcome of future settlement negotiations is premature.

⁵ 18 C.F.R. § 385.603 (2004).

⁶ If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of this order. The Commission's website contains a list of Commission judges and a summary of their background and experience, available at: <http://www.ferc.gov/about/offices/oalj/oalj-dj.asp>.

C. ER04-1254-000**1. Revisions to Illinois Power OATT**

15. We will accept, to be effective October 1, 2004,⁷ as requested, Illinois Power's proposed revisions to its OATT, which are intended to recognize that Illinois Power no longer offers certain services under its OATT because such services are provided by Midwest ISO. Intervenors do not protest the changes being made to Illinois Power's OATT, but instead protest the rates that will be charged under the Midwest ISO OATT, an issue we have addressed above. The proposed changes to the Illinois Power OATT are necessary to implement Illinois Power's decision to join Midwest ISO, and our review indicates that the revisions are just and reasonable.

16. We do however agree with Exelon that the terms "Commonwealth Edison hourly LMP price" and "Commonwealth Edison LMP price" in the revised Illinois Power OATT need to be expressly defined. Therefore, we direct Illinois Power to revise schedule 4R, section 1.0 and schedule 4W, section 1.0 of its revised tariff to explicitly define these terms to make clear that the LMP price is the ComEd Zone LMP, as opposed to other ComEd associated areas' LMP. Illinois Power must submit revised tariff sheets in a compliance filing, as ordered below, within 30 days of the issuance of this order. Exelon also asks that the Commission's acceptance of the revisions be made contingent upon assurance that PJM members will not bear any expense for Illinois Power to obtain the LMP values, but we dismiss this request, which relates to cost allocation matters within PJM, as outside the scope of this proceeding.

2. Reclassification of Local Distribution and Transmission Facilities

17. Illinois Power states that it has conducted an analysis of its transmission and local distribution systems under the Commission's "seven-factor test" set forth in Order No. 888 and that the Illinois Commerce Commission (Illinois Commission) has approved the reclassification of facilities between transmission and local distribution. Consistent with Order No. 888 and prior Commission orders, the Commission is persuaded to defer to the Illinois Commission's determination concerning the reclassification of facilities.⁸

⁷ See *Central Hudson Gas & Electric Corp.*, 60 FERC ¶ 61,106, reh'g denied, 61 FERC ¶ 61,089 (1992).

⁸ See *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, 61 Fed. Reg. 21,540 (May 10, 1996), FERC Stats. & Regs. ¶ 31,036 at 31,783-84 (1996), *order on reh'g*, Order

(continued)

However, we reiterate the Commission's finding in Order No. 888 that, to the extent that any facilities, regardless of their original nominal classification, in fact, prove to be used by public utilities to provide transmission service in interstate commerce to deliver power and energy to wholesale purchasers, such facilities become subject to the Commission's jurisdiction and review.⁹ In addition, the rates, terms and conditions of all wholesale and unbundled retail transmission service provided by public utilities in interstate commerce are subject to this Commission's jurisdiction and review.

The Commission orders:

(A) The Notice of Succession filed by Midwest ISO in Docket No. ER04-1239-000 is hereby accepted for filing, suspended for a nominal period, to be effective October 1, 2004, subject to refund, as discussed in the body of this order.

(B) The OATT revisions filed by Illinois Power in Docket No. ER04-1254-000 are hereby conditionally accepted for filing, to be effective October 1, 2004, subject to Illinois Power's compliance filing, to be filed within 30 days of the date of this order, as discussed in the body of this order.

(C) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, particularly section 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R., Chapter I), a public hearing shall be held in Docket No. ER04-1239-000 concerning the Notice of Succession. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Paragraphs (D) and (E) below.

(D) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2004), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this

No. 888-A, 62 Fed. Reg. 12,274 (March 14, 1997), FERC Stats. & Regs. ¶ 31,048 at 30,336 (1997), *order on reh'g*, Order No. 888- B, 81 FERC ¶ 61,248 (1997); *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd* in relevant part sub nom. *Transmission Access Policy Study Group, et al. v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002). *See also MidAmerican Energy Co. et al.*, 90 FERC ¶ 61,105 (2000).

⁹ *See* Order No. 888 at 31,969.

order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge in writing or by telephone within five (5) days of the date of this order.

(E) Within sixty (60) days of the issuance of this order, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(F) If Settlement Judge Procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within fifteen (15) days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426. The Presiding Judge is authorized to establish procedural dates, and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.