102 FERC ¶ 61,192
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 Nos. ER98-1438-014, ER01-479-004, EC98-24-008

ORDER ON REMAND

(Issued February 24, 2003)

I. Introduction

1. This case is before the Commission on voluntary remand from the United States Court of Appeals for the District of Columbia (D.C. Circuit Court).[1] Below, the Commission continues to affirm, with modification, the decisions in Opinion Nos. 453 and 453-A.[2] Those two decisions required, among other things, that Midwest Independent Transmission System Operator, Inc. (Midwest ISO): (1) include bundled retail load and load associated with grandfathered bundled wholesale agreements (grandfathered load) in the calculation of the Schedule 10 Cost Adder (ISO Cost Adder);[3] and (2) place and provide all load under the tariff. This order benefits

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[1]Midwest ISO Transmission Owners, et al. v. Federal Energy Regulatory Commission, (Nos. 02-1121 and 02-1122, (D.C. Cir. Dec. 6, 2002).

[2]Midwest Independent Transmission System Operator, Inc., Opinion No. 453, 97 FERC ¶ 61,033 (2001) (Opinion No. 453), order on reh'g, 98 FERC ¶ 61,141 (2002) (Opinion No. 453-A).

[3]The ISO Cost Adder is designed to recover all costs that are not recovered under Schedule 1 to the tariff (Scheduling, System Control and Dispatch Service). These costs include Midwest ISO's costs associated with building and operating the Security Center, "running" the ISO, and administering the Midwest ISO Open Access Transmission Tariff (OATT or Tariff). The monthly rate is calculated based on budgeted costs and estimated MWhs of transmission service, trued-up the following month and capped at 15 cents/MWh. Bundled retail and grandfathered wholesale load is to be added to the estimated MWhs of transmission service to calculate the unit rate. Any costs incurred in
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customers by providing customers more clarity through the resolution and more detailed discussion of the issues addressed below.

II. Background

2. On January 15, 1998, several transmission-owning public utilities[4] applied for Commission approval of the transfer of operational control over their jurisdictional facilities to Midwest ISO under Section 203 of the Federal Power Act (FPA).[5] Concurrently, Commission approval of the Midwest ISO Tariff and the Midwest ISO Agreement was sought pursuant to Section 205 of the FPA.[6] The Commission conditionally authorized the establishment of Midwest ISO and, among other things, conditionally accepted for filing the proposed tariff, suspended it, and set it for hearing.[7]

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[3](...continued)
excess of the 15 cents/MWh are deferred until after the transition period, to be recovered later, plus financing costs, as an additional adder under Schedule 10. The deferred costs will be amortized monthly over five years and recovered from all customers taking service under the tariff.

[4]Cincinnati Gas & Electric Company; Commonwealth Edison Company; Commonwealth Edison Company of Indiana; Illinois Power Company; PSI Energy, Inc.; Wisconsin Electric Power Company; Union Electric Company; Central Illinois Public Service Company; Louisville Gas & Electric Company; and Kentucky Utilities Company.

[5]16 U.S.C. § 824(b) (1994).

[6]16 U.S.C. § 824(d) (1994).

[7]Midwest Independent Transmission System Operator, Inc., et al., 84 FERC ¶ 61,231 (September 16 Order), order on reconsideration, 85 FERC ¶ 61,250, order on reh'g, 85 FERC ¶ 61,372 (1998). In the September 16 Order, the Commission noted, among other things, that under the proposed tariff, all new wholesale and unbundled retail transmission services must be under the tariff with additional retail loads placed under the tariff as those loads are unbundled under retail access programs in the various states. Furthermore, under the proposal, existing wholesale loads, including transmission services provided under bilateral agreements, would be placed under the tariff in six years. The September 16 Order also pointed out that Midwest ISO proposed to assess an adder equal to its actual operating costs, but capped at $0.15/MWh, with any costs in
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3. Following a public hearing, the presiding judge issued a decision on November 26, 1999.[8] Among other things, the presiding judge determined that the proposed ISO Cost Adder was not just and reasonable because: (1) the ISO Cost Adder applicable during the transition period did not include bundled retail load or grandfathered load; (2) Midwest ISO failed to propose either a rate cap, with related cost support, or a formula rate to be implemented in the ISO Cost Adder after the transition period; and (3) Midwest ISO did not explain how the deferred costs would be apportioned among the tariff customers after the transition period ends.

4. Several parties filed exceptions to the ID arguing, among other things, that: (1) bundled load should not be assessed the ISO Cost Adder during the transition period because during this period bundled load would not be served under the Midwest ISO Tariff and would only receive benefits from Midwest ISO performing its reliability function; and (2) assigning cost responsibility based upon the proportion of bundled and grandfathered loads to the overall load in the ISO Cost Adder rate divisor would cause transmission owners to face trapped costs and thus bear a large part of Midwest ISO's administrative costs during the transition period.

5. Parties argued that these additional costs cannot be recovered absent contract modification to grandfathered agreements and because of retail rate freezes transmission owners may have difficulty in some states recovering the additional ISO costs in retail rates. Some parties proposed that if the Commission concludes that bundled load and grandfathered load should be included in the divisor for recovery of Midwest ISO's costs, then the Commission should clarify: (1) that the costs assigned to grandfathered load will not be collected from those customers until the Commission approves the passthrough of those costs to customers; and (2) that the costs assigned to bundled load not taking service under the tariff be accounted for but deferred and collected after the transition period.

6. On October 11, 2001, the Commission issued Opinion No. 453 affirming and clarifying the ID in part. The Commission summarily affirmed, without discussion, eight of the issues decided by the administrative law judge. The Commission then addressed

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excess of the cap being deferred and amortized over the first five years of the post transition period. Since these and other terms and conditions had not been shown to be just and reasonable they were set for hearing. September 16 Order, 84 FERC at 62,167.

[8]Midwest Independent Transmission System Operator, Inc., 89 FERC ¶ 63,008 (1999) (Initial Decision or ID).

the issues: (1) whether the proposed ISO Cost Adder is just and reasonable and what, if any, changes should be made to the ISO Cost Adder; and (2) whether the Midwest ISO Agreement and the proposed Midwest ISO Tariff are just and reasonable as they apply to bundled loads. The Commission affirmed the administrative law judge's decision that the ISO Cost Adder must include all loads in its calculation. The Commission found that "all users of the grid will benefit from the Midwest ISO's operational and planning responsibilities for the Midwest ISO transmission system, as well as increased grid reliability of the transmission system. Therefore, to ensure that loads will properly bear a fair share of the Midwest ISO's costs, all long-term firm, bundled retail and grandfathered load should be included in the divisor in developing the Cost Adder."[9] The Commission recognized that the proposed design and operation of Midwest ISO did not include all load in the ISO Cost Adder divisor since the Midwest ISO Agreement, as accepted by the September 16 Order, did not place existing bundled load or any grandfathered wholesale load under the tariff during the six-year transition period. The Commission concluded that non-inclusion of existing bundled retail or grandfathered wholesale load in the ISO Cost Adder divisor was no longer appropriate in light of Order No. 2000. Citing Southern Company Services, Inc., 94 FERC ¶ 61,271, reh'g denied, 95 FERC ¶ 61,172 and 95 FERC ¶ 61,190 (2001) and its regulation, 18 C.F.R.§ 35.34(k)(1)(i) (2002), the Commission pointed out that Midwest ISO, as a Regional Transmission Organization (RTO), must: "be the only provider of transmission service over the facilities under its control, . . . the sole administrator of its own Commission-approved open access transmission tariff. . .[,] have sole authority to receive, evaluate, and approve or deny all requests for transmission service. . ., [and] have authority to review and approve all requests for new interconnects."[10] In light of the fundamental change to Midwest ISO's authority and responsibilities caused by Order No. 2000's implementation, the Commission directed Midwest ISO to revise its Midwest ISO Agreement and Tariff, as necessary, to consider all load in the ISO Cost Adder calculation under the Midwest ISO Tariff.[11]

7. Several parties sought rehearing of Opinion No. 453 contending that the Commission erred because it: (1) asserted jurisdiction over bundled load; (2) nullified the Midwest ISO Participants' compromise that included the six-year transition period during which time the grandfathered load and the bundled load would be phased in under Midwest ISO's Tariff; (3) found that bundled load and grandfathered load benefit from

[9]Opinion No. 453, 97 FERC at 61,169.

[10]Opinion No. 453, 97 FERC at 61,170.

[11]Id.

Midwest ISO's operational and planning responsibilities for the transmission system;[12] and (4) failed to recognize that Opinion No. 453 subjects them to unreasonably trapped costs because retail rate freezes and grandfathered agreements' provisions will prevent them from recovering the ISO Cost Adder that the transmission owners must pay for bundled retail and grandfathered wholesale load.

8. On February 13, 2002, the Commission issued an order that denied in part and granted in part rehearing and clarified Opinion No. 453. The Commission found that it had not exercised jurisdiction over bundled retail load. The Commission explained that Opinion No. 453 only directed that all long-term firm, bundled retail and grandfathered wholesale load be included in the divisor used to develop the ISO Cost Adder and that all load relying on facilities under Midwest ISO's control be placed and provided under the Midwest ISO Tariff. The Commission found that nonetheless it had not abrogated the bundled retail agreements or the grandfathered agreements because the rates, terms and conditions of those agreements would still be honored throughout the transition period, until the parties renegotiated them. In addition the Commission stated that the revenues from these bundled-retail and grandfathered agreements should continue to flow directly to the transmission owners who are signatories to the agreements, rather than go to the ISO. The Commission also pointed out that it had not nullified the Midwest ISO Participants' compromise regarding the six-year transition period because the September 16 Order required the parties to grandfathered agreements to begin the re-negotiation process within three years of start-up to address the post-transition conversion to the Midwest ISO Tariff. The Commission stated that parties to those agreements could start the re-negotiation process sooner if they so chose. The Commission explained that all users of the regional grid would receive benefits, beyond just the Security function, when that grid is operated and planned by a single regional entity. The Commission pointed out that non-Midwest ISO operated facilities, such as those connected to local generation, are part of an integrated grid and that all customers utilizing the grid must share in the costs because they all benefit.[13] The Commission granted rehearing of its affirmation of the administrative law judge's decision not to

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[12]Parties argued that at best the Security Coordination function is the only function that Midwest ISO performs that benefits bundled-load and grandfathered agreements and that this function represents only a small percentage of Midwest ISO's expected capital costs. They further argued that most of the Midwest ISO Participants' load is bundled-load and most of that load is served from generation located on their systems and thus the transmission facilities that Midwest ISO controls will not be used for a significant portion of their loads.

[13]See Opinion No. 453-A, 98 FERC at 61,412.

upset the consensus reached by the founding transmission owners regarding the transition period restrictions on the use of network service to serve bundled load. The Commission pointed out that Midwest ISO proposed to revise the tariff to remove these restrictions in a pending docket and decided that it would address this issue in that proceeding.[14] Finally, the Commission held that it had no jurisdiction over rate issues arising at the retail level. The Commission also pointed out that the issue of trapped costs in the grandfathered agreement context was initially a matter for party renegotiation and ultimately an issue for Commission determination once a proposed rate change was filed pursuant to Sections 205 or 206 of the FPA.

9. Several parties filed timely petitions for review with the D.C. Circuit of Opinion No. 453-A.[15]

10. The Commission filed a motion for limited voluntary remand with the D. C. Circuit Court. In that motion the Commission requested "that the Court hold this proceeding in abeyance and order a partial remand so the Commission can further consider Petitioners' and Intervener Aquila, Inc.'s trapped cost issue."[16]

11. The D.C. Circuit remanded the record in its entirety to allow further consideration of all issues presented for review.

III. Discussion

12. We again find that the ISO Cost Adder should include in its calculation all loads using the regional grid that Midwest ISO operates. It would not be just and reasonable to exclude bundled retail and grandfathered loads from the divisor used to develop the ISO Cost Adder.

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[14] The proposed revised provisions were conditionally accepted for filing in Midwest Independent Transmission System Operator, Inc., 101 FERC ¶ 61,113 (2002), reh'g pending.

[15] The Midwest Transmission Owners (Cinergy Corp., Indianapolis Power and Light Company, and Wabash Valley Power Association), Louisville Gas & Electric Company, Kentucky Utilities Company, along with interveners, Aquila, Inc., and the Kentucky Public Service Commission filed a joint brief for review with the court.

[16] Motion for Voluntary Remand at 1.

A. Did the Commission comply with Sections 205 and 206 of the FPA when it issued Opinion Nos. 453 and 453-A?

13. Several parties challenged the decisions in Opinion Nos. 453 and 453-A as violating the Commission's authority under Sections 205 and 206 of the FPA. They argued that directing Midwest ISO to include bundled retail load and grandfathered wholesale agreement load in the calculation of the ISO Cost Adder overturns the September 16 Order's decision to accept, without hearing or revision, the Midwest ISO Participants' proposal to exclude bundled retail or grandfathered load from service under the tariff for a maximum of six years or until the individual grandfathered agreements are renegotiated and the bundled retail load is unbundled by the states, whichever comes first. The parties argue that such a reversal fails to comply with Section 206.

14. We do not agree with the parties' assertions. As we stated previously, the September 16 Order specifically listed the issues to be set for hearing. The issues set for hearing included the rate formulae, costing methodology, return on common equity, losses, penalties, the ISO Cost Adder, and ancillary service rates.[17] The parties confuse the Commission's acceptance of the proposal to exclude the bundled retail and grandfathered wholesale loads from the Tariff terms and conditions (i.e., the rates, terms and conditions of bundled retail agreements and grandfathered wholesale agreements would still be honored) during the transition period with the Commission's decision in Opinion Nos. 453 and 453-A that bundled retail load and grandfathered wholesale load, not served under the Tariff, must be included in the calculation of the ISO Cost Adder. Opinion 453-A clearly stated that the six-year transition period is still operational.

15. The September 16 Order set the ISO Cost Adder for hearing pursuant to the Commission's authority under Section 205 of the FPA. After careful examination of the record evidence, the Commission directed that, all long-term firm, bundled retail, and grandfathered loads be included in the divisor used to develop the ISO Cost Adder.[18] Since Opinion Nos. 453 and 453-A represent an appropriate exercise of the Commission's authority under Section 205 of the FPA, there was no need for the Commission to examine the proposed ISO Cost Adder as if it had already been unconditionally accepted (i.e, examined under the Section 206 standard).

[17] See September 16 Order, 84 FERC at 61,167.

[18] The Commission reached this conclusion because it recognized that all loads benefit from Midwest ISO's operation of the regional grid and the including all load in the ISO Cost Adder calculation would more fairly distribute the cost of running Midwest ISO.

B. Should the mandates of Order Nos. 2000 and 2000-A apply to the Commission's review of Midwest ISO's proposal?

16. Order Nos. 2000 and 2000-A build on the provisions set forth in Order Nos. 888[19] and 889,[20] intended to further eliminate undue discrimination and anti-competitive practices and further improve grid reliability within the electric industry. To that end, Order Nos. 2000 and 2000-A found, among other things, that transmission customers, including those serving bundled load, will derive significant benefit from the operation of an RTO. In order to determine fair allocation of RTO costs, an RTO must consider the existence of bundled load that utilizes facilities on the RTO's integrated grid when it performs its functions.

17. Midwest ISO's proposal at issue here was made as the industry was rapidly evolving. We cannot be expected to exercise our authority to evaluate that application in a vacuum. Even Midwest ISO has recognized this, as it in effect, amended its original application in light of Order Nos. 2000 and 2000-A.[21] In Order No. 2000, we pointed out that:

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[19]Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, 61 Fed. Reg. 21,540 (May 10, 1996), FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996 ¶ 31,036 (1996), order on reh'g, Order No. 888-A, 62 Fed. Reg. 12,274 (March 14, 1997), FERC Statutes and Regulations, Regulations Preambles July 1996-December 2000 ¶ 31,048 (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, 122 S.Ct. 1012 (2002).

[20]Open Access Same-Time Information System (Formerly Real-Time Information Networks) and Standards of Conduct, Order No. 889, 61 FR 21,737 (May 10, 1996), FERC Stats. & Regs. ¶ 31,035 (1996), order on reh'g, Order No. 889-A, 62 FR 12,484 (March 14, 1997), FERC Stats. & Regs. ¶ 31,409 (1997), order on reh'g, Order No. 889-B, 81 FERC ¶ 61,253 (1997).

[21]On January 16, 2001, Midwest ISO submitted to the Commission a filing in compliance with Order Nos. 2000 and 2000-A asserting that as currently configured, Midwest ISO satisfies the requirements of Order No. 2000. See Transmittal Letter in Docket No. RT01-87-000 at 1.

> Since [1996[22]] the industry has undergone sweeping restructuring activity, including a movement by many states to develop retail competition, the growing divestiture of generation plants by traditional electric utilities . . . and the establishment of independent system operators (ISOs) as managers of large parts of the transmission system. Trade in bulk power markets has continued to increase significantly and the Nation's transmission grid is being used more heavily and in new ways.

Order No. 2000, FERC Stats. & Regs. ¶ 31,089 at 30,993. Given these significant changes, in May 1999, the Commission proposed a rule on RTOs that identified and discussed its concerns with the traditional means of grid management.[23] As a result of the comments submitted in response to the NOPR, the Commission adopted the final rule in an effort to attain independent regionally operated transmission grids that would efficiently and effectively address these significant changes.

18. The final rule required public utilities (individually or as a group) that were members of an existing ISO to file, no later than January 15, 2001, an explanation of the extent to which the transmission entity in which it participates meets the minimum characteristics and functions for an RTO, and either propose to modify the existing institution where necessary to become an RTO, or explain the efforts, obstacles and plans with respect to conforming to these characteristics.[24] Midwest ISO, having already been found to meet the Commission's ISO principles,[25] submitted its Order No. 2000 compliance filing.

19. Midwest ISO, on notice that its structure and operation would be subjected to additional Commission scrutiny -- which carried the risk that it could be required to institute changes not negotiated among the participants -- made an Order No. 2000 filing requesting RTO status less than 60 days after the ID was issued. Consequently, Midwest ISO’s actions - as supported by its TO members - of resubmitting its application to

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[22]In 1996, the Commission put into place the foundation necessary for competitive wholesale power markets in this country - open access transmission. See generally, Order No. 888.

[23]Regional Transmission Organizations, Notice of Proposed Rulemaking, 64 FR 31,390 (June 10, 1999), FERC Stats. & Regs. ¶ 32,541 at 33,683-781 (1999).

[24]See Order No. 2000, FERC Stats. & Regs. ¶ 31,089 at 31,226.

[25]See generally, September 16 Order, 84 FERC at 62,143-166.

voluntarily become an RTO, anticipated and recognized that the standard for evaluating its proposal had changed to the one imposed by Order No. 2000.[26]

20. The Commission ultimately found that Midwest ISO's application satisfied all of the characteristics and functions of an RTO under Order No. 2000.[27] In making this finding, the Commission found that Midwest ISO, among other things, would be the sole administrator of its OATT, thus satisfying one of the RTO functions identified in Order No. 2000.[28] This finding supports the Commission's requirement in Opinion No. 453 that all load should be placed under the Midwest ISO OATT and that the ISO Cost Adder be assessed against all loads.

C. Should bundled retail and grandfathered wholesale load be included in the calculation of the ISO Cost Adder?

21. Including bundled retail and grandfathered wholesale load in the calculation of the ISO Cost Adder during the transition period is appropriate because these loads benefit from Midwest ISO's operational and planning responsibilities for the Midwest ISO transmission system. Order No. 2000 clearly explains that transmission facilities can be operated more reliably and efficiently when coordinated over large geographic areas, and that RTOs would achieve this result by establishing regional transmission pricing;[29] eliminating rate pancaking;[30] improving congestion management;[31] more efficiently

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[26] The Commission said in Order No. 2000-A: "[w]e agree with those advocating a mandatory approach that the objective is to have all transmission-owning entities place their transmission facilities under the control of RTOs in a timely manner, ... There are, however, different possible means of attaining that objective." See Order No. 2000-A, FERC Stats. & Regs. ¶ 31,092 at 31,357. See also supra n.24.

[27] See generally, Midwest Independent Transmission System Operator, Inc., 97 FERC ¶ 61,326 (2001).

[28] 97 FERC at 62,511.

[29] See Order No. 2000, FERC Stats. & Regs. ¶ 31,089 at 31,108.

[30] See Order No. 2000, FERC Stats. & Regs. ¶ 31,089 at 31,174.

[31] See Order No. 2000, FERC Stats. & Regs. ¶ 31,089 at 31,126.

planning for transmission and generation investment;[32] and improving grid reliability.[33] The Commission explained in Order No. 2000-A that each of these activities benefits all users of the integrated grid, including retail load.[34]

22. In addition, even if the Order No. 2000 standards for RTO operation did not apply to the instant Midwest ISO application, we find that the inclusion of bundled retail and grandfathered wholesale load in the calculation of the ISO Cost Adder is appropriate. The record, contrary to parties' assertions, is replete with evidence that justifies the inclusion of bundled retail and grandfathered wholesale load in the calculation of the ISO Cost Adder. First, Midwest ISO exercises operational control over the regional system that serves bundled retail load, as well as other types of loads.[35] Second, the ISO

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[32]In Opinion No. 453-A, the Commission pointed out even non-Midwest ISO operated facilities, such as those connected to local generation, are integrated with and therefore dependent upon the grid and the grid facilities operated by Midwest ISO. The Commission noted that it is established policy that customers using a grid must share in all of the costs of the grid. The Commission also pointed out that efficient operation of the regional grid should result in an increase in the supply of competing generation to load serving entities. See Opinion No. 453-A, 98 FERC at 61,412; see also, Proposed Pricing Policy for Efficient Operation and Expansion of Transmission Grid, 18 C.F.R. Part 35, Docket No. PL03–1-000, 102 FERC ¶ 61,032 at P 32 (January 15, 2003).

[33]Order No. 2000 added a general interregional coordination requirement as one of the minimum RTO functions. See Order No. 2000, FERC Stats. & Regs. ¶ 31,089 at 31,166-68. "The Final Rule envisioned some level of standardization and practices, including coordination and sharing reliability data and data for TTC and ATC calculation, transmission reservation practices and congestion management." Order 2000-A, FERC Stats. & Regs. ¶ 31,092 at 31,382.

[34]See, e.g, Order No. 2000-A, FERC Stats. & Regs. ¶ 31,092 at 31,383, 31,389 (retail suppliers will benefit by access to regional markets at non-pancaked rates under an RTO).

[35]See, e.g, LG&E witness Becher's testimony that Midwest ISO's control "means functional control essentially, that any operation of the transmission system would have to be cleared with the Midwest ISO control center." Tr. 49, at 19-21. Witness Becher admitted that: (1) the transmission control is unrelated to the identity of the customer (Tr. 49 at 25-50 at 1); (2) Midwest ISO's operations affect the transmission system as a whole (Tr. 53 at 14-21); and (3) Midwest ISO's exercise of system security functions is

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Cost Adder is designed to recover the costs of running Midwest ISO as it operates the grid from which bundled retail and grandfathered wholesale loads take power.[36] Third, bundled retail and grandfathered wholesale loads will take power over the transmission system, relying on Midwest ISO's operation and planning of that system.[37] Fourth, the bulk of Midwest ISO TOs' load using the regional system is bundled retail load.[38] Fifth, certain functions that Midwest ISO performs directly affect all retail load.[39] Despite these benefits to all load, during the transition period, Midwest ISO only proposed to collect the ISO Cost Adder costs from unbundled retail and non-grandfathered wholesale

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"done for the purpose of all transmission" customers, both wholesale and retail (Tr. 50 at 10-12). Witness Becher also admitted that the bulk of LG&E's transmission system was built primarily to serve the company's retail load and that these facilities would be operated by Midwest ISO. See, e.g., Witness Becher, Tr. 47-49.

[36]"The ISO costs to be recovered under Schedule 10 shall include the ISO's deferred pre-operating costs; the costs associated with building and operating the Security Center, including capital costs and operating expenses and costs associated with administering the tariff." Schedule 10, Determination of the Monthly Charge.

[37]Midwest ISO Participants' witness, Heintz, conceded that the transmission facilities to be placed under Midwest ISO's control currently serve bundled retail customers and will continue to serve the bundled retail customers after Midwest ISO begins operations. See Tr. 208 at 12-21. Witness Becher admitted that bundled retail load will use the transmission system during the transition period. See Tr. 70 at 12-16. Witness Becher also admitted that bundled retail load will use the Midwest ISO controlled system in the same manner after the transition period ends. See Witness Becher, Tr. 68 at 17-25.

[38]See, e.g., Heintz Rebuttal Testimony, Exhibit No. MWP-18 at 35, 16-17. See also, Witness Becher, Tr. 58 at 21-25 (ninety percent of load on LG&E system is bundled retail).

[39]Witness Becher, TR. 49-50 (transmission control even at 100 kV or above could affect any user); 50-51 (regional appraisal of security or reliability of transmission system could affect all customers on the transmission system); Tr. 51-52 (calculation of ATC and maintenance of OASIS information will take into account the capacity benefit margin associated with native load); and Tr. 53-56 (transmission system planning affects the system operation as a whole without regard to any specific customer class).

customers (even though jointly they account for only about one-third of the total load).[40] Further compounding this inequity, the record shows that up to 75 percent of the ISO Cost Adder costs was expected to be recovered during the transition period[41] and no mechanism was proposed to recover from bundled retail and grandfathered wholesale loads (the largest loads on the Midwest ISO grid) any of the ISO Cost Adder costs collected during that transition period. In essence, the Midwest ISO TOs agreed among themselves to charge only the two smallest classes - wholesale customers (not parties to grandfathered agreements) and unbundled retail customers - for the bulk of costs that Midwest ISO incurs to operate a grid that primarily serves bundled retail load.[42] Accordingly, we reaffirm our conclusion that the presiding judge correctly found that Midwest ISO did not meet its Section 205 burden because it failed to show that the exclusion of bundled retail and grandfathered wholesale load from its calculation of the proposed ISO Cost Adder was just and reasonable.

D. Did Opinion Nos. 453 and 453-A exercise jurisdiction over the bundled retail rates?

23. We continue to hold that we did not exercise jurisdiction over bundled retail load when we ordered Midwest ISO to place all bundled retail load under the Midwest ISO Tariff. The terms and conditions of the service agreements that serve bundled retail load have not been modified. See Order No. 2000-A, FERC Stats. & Regs. ¶ 31,092 at 31,375. During the transition period, the retail rates also are not directly affected by the bundled retail load being placed under the Midwest ISO Tariff.

[40] See, e.g., Witness Heintz Rebuttal Testimony, Exhibit No. MWP-18, at 9, 11, 16-18.

[41] Tr. 75 at 13-24.

[42] We also find that parties' contention that bundled retail load reaps little if any benefit from Midwest ISO's activities to be undercut by their original proposal, which would impose the ISO Cost Adder on bundled retail load once the transition period ended. See, e.g., Heintz Rebuttal Testimony, Exhibit No. MWP-18 at 8, 16-18. See also, Witness Becher, Tr. 73-74.

24. As we stated in GridSouth,[43] Order No. 2000 did not require that bundled retail rates, i.e., the bundled price for electric energy delivered to retail customers, be unbundled. However, as in GridSouth, the Midwest ISO TOs are no longer the transmission providers. Midwest ISO is the sole provider of transmission service and the TOs must take all transmission services, including transmission used to deliver power to bundled retail customers, from Midwest ISO. As a result, the rates, terms and conditions of transmission service purchased by the TOs from Midwest ISO in order to serve their bundled retail customers must be on file with the Commission. This reflects the simple reality that Midwest ISO provides all transmission service and must be compensated, as would any transmission provider.

25. The price that the Midwest ISO TOs pay to the RTO becomes their cost for the transmission used to deliver the energy they sell at retail. These TOs are free to seek a rate from Midwest ISO for the transmission purchased to deliver energy to bundled retail customers equal to the transmission component of the bundled retail rates set by their state commissions. Thus, under this approach, the rate set for transmission in interstate commerce to be re-sold to retail customers as part of bundled retail service would be the same rate set by the states for the transmission component of bundled retail sales. As we stated in GridSouth, this must be accomplished by contract between Midwest ISO and the TOs. Service agreements reflecting such proposed rates must be filed with the Commission and be consistent with the Federal Power Act. This approach would not prohibit Midwest ISO from permitting the state-approved rate for service to TOs, so long as Midwest ISO followed the Order No. 888 pro forma tariff requirement with respect to discounts.[44]

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[43] Carolina Power & Light Co., et al., 94 FERC ¶ 61,273 at 61,999 (2001) (GridSouth).

[44] The pro forma tariff's discounting principles, as applied to ancillary and point-to-point services, are that any offer of a discount made by the Transmission Provider must be announced to all Eligible Customers by posting on the OASIS, and once a discount is negotiated, details must be immediately posted on the OASIS. For any discount agreed upon for service on a path, from point(s) of receipt to point(s) of delivery, the Transmission Provider must offer the same discounted transmission (or ancillary) service rate for the same time period to all Eligible Customers on all unconstrained transmission paths that go to the same point(s) of delivery on the Transmission System. (All network integration transmission service customers pay rates based on a load ratio share of the transmission provider's annual revenue requirement.)

E. Do Opinion Nos. 453 and 453-A cause the TOs to incur costs that they are not permitted to recover?

26. We are not persuaded that an inappropriate under recovery of costs will result from Opinion Nos. 453 and 453-A requiring that Midwest ISO include bundled retail load and grandfathered load in the ISO Cost Adder calculation. The parties' bald assertions have not demonstrated that costs will indeed be unrecovered as a result of that ruling.[45]

27. While some grandfathered and bundled retail agreements may not expressly provide for recovery of ISO Cost Adder assessments,[46] no information was provided in the record to establish that assessment of such additional costs would result in a net under

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[45]For example, LG&E/KU claim that it will be subject to millions of dollars of unrecoverable Midwest ISO operating costs if such costs are assessed against LG&E/KU's bundled retail load. However, LG&E/KU provide no support for this claim. We note that, as stated in LG&E/KU's request for rehearing of Opinion No. 453, LG&E/KU's retail rates are capped through 2003 pursuant to the Kentucky Public Service Commission's approval of the LG&E/KU merger. See LG&E Rehearing Request at 22; Becher Rebuttal Testimony, Exhibit MWP-14 at 5-6. We note further that Midwest ISO began billing its Cost Adder after February 1, 2002, the date that Midwest ISO began providing transmission service under its OATT. Thus, even if LG&E/KU cannot collect the ISO Cost Adder assigned based on its bundled retail load, we have no basis to find that such amounts will be in the "millions of dollars" as LG&E/KU claim. In any event, we do not believe, based on this record, that LG&E/KU has adequately demonstrated that it should be afforded any protection for its alleged inability to collect Midwest ISO costs assessed based on its bundled load as a result of its business decision to agree to a retail rate freeze in order to gain state commission approval of its merger. See, e.g., Becher Rebuttal Testimony, Exhibit MWP-14 at pp. 5-6. A utility's costs inevitably will change over time, and an increase in certain cost categories may well be offset by decreases in other categories. A utility agreeing to a rate freeze or contractually waiving its unilateral right to seek a rate increase assumes the risk that its total costs will increase.

[46]The Commission has no authority to modify any retail rate freezes; rather, rate issues related to bundled retail loads may be taken up with the appropriate state commissions. Nothing in the record indicates that any TO has attempted but been denied such state relief. Similarly, certain retail rate freezes allow rates to be increased in limited circumstances, but the TOs have not addressed this possibility on this record.

recovery of total costs by the Midwest ISO TOs.[47] Also, with Midwest ISO acting as the regional transmission service provider, as discussed in Opinion No. 453-A, there will be significantly more power supply at non-pancaked rates, which should allow a TO to lower its cost to serve its bundled retail and grandfathered wholesale customers.

28. With respect to grandfathered agreements, in addition to the right to seek to amend these grandfathered agreements pursuant to Section 206, the Midwest ISO TOs may have the unilateral right to amend rates, terms and conditions of these agreements under Section 205 if the TOs find that their rates actually turn out not to sufficiently recover their costs.[48]

29. We find that all of the reasons stated above as well as the reasons stated in Opinion Nos. 453 and 453-A are sufficient to affirm, as modified below, our direction to Midwest ISO to include all load in the divisor of the ISO Cost Adder.

30. As we explained above, it is unclear whether any costs will indeed be unrecovered as a result of our rulings in Opinion Nos. 453 and 453-A. The parties provide no concrete information concerning the existence of or the amount of the costs that the Midwest ISO TOs allegedly cannot recover. We continue to find that it is appropriate that all load be included in the ISO Cost Adder and such costs shall be collected pursuant to Schedule 10 of the Midwest ISO OATT. However, in recognition of the parties' concerns that they may be unable to collect ISO Cost Adder charges,[49] we will permit those parties, at their discretion, to make a filing with the Commission clearly demonstrating and supporting that such costs are indeed currently unrecoverable and should be treated as a regulatory

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[47]If the grandfathered agreements are reviewed under either Sections 205 or 206, the Commission must examine the overall rate and all cost components reflected in the rate and such an examination may reveal that a TO is over recovering costs. In any event, it is well-established that while regulated companies must have a reasonable opportunity to recover their costs, they enjoy no guarantee that they will necessarily do so. See, e.g., FPC v. Hope Natural Gas Co., 320 U.S. 591 at 603 (1944); Jersey Central Power & Light Co. v. FERC, 810 F.2d 1168, at 1180-81 & n.3 (D.C. Cir. 1987).

[48]Indeed, LG&E/KU recently filed under Section 205 to modify rates under two grandfathered wholesale agreements; the revised agreements were accepted for filing with a nominal suspension, subject to refund. See Louisville Gas and Electric, Co. et al., 101 FERC ¶ 61,182 (2002).

[49]We note that a related issue, raised in a contested settlement also involving the Schedule 10 Cost Adder, is being acted on concurrently in Docket No. ER02-111-000.

asset under the Commission's Uniform System of Accounts properly classified in Account No. 182.3, Other Regulatory Assets.[50]

The Commission orders:

Opinion Nos. 453 and 453-A are hereby affirmed, with modification, for the reasons stated herein.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

[50] 18 C.F.R. § 182.3 (2002).