

103 FERC ¶ 61, 035
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. ER02-2595-001

ORDER ON REHEARING AND CLARIFICATION

(Issued April 11, 2003)

1. In this order we grant in part, and deny in part, the requests for rehearing, and provide clarification. This order will enable Midwest Independent Transmission System Operator, Inc. (Midwest ISO) to recover its reasonable and prudently incurred costs associated with the establishment and administration of Financial Transmission Rights (FTR) and the development and operation of energy markets.

Background

2. On November 22, 2002, the Commission issued an order that, among other things, conditionally accepted for filing and suspended, subject to refund, proposed Schedules 16 and 17 of the Midwest ISO Open Access Transmission Tariff (OATT) providing mechanisms for Midwest ISO to recover costs associated with FTRs and energy markets.¹ The November 22 Order directed Midwest ISO to make periodic detailed reports of projected and actual costs associated with implementation of FTRs and energy markets every 60 days and to participate in a paper hearing in order to justify the appropriate billing determinants and exit fees.

3. Several timely requests for rehearing were filed. These requests, among other things, object to the Commission's finding that the proposed true-up mechanism

¹Midwest Independent Transmission System Operator, Inc., 101 FERC ¶ 61,221 (2002) (November 22 Order).

associated with the costs of implementing FTRs and energy markets is just and reasonable and that the proposed exit fee, in principle, is just and reasonable. Also, a request for clarification seeks assurance that Midwest ISO will not be allowed to recover costs through Schedules 16 and 17 prior to a Commission finding that the costs are prudently incurred and that load serving entities will be protected from incurring trapped costs. We will discuss these pleadings in more detail below.

Discussion

A. Exit Fees

1. Rehearing Request

4. In their rehearing request, Westar Energy, Inc., and Kansas Gas and Electric Company (collectively, Westar) assert that the Commission erred in holding that it was premature to determine whether it was unduly discriminatory for Midwest ISO to exempt only American Electric Power Company's (AEP) subsidiaries in the Southwest Power Pool (SPP) from the exit fees and not other SPP transmission owners. Westar proposes that the Commission approve an exemption for AEP and extend the exemption to the other SPP transmission owners. Alternatively, Westar argues that exit fees are anti-competitive and that the Commission's assertions to the contrary are arbitrary and capricious and not supported by substantial evidence. Westar asserts that the Commission misinterpreted Article Five of the Midwest ISO TO Agreement² to permit Midwest ISO to unilaterally impose exit fees on withdrawing transmission owners with respect to Schedule 16 and 17 costs. Finally, Westar argues that the Commission did not adequately explain why the Commission's stranded cost policy does not apply to the exit fees.

2. Commission Determination

5. We will deny Westar's request that we approve an exemption from exit fees for AEP. We also deny Westar's request that the Commission direct Midwest ISO to extend that exemption from Schedule 16 and 17 exit fees to other SPP transmission owners. The AEP exemption was included in the Memorandum of Understanding (MOU) that expressed AEP's intent to file an application to join Midwest ISO. In a letter to the

²Article Five of the Midwest ISO TO Agreement provides that the withdrawing transmission owner and Midwest ISO will settle outstanding obligations (and renegotiate as necessary).

Commission dated January 10, 2003, AEP informed the Commission that it was withdrawing from the MOU and would not apply for membership in the Midwest ISO under the terms of the MOU.³ Since AEP is withdrawing from the MOU, Westar's objection to the Commission's decision not to evaluate the exit fees in light of the MOU, as well as Westar's request that the MOU's exemption of AEP from payment of exit fees be extended to other SPP transmission owners is moot.

6. The Commission continues to disagree with Westar's assertion that the exit fees are anti-competitive. Westar raises no new arguments to support this contention. As stated previously, the Commission's experience indicates that exit fees do not hinder competition as indeed several public utilities have left Midwest ISO to participate in another Regional Transmission Organization (RTO) even though they were required to pay exit fees.⁴

7. Accordingly, we deny Westar's request that we reverse our decision that exit fees charged to withdrawing transmission owners are reasonable. Westar has not raised any

³AEP stated that it was withdrawing from the MOU and would not apply for membership in Midwest ISO under the terms of the MOU because of the Commission's decision in *Midwest Independent Transmission System Operator, Inc.*, 101 FERC ¶ 61,319 (2002). In that order the Commission, among other things, rejected the proposed modification to Article Five of the Resulting Company Agreement that contained a similar "quick out" withdrawal right as the MOU and directed Midwest ISO to modify Article Five of the Resulting Company Agreement to track the termination provisions in the original Midwest ISO TO Agreement - in effect nullifying "quick-out" rights in the MOU. See *Id.* at PP 40-46. AEP also stated in the letter that it still intends to transfer functional control of its SPP subsidiaries' facilities to Midwest ISO in order to meet its merger obligations.

⁴See *Illinois Power Company, et al.*, 95 FERC ¶ 61,183 order denying reh'g, 96 FERC ¶ 61,026 (2001) (approving settlement allowing Illinois Power Company (Illinois Power), Commonwealth Edison Company (CEC) and Ameren Corporation (Ameren) to leave Midwest ISO). Westar states that it may pay as much as \$3 million as an exit fee if it left the Midwest ISO prior to December 31, 2006, based on a load of approximately 42,685,000 Mwh (*i.e.*, \$0.0702/Mwh). Illinois Power, CEC and Ameren paid \$6.5 million, \$35.5 million, and \$18 million, respectively, to leave Midwest ISO. These payments are equivalent to the following based on 2001 load: \$0.378 Mwh for Illinois Power, \$0.407 Mwh For CEC and \$0.298 Mwh for Ameren. In other words, Illinois Power, CEC and Ameren left Midwest ISO even though they were required to pay amounts exceeding what Westar states it would have to pay.

new issues or arguments on this issue that we have not already considered. In addition to the reasons stated above, the November 22 Order clearly states that Midwest ISO is dependent on the transmission owners and that it is reasonable to assess the exit fees in order to ensure that Midwest ISO can service its debt.⁵ Such commitments will facilitate the financing of costs incurred by Midwest ISO to develop market infrastructure and will help ensure reliable operation and maintenance of Midwest ISO. As we stated in the November 22 Order:

[w]ithout a withdrawal fee, the unrecovered costs of these services shifts to the other parties when a Transmission Owner withdraws from Midwest ISO even though Midwest ISO's services were created, in part, to benefit that departing Transmission Owner and comply with the Commission's directive in MISO to establish services that are consistent with the Commission's efforts to develop a standardized market.⁶

8. Westar argues that the Commission erred when it determined that Article Five of the Midwest ISO TO Agreement authorizes new exit fees. According to Westar, the language in Article Five requires payments for services the withdrawing owner has received prior to the date of its withdrawal. Westar also believes that the Commission's interpretation that allows new exit fees alters the rights of transmission owners to withdraw from Midwest ISO.

9. The Commission has carefully reviewed Article Five and believes that the language is clear on its face that it does not preclude assessing the exit fees in Schedules 16 and 17, nor does it simply require payments for services received by the TO prior to the date of withdrawal.⁷ Accordingly, we believe that the Commission's interpretation that Article Five applies to the exit fees of Schedules 16 and 17 is reasonable. Furthermore, the Commission pointed out in the November 22 Order that transmission owners can still withdraw from Midwest ISO. Therefore, the Commission's

⁵See November 22 Order, 101 FERC at P 54.

⁶November 22 Order, 101 FERC at fn 63.

⁷Part II of Article Five discusses the effect of withdrawal by an owner on contractual obligations and Section B, thereunder, states, "All financial obligations incurred and payments applicable to time periods prior to the effective date of such withdrawal shall be honored by the Company and the withdrawing Owner." Section D states "other obligations between the Company and the withdrawing Owner shall be renegotiated as between the Company and the withdrawing Owner."

interpretation of Article Five in no way alters the transmission owners' rights to withdraw from Midwest ISO.

10. Westar asserts that the Commission erred in holding that its stranded cost policy in Order No. 888⁸ does not apply here because that stranded cost policy addressed generation costs, as opposed to the costs for establishing FTRs and energy markets. Westar argues that the difference in type of costs is not relevant because the underlying principles are the same. We disagree and remain convinced that the Order No. 888 stranded cost policy does not apply here for the reasons stated in the November 22 Order.

11. Furthermore, even if the Order No. 888 stranded cost policy did apply, we would still find that the policy does not prohibit Midwest ISO from assessing exit fees for the implementation of FTRs and energy markets.⁹ While Westar is correct that Order No. 888 prohibits public utilities from seeking recovery of stranded costs from departing customers under existing wholesale requirements contracts if such contracts already contain an exit fee or explicit stranded cost provision, it does not prohibit utilities from proposing provisions for the recovery of stranded costs in new wholesale requirements contracts.¹⁰ Midwest ISO's proposal to include exit fee provisions at the outset for its provision of new services under new Schedules 16 and 17 is akin to the latter situation.

⁸See 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. 21540 (May 10, 1996), FERC Stats. & Regs. ¶ 31,036 at ¶ 31,812 (1996), order on reh'g, Order No. 888-A, 62 Fed. Reg. 12,274 (March 14, 1997), FERC Stats. & Regs. ¶ 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 part and remanded in part sub nom., Transmission Access Policy Study Group, et al., v. FERC, 122 S.Ct. 1012 (2002).

⁹The issue of exit fee allocation is before the Commission in the paper hearing ordered in the Commission's November 22 Order.

¹⁰See 18 C.F.R. § 35.26(c)(1)(v) through (vii) and (c)(2) (2002).

B. Cost Recovery

1. Clarification/Rehearing Request

12. The Midwest ISO Transmission Owners filed a request for clarification or in the alternative, a request for rehearing.¹¹ The Midwest ISO Transmission Owners ask the Commission to clarify that once the Commission determines that costs are imprudent, Midwest ISO cannot recover any imprudent monies spent. According to the Midwest ISO Transmission Owners, footnote 35 in the November 22 Order creates uncertainty in this regard because the Commission required revisions to the Midwest ISO OATT "to provide that Schedule 10 includes all costs except those costs that are recoverable under Schedule 1, Schedule 16, or Schedule 17." They are concerned that this revision may allow Midwest ISO to recover costs under Schedule 10 that were deemed imprudent under Schedules 16 and Schedule 17. They also request clarification as to how the informational filing will be used to determine if those costs are prudent. Finally, the Midwest ISO Transmission Owners request that the Commission clarify that Midwest ISO must obtain Commission approval of the projected costs contained in the informational filings before spending money to incur such costs.

2. Commission Determination

13. We clarify that Midwest ISO's informational filings will be used to indicate the expected expenditures and monitor the progress made by Midwest ISO. However, we

¹¹The Midwest ISO Transmission Owners consist of Ameren Services Company, as agent for Union Electric Company and Central Illinois Public Service Company; Alliant Energy Corporate Services, Inc. as agent for IES Utilities Inc., and Interstate Power Co.; American Transmission Company LLC; Aquila, Inc.; Central Illinois Light Co.; Cinergy Services, Inc. (for Cincinnati Gas & Electric Co., PSI Energy, Inc., and Union Light Heat & Power Co.); City Water, Light & Power (Springfield, IL); Hoosier Energy Rural Electric Cooperative, Inc.; Indiana Municipal Power Agency; Indianapolis Power & Light Company; International Transmission Company; LG&E Corporation (for Louisville Gas and Electric Co., and Kentucky Utilities Co.); Lincoln Electric System; Manitoba Hydro; Michigan Electric Transmission Company, LLC; Minnesota Power (and its subsidiary Superior Water, L&P); Montana-Dakota Utilities Co.; Northwestern Wisconsin Electric Company; Otter Tail Power Company; Southern Illinois Power Cooperative; Southern Indiana Gas & Electric Company; Wabash Valley Power Association, Inc. and Xcel Energy Inc., (for Northern States Power Company and Northern States Power Company (Wisconsin)).

note that the informational filings are not intended to form the basis of an automatic prudence review of reported costs. Rather, these filings are intended to give the parties advance notice of potential cost issues which they can then raise via an appropriate filing with the Commission.¹²

14. With respect to footnote 35 in the November 22 Order, the Commission's intent was to preclude the double recovery of costs. Prior to the Schedule 10 modifications directed in the November 22 Order, Schedule 10 included all costs except those costs recovered in Schedule 1. The Schedule 10 modifications ordered by the Commission are necessary so that Midwest ISO cannot recover Schedule 16 and Schedule 17 costs under those respective schedules as well as under Schedule 10. The language in footnote 35 is not intended to permit Midwest ISO to recover imprudent costs in Schedule 10 or in any other provisions of the Midwest ISO OATT or Midwest ISO TO Agreement.

C. True-up Mechanism

1. Rehearing Request

15. Consumers Energy Company (Consumers) objects to our decision not to separate the calculation of the monthly charge from the calculation of the true-up amount for the prior month. Consumers asserts that, anytime there is a difference between a transmission customer's FTR volume in one month and the FTR volume in the subsequent month, there will be a mismatch between the costs incurred by the Midwest ISO for a transmission customer and the Schedule 16 charge assessed to that transmission customer. Consumers argues that a similar mismatch occurs with Schedule 17 charges. Consumers further asserts that the proposed true-up mechanisms do not encourage price certainty nor are they consistent with the basic principles of equity and cost causation.

¹²See, e.g., Midwest Independent Transmission System Operator, Inc., Docket No. EL03-34-000, 102 FERC 61,279 at fn 21 (March 12, 2003). In late January and early February of 2003, comments on the first informational filing were submitted in Docket No. ER02-2595-000 by Louisville Gas & Electric Company and Kentucky Utilities, Midwest ISO Transmission Owners (except Manitoba Hydro, Michigan Electric Transmission Company and Xcel Energy, Inc.), and Public Service Commission of Ohio. The commenters generally request more detailed information so that they can better evaluate the costs Midwest ISO expects to incur. We agree that more detailed information is required and we order Midwest ISO to address the concerns expressed by the commenters in future informational filings.

2. Commission Determination

16. We disagree with Consumers that the proposed true-up mechanism would not provide price certainty for transmission customers. The proposed true-up mechanism would determine the price at the beginning of the month, allowing market participants to enter into economic transactions based on that price. Contrary to Consumers' assertion, we believe that this mechanism will increase certainty for transmission customers. If Consumers' request were granted, the price would not be known until the end of the month.¹³

17. Nonetheless, any mismatches can be minimized by the efforts of Midwest ISO to accurately forecast costs and billing determinants, and we expect Midwest ISO to employ reasonable efforts to forecast costs and billing determinants in order to minimize amounts to be included in the true-up in the following month's charge. Furthermore, we continue to expect that any mismatches will be mitigated over time.¹⁴ If Midwest ISO is unable to forecast costs and billing determinants accurately, thereby making the mismatches sizable, concerned parties have the option to bring this matter to the Commission's attention by filing a complaint.

¹³Consumers alleges that Midwest ISO's Schedule 10 true-up practice is inconsistent with its tariff and that this practice results in a mismatch between costs incurred and charges. We did not rely on Midwest ISO's practice with respect to Schedule 10 to support the instant proposal. If Consumers believes that Midwest ISO's Schedule 10 is no longer just and reasonable or that Midwest ISO is improperly implementing Schedule 10 of its tariff, Consumers may file a complaint, under Section 206 of the Federal Power Act, 16 U.S.C. §824e(1994).

¹⁴Additionally, we note that in Consumers' initial protest and in its rehearing request, it stated that the rates in Schedule 16 and 17 should be capped as is the rate in Schedule 10. The Schedule 10 rate is capped, and any excess costs are deferred until after the transition period and are then recovered as part of the post-transition rate. Consumers argues that capping the rate in Schedule 10 could result in a mismatch between cost incurrence and cost recovery, between the transition period and the post-transition period. Consumers has not explained why it supports one rate treatment, a rate cap and deferral mechanism, that could create a sizable mismatch between distant time period, depending on the level of the rate cap, but opposes another rate treatment that, if not mitigated, may result in minor mismatches from one month to the next.

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The Commission orders:

(A) The requests for rehearing are hereby denied.

(B) The request for clarification is hereby granted to the extent discussed herein.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.