

UNITED STATES OF AMERICA 107 FERC ¶ 61,131
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.

Docket No. ER04-158-000

ORDER DENYING AUTHORIZATION

(Issued May 7, 2004)

1. This order denies Midwest Independent Transmission System Operator, Inc.'s (Midwest ISO) request for authorization to reimburse Michigan Electric Transmission Company, LLC (Michigan Transco)¹ for costs incurred by Consumers Energy Company (Consumers) in seeking to establish the Alliance Regional Transmission Organization (Alliance RTO).² This order benefits customers by ensuring that impermissible collateral attacks on previous Commission orders will not be allowed.

I. Background

2. On April 25, 2002, the Commission issued an order stating its intent to allow any member company of the now defunct Alliance RTO, to recover all costs prudently incurred to establish the RTO, once that company is a member of an RTO.³

¹ Please note that Midwest ISO's filing refers to Michigan Electric Transmission Company, LLC as "METC." Because the Commission has frequently referred to Michigan Electric Transmission Company, LLC as "Michigan Transco" in the past, see e.g., Michigan Electric Transmission Company, 101 FERC ¶ 61,086 (2002), we will continue to do so here.

² Midwest ISO states that although it is submitting this request, it does not take a position on whether the Commission should grant the request.

³ Alliance Companies, et al., 99 FERC ¶ 61,105 at 61,442 (2002) (Alliance). The Commission initially expressed its intention to consider proposals for recovery of Alliance RTO-related prudently incurred costs in Alliance Companies, et al., 97 FERC ¶ 61,327 (2001).

3. On February 27, 2003, Midwest ISO filed a request for authorization to reimburse Consumers approximately \$8.3 million, under Schedule 10 of the Midwest ISO Open Access Transmission Tariff, for costs Consumers claimed to have incurred in seeking to establish the Alliance RTO.

4. On May 22, 2003, the Commission denied Midwest ISO's request for authorization.⁴ The Commission acknowledged its previously-stated intention to allow recovery of all costs prudently incurred by an Alliance RTO member to establish an RTO once it is a member of an RTO. However, it found that Consumers had already been adequately compensated. The Commission explained that, prior to the issuance of Alliance, Consumers had transferred its transmission facilities to its affiliate Michigan Electric Transmission Company (METC)⁵ and received authorization for the further sale and transfer from METC to Michigan Transco, whose transmission facilities were under the operational control of the Midwest ISO.⁶ The May 22 Order found that Consumers was not entitled to recover costs associated with Alliance RTO development activities because it did not join an RTO as a transmission owner and had sold its transmission facilities to Michigan Transco.

5. On June 23, 2003, Consumers and Midwest ISO filed a joint request for rehearing of the May 22 Order. They requested that the Commission clarify that the May 22 Order intended to allow all of Consumers' prudently incurred Alliance RTO start-up costs to be recovered by the current owner of Consumers' former transmission system, *i.e.* Michigan Transco, because it is a member of the Midwest ISO. In the alternative, Consumers asserted that the Commission erred in denying the authorization for Consumers to recover its costs. On September 16, 2003, iterating the same rationale articulated in the May 22 Order, the Commission denied the joint request for rehearing.⁷

⁴ Midwest Independent Transmission System Operator, Inc., 103 FERC ¶ 61,219 (2003) (May 22 Order).

⁵ Please note that Midwest ISO's filing refers to Michigan Electric Transmission Company as "Michigan Transco." Because the Commission has frequently referred to Michigan Electric Transmission Company as "METC" in the past, *see supra* note 1, we will continue to do so here.

⁶ In addition, the May 22 Order explained that Consumers closed on the deal to sell METC to Michigan Transco on May 1, 2002, after Alliance was issued and that Consumers did not seek clarification of that order.

⁷ Midwest Independent Transmission System Operator, Inc., 104 FERC ¶ 61,298 (2003) (September 16 Order).

6. Now, Midwest ISO states that Michigan Transco, as the direct successor in interest to Consumers and METC, is entitled to recover the costs incurred by Consumers in its attempt to form the Alliance RTO. Midwest ISO argues that denial of recovery would be inequitable and discriminatory in light of Commission precedent allowing recovery of costs prudently incurred in the development of the Alliance RTO and establishing a mechanism for such reimbursement.⁸

II. Notice of Filing, Interventions, Protests and Answers

7. Notice of Midwest ISO's filing was published in the Federal Register, 68 Fed. Reg. 65,693 (2003), with comments, interventions, and protests due on or before November 26, 2003. The Michigan Public Power Agency and the Michigan South Central Power Agency, Louisville Gas and Electric Company and Kentucky Utilities Company, Wolverine Power Supply Cooperative, Inc. (Wolverine), Wisconsin Public Service Corporation and Upper Peninsula Power Company, Midwest ISO Transmission Owners, and Wisconsin Electric Power Company filed timely motions to intervene and protests. Midwest ISO and Michigan Transco filed a joint answer to the protests. Wolverine filed an answer to the answer. The Kentucky Public Service Commission (Kentucky Commission) filed a motion to intervene out-of-time.

8. Several protestors argue that Midwest ISO's filing constitutes a collateral attack on the Commission's May 22 Order in which the Commission rejected Consumers' request to recover the same costs that Midwest ISO and Michigan Transco are requesting in this proceeding. Moreover, most of the protestors argue that Michigan Transco does not meet the requirements for recovering Alliance RTO formation costs as established by the Commission in Alliance.

III. Discussion

A. Procedural Matters

9. 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. Pursuant to rule 214(d) of the Commission's Rules of Practice and Procedure,⁹ given its interest in this proceeding, the early stage of the proceeding, and the absence of any undue prejudice or delay, we find

⁸ See Ameren Services Company, 101 FERC ¶ 61,320 (2002).

⁹ 18 C.F.R. ' 385.214(d) (2003).

good cause to grant the Kentucky Commission's untimely, unopposed motion to intervene.

10. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 384.213 (2003), prohibits an answer to a protest or answer unless otherwise ordered by the decisional authority. We are not persuaded to accept Midwest ISO and Michigan Transco's answer or Wolverine's answer and will, therefore, reject them.

B. Analysis

11. We will deny Midwest ISO's request for authorization. The issue of whether Consumers is entitled to separately recover costs it may have incurred in the development of the Alliance RTO was addressed in the May 22 Order and on rehearing in the September 16 Order. As explained above, the Commission denied Consumers' request for such a recovery. In the instant filing, Midwest ISO presents the same issue and makes the same arguments (even though it is requesting the recovery on behalf of Michigan Transco) as those raised and addressed in the May 22 and September 16 Orders. In fact, Midwest ISO states that if the Commission grants authorization to recover such costs, Michigan Transco will remit the dollars recovered to Consumers. Thus, the fundamental issue here is not whether Michigan Transco can recover the costs that Consumers incurred, but whether Consumers, through Michigan Transco, should now separately recover the costs in the first instance. Because we have already ruled on this issue in the May 22 and September 16 Orders, Midwest ISO's filing constitutes an impermissible collateral attack on those orders and is rejected.

12. In any event, Michigan Transco is not eligible to recover the costs that Consumers incurred. The Commission's test for utilities that seek reimbursement for costs incurred in the formation of the Alliance RTO is: (1) the utility must have been a member of the Alliance RTO; (2) the utility must be a transmission-owning member of an RTO; and (3) the costs must be prudently incurred. That test is not satisfied by either Consumers or Michigan Transco.¹⁰ As Michigan Transco was not a member of the Alliance RTO, Michigan Transco does not even satisfy the first prong of the test. While Consumers was a member of the Alliance RTO, it does not satisfy the second prong of the test because Consumers did not join an RTO as a transmission owner, but sold its transmission facilities to Michigan Transco. Regardless of Michigan Transco's position as direct successor in interest to Consumers, Consumers was the only utility eligible to recover the costs (because it was a member of the Alliance RTO). Once Consumers sold its facilities

¹⁰ See Alliance, 99 FERC ¶ 61,105 at 61,442; May 22 Order, 103 FERC ¶ 61,219 at P 17-19; September 16 Order, 104 FERC ¶ 61,298 at P 10.

before joining another RTO, it relinquished its ability to recover the costs and the ability of any successor in interest to recover the costs as well.¹¹

The Commission orders:

Midwest ISO's request is hereby denied.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

¹¹ See September 16 Order, 104 FERC ¶ 61,298 at P 10 & n.5. See also *id.* at P 11 & n.8 (describing the apparent profits Consumers received when it transferred its facilities).