

110 FERC ¶ 61,081  
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.

Docket No. ER05-273-000

ORDER ACCEPTING AND SUSPENDING REVISED TARIFF SHEETS AND  
ESTABLISHING HEARING AND SETTLEMENT JUDGE PROCEDURES

(Issued January 28, 2005)

1. On November 30, 2004, Midwest Independent Transmission Operator, Inc. (Midwest ISO) filed proposed clarifying revisions to section 22.2 of its Open Access Transmission Tariff (OATT), pursuant to section 205 of the Federal Power Act (FPA)<sup>1</sup>. Midwest ISO states that the proposed revisions clarify the charges it will assess when a transmission customer elects to redirect its firm point-to-point transmission service pursuant to section 22.2. In this order, the Commission will accept and suspend the revised tariff sheets, and set them for hearing and settlement judge procedures. This order benefits customers by ensuring that Midwest ISO's rates under its OATT are consistent with Commission requirements.

**Midwest ISO's Filing**

2. Under section 22.1 of the Midwest ISO OATT, a firm point-to-point transmission service customer may request to redirect its scheduled transmission service over Receipt and Delivery Points other than those originally reserved (Secondary Receipt and Delivery Points) without additional non-firm point-to-point transmission service charges (except as provided in section 22.1a), subject to certain conditions.<sup>2</sup> If the customer requests to

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<sup>1</sup> 16 U.S.C. § 824d (2000).

<sup>2</sup> The conditions in section 22.1 provide that redirected service is non-firm only and does not displace any firm or non-firm service already scheduled, that the total  
(continued)

redirect service over a transmission path with a higher cost than the path the customer initially reserved, section 22.2 of the Midwest ISO OATT provides that the customer shall pay the additional costs (i.e., the difference in the zonal rates) associated with the redirected path.

3. Midwest ISO states in its filing that its practice has been to charge redirecting customers the “higher of” the cost of its initial firm point-to-point service or the new non-firm point-to-point service it will receive. According to the Midwest ISO, charging the “higher-of” rate prevents a Transmission Customer from “gaming” the transmission service reservation system by redirecting its firm reservations to acquire non-firm transmission service at discounted rates.

4. Midwest ISO states that despite this “long-standing” practice, it has become aware of some confusion among its Transmission Customers as to the authority to charge the “higher-of” rate. To resolve this ambiguity, Midwest ISO proposes in the instant filing to revise the current language in section 22.2 of its OATT, and add a new subsection (a). According to Midwest ISO, this change is intended to clarify that a redirecting Transmission Customer will be liable for the additional costs associated with redirecting. Additionally, Midwest ISO proposes a new subsection (a) that would spell out the Midwest ISO’s practice of charging redirecting Transmission Customers the “higher-of” rate for redirect services:

- (a) During the time that the Transmission Customer is obtaining Non-Firm Transmission Service over Secondary Receipt or Delivery Points, the Transmission Customer shall be charged the higher of: (1) the rate associated with the original Firm reservation that was redirected; or (2) the rate for the Non-Firm Transmission Service obtained over the Secondary Receipt or Delivery Points. Any portion of the original Firm reservation not redirected will be charged the original Firm reservation rate.

5. Midwest ISO requests waiver of the 60-day prior notice requirement of the Federal Power Act, pursuant to section 35.11 of the Commission’s regulations,<sup>3</sup> to establish an effective date of December 1, 2004. Midwest ISO argues that good cause exists to grant

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amount of firm and non-firm service provided to the redirecting customer shall not exceed reserved in the initial Service Agreement, and that the non-firm service is subject to the requirements of Section II of the OATT, except as to transmission rates.

<sup>3</sup> 18 C.F.R. § 35.11 (2004).

waiver because the proposed revisions are merely clarifying, and do not change any rates assessed to transmission customers.

### **Notice of Filing, Interventions and Protests**

6. Notice of Midwest ISO's filing was published in the *Federal Register*,<sup>4</sup> with comments, protests and interventions due on or before December 21, 2004. Timely motions to intervene were filed by Constellation Energy Commodities Group, Inc. (Constellation), Consumers Energy Company, DTE Energy Trading, Inc. (DTE), Holland Board of Public Works (Holland) and Northern Indiana Public Service Company. Constellation, DTE, and Holland each filed protests. On January 24, 2005, Midwest ISO filed an answer. On January 27, 2005, the Midwest Stand-Alone Transmission Companies<sup>5</sup> filed a motion for leave to intervene out-of-time.

7. Constellation argues that the revised tariff language proposed by Midwest ISO in the instant filing results in charges in excess of Midwest ISO's Commission-approved rates and unduly restricts firm customers' rights to redirect service. Constellation asserts that Midwest ISO's revised tariff language assesses short-term rates that assume customers take and pay for service only during peak periods when taking redirect service. According to Constellation, a firm customer, under its initial firm monthly reservation, has prepaid for service during every hour of every day of the month whether or not it schedules any energy during the reservation period. Further, Constellation contends that Midwest ISO cannot argue that its proposed charges are justified because it is forgoing additional revenues for non-firm redirects, because such redirects are granted on a space-available basis only and redirect service is accorded the lowest reservation priority under the Commission's *pro forma* OATT. Constellation posits that the proper charge for redirect service into the same zone should be at the same rate as the original reservation. It argues that Midwest ISO's proposal, by attaching a premium to the customer's ability to redirect, effects a financial penalty inhibiting the customer from using the flexibility the Commission has accorded to long-term firm transmission customers. Constellation also expresses concern that applying rates which reflect peak period pricing, as in the instant proposal, would violate Midwest ISO's weekly and daily caps. Further, Constellation states that Midwest ISO filed the instant tariff sheets without stakeholder

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<sup>4</sup> 69 Fed. Reg. 74,516 (2004).

<sup>5</sup> The Midwest Stand-Alone Transmission Companies include American Transmission Company LLC, International Transmission Company, and Michigan Electric Transmission Company, LLC.

input, in violation of an earlier Commission directive. Finally, Constellation avers that Midwest ISO, by already charging the rates outlined in the revised tariff sheets filed in this proceeding, has been charging a rate which is greater than the rate on file without first making a filing under section 205 of the FPA, and requests refunds on the over-collected amounts.

8. In its protest, DTE first argues that Midwest ISO's filing evidences a violation of the filed rate doctrine, since Midwest ISO is attempting to justify for the first time before the Commission increased charges already being assessed pursuant to the Midwest ISO Business Practices Manual. DTE asserts that all such increased charges assessed to date should be refunded. Further, DTE states that Midwest ISO's proposal seeks not only to impose higher costs related to redirected transmission service over higher-cost paths (which DTE argues is permitted under the current tariff language), but is an attempt to redefine the redirected service as a more expensive short-term non-firm service. DTE argues that Midwest ISO has not stated why this revised tariff language is necessary to curb abuse of the redirect option by customers, and that Midwest ISO has not justified the new rate structure with cost information indicating transmission owners are under-recovering their costs due to the provisions of redirect service. Additionally, DTE argues that the revised tariff language violates the fundamental distinctions made by the Commission between firm and non-firm transmission service. Finally, DTE asserts that Midwest ISO's "higher-of" rate proposal is overly broad, because it encompasses changes in receipt points that have no effect on the value of a particular transmission path.

9. In its protest, Holland explains that all of its primary delivery points under its firm point-to-point reservation are located in the Michigan Electric Transmission Company, LLC (METC) pricing zone and Holland should, therefore, not incur any additional costs for secondary reservations. Holland states however, that Midwest ISO has been billing Holland at the hourly rate for non-firm point-to-point service, a rate that is greater than the firm point-to-point rate which applies to the original reservation. Holland protests that Midwest ISO is charging rates for which it has not provided adequate support nor sought authorization, in violation of the filed rate doctrine. Holland requests that the Commission reject Midwest ISO's filing or in the alternative suspend the filing for five months, provide refund protection, order Midwest ISO to provide cost support and set the matter for hearing.

10. In its answer, Midwest ISO first contends that the protestors improperly combine complaints with their protests, contrary to Commission precedent and section 206 of the FPA. Additionally, Midwest ISO states that while the protests suggest that the intent of proposed section 22.2 of the OATT is only to prevent zonal rate gaming, the actual intent of this tariff language was to address all instances of gaming through the use of non-firm redirect service. Midwest ISO argues that the Commission, in its order initially

approving this language in Midwest ISO's OATT, understood this broader intent. Finally, Midwest ISO argues that no violation of the filed rate doctrine has occurred because it has applied its tariff language as filed, and that the arguments of protestors that Midwest ISO has not provided proper cost support for its filing should be rejected, because the proposed tariff sheets are only clarifying in nature and do not propose a rate increase.

### **Discussion**

11. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,<sup>6</sup> the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Additionally, pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, we will grant the motion to intervene out-of-time of the Midwest Stand-Alone Transmission Companies, given their interest in the proceeding, the early stage of the proceeding, and the absence of any undue prejudice or burden. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure<sup>7</sup> prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept Midwest ISO's answer because it has provided information that assisted us in our decision-making process.

12. We find that the concerns raised by the protestors present issues of material fact that cannot be resolved based on the record before us. The protests raise important issues regarding whether Midwest ISO's proposed charges for redirect service conform to the Commission's policy on pricing of redirected transmission, and in fact whether the Midwest ISO's proposed revised tariff language results in charges in excess of its tariff rates. Furthermore, Midwest ISO has not provided a clear explanation or adequate cost support for the redirect pricing reflected in the revised tariff sheets filed in this proceeding.<sup>8</sup>

13. The Commission's preliminary analysis indicates that the proposed rates in the revised tariff sheets filed by Midwest ISO have not been shown to be just and reasonable,

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<sup>6</sup> 18 C.F.R. § 385.214 (2004).

<sup>7</sup> 18 C.F.R. § 385.213(a)(2) (2004).

<sup>8</sup> With regard to the arguments raised by protestors regarding Midwest ISO's past charges for redirect service and the requests for refund protection, those arguments are more appropriately raised in the context of the recent complaint filed by Holland in Docket No. EL05-55-000.

and may be unjust, unreasonable, unduly discriminatory or preferential or otherwise unlawful. Accordingly, as noted elsewhere in this order, the Commission will accept the revised tariff sheets and suspend them for a nominal period, to be effective January 30, 2005, subject to refund, and set them for hearing and settlement judge procedures.<sup>9</sup>

14. Additionally, the Commission will deny Midwest ISO's request to waive the 60-day prior notice requirement.<sup>10</sup>

15. In order to provide the parties an opportunity to resolve these matters among themselves, we will hold the hearing in abeyance and direct settlement judge procedures, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.<sup>11</sup> If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in this proceeding; otherwise, the Chief Judge will select a judge for this purpose.<sup>12</sup> 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.

The Commission orders:

(A) The tariff sheets filed by Midwest ISO are hereby accepted for filing and suspended for a nominal period, to be effective January 30, 2005, subject to refund.

(B) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the

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<sup>9</sup> Additionally, we note that setting this matter for hearing and settlement judge procedures should alleviate concerns raised by Constellation regarding stakeholder input.

<sup>10</sup> See *Central Hudson Gas and Electric Corp.*, 60 FERC ¶ 61,106 at 61,338-39 (1992), *reh'g denied*, 61 FERC ¶ 61,089 (1992).

<sup>11</sup> 18 C.F.R. § 385.603 (2004).

<sup>12</sup> 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 the date of this order. The Commission's website contains a list of Commission judges and a summary of their background and experience. ([www.ferc.gov](http://www.ferc.gov) – click on Office of Administrative Law Judges).

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Department of Energy Organization Act and the Federal Power Act, particularly section 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 concerning the redirect pricing proposed by Midwest ISO. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Paragraphs (C) and (D) below.

(C) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603(2003), 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 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.

(D) Within sixty (60) days of the date 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.

(E) 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 this proceeding in a hearing room of the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington DC 20426. Such conference shall be held for the purpose of establishing a procedural schedule. 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.