113 FERC ¶ 61,264
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Midwest Independent Transmission System Operator, Inc.	Docket Nos. ER05-1085-001 ER04-458-008

ORDER ACCEPTING COMPLIANCE FILING
OF PROPOSED TARIFF REVISIONS

(Issued December 15, 2005)

1. This order addresses the September 6, 2005 Filing by the Midwest Independent Transmission System Operator, Inc. (Midwest ISO) to revise Attachments AA and BB of its Open Access Transmission and Energy Markets Tariff (TEMT) (September 6 Filing).[1] The attachments concern provision of compensation to Generation Resources under certain circumstances.[2] Midwest ISO made the filing, under section 205 of the Federal Power Act (FPA),[3]to comply with the directives in the Commission's order of August 5, 2005.[4] For the reasons discussed below, we will accept the tariff revisions for filing.

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[1] Effective April 1, 2005, Midwest ISO replaced its former Open Access Transmission Tariff (OATT) with the TEMT. *See Midwest Independent Transmission System Operator, Inc.*, 108 FERC ¶ 61,163, *order on reh'g*, 109 FERC ¶ 61,157 (2004), and, for extension of effective date, *Midwest Independent Transmission System Operator, Inc.*, 110 FERC ¶ 61,169 (2004). The TEMT permits a market-based congestion management program and energy spot markets, including, among other things, a Day-Ahead Energy Market, a Real-Time Energy Market, and locational marginal pricing (LMP).

[2] On September 23, 2005, Midwest ISO amended the September 6 Filing to correct a minor error.

[3] 16 U.S.C. § 824d (2000).

[4] *Midwest Independent Transmission System Operator, Inc.*, 112 FERC ¶ 61,172 (2005) (August 5 Order).

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Background

2. On April 15, 2005, the Commission accepted in part but required additional revisions of Midwest ISO's November 8, 2004 compliance filing, in Docket Nos. ER04-458-004 and ER04-458-006, that added Attachments Y and Z to the Midwest ISO OATT (November 2004 Filing).[5] Attachments Y and Z concerned compensation and cost recovery to Generation Resources for their actions, taken at Midwest ISO's direction or request, during emergency conditions or to reschedule planned generator outages. The Commission's acceptance was provisional, pending stakeholder review to determine whether the attachments needed modifications to conform to the new energy market-based operations of the TEMT. Attachments Y and Z were subsequently incorporated into the TEMT as Attachments AA and BB. On June 7, 2005, in Docket Nos. ER05-1085-000 and ER04-458-007, Midwest ISO filed proposed modifications to Attachments AA and BB to make them consistent with the TEMT and to incorporate the revisions required by the April 15 Order (June 7 Filing).[6]

3. In the August 5 Order, the Commission conditionally accepted the June 7 Filing's proposed modifications to Attachments AA and BB, but directed Midwest ISO to make

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[5] *Midwest Independent Transmission System Operator, Inc.*, 111 FERC ¶ 61,052 (2005) (April 15 Order). Midwest ISO made the November 2004 Filing in response to Commission directives of July 8, 2004. *Midwest Independent Transmission System Operator, Inc.*, 108 FERC ¶ 61,027, *order on reh'g, clarification, and compliance*, 109 FERC ¶ 61,085 (2004) (July 2004 Order). In addition to proposing new Attachments Y and Z, the November 2004 Filing also revised OATT Attachment O, "Rate Formulae," as the July 2004 Order had directed Midwest ISO to do. However, the November 2004 Filing failed to include a discernible redlined version of proposed changes to Attachment O. At P 51-52 of the April 15 Order, the Commission directed Midwest ISO to file a redlined version of Attachment O, for which it granted, subject to further order, an effective date of November 9, 2004, one day after the date of the compliance filing.

[6] Midwest ISO also requested that the Commission find that the June 7, 2005 Filing satisfied the Commission's directives concerning Attachments Y and Z in Docket No. ER04-458-007.

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several limited changes.[7] Only the change addressing full compensation of Generation Resources ordered to reduce generation in emergency situations is of concern in this proceeding.

4. The August 5 Order, at P 24, directed Midwest ISO to address an issue raised by LG&E Energy LLC (LG&E)[8] in its June 28, 2005 Protest (LG&E's June 28 Protest) of Attachment AA's provisions for emergency conditions service. LG&E had protested that Midwest ISO's compensation proposal, to pay the higher of the applicable LMP or the offer price for Emergency Energy, would inadequately compensate generation owners who had been directed, during an emergency, to back down generation that had cleared the Day-Ahead market and who had to buy back energy from the market at real-time prices above those at which they had settled in the Day-Ahead market. The Commission stated that the TEMT did not appear to address this situation, and that Midwest ISO's Market Subcommittee was looking into the issue. The Commission accepted Midwest ISO's proposed incorporation of TEMT pricing into Attachment AA, subject to Midwest ISO addressing LG&E's pricing issue and establishing a method to fully compensate Generation Owners in the situation LG&E described.[9]

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[7] These changes concerned requiring Midwest ISO to: (1) fully compensate Generation Resources directed to back down during emergency conditions; (2) reinstate information reporting requirements under Attachment AA; (3) compensate an entity for rescheduling a maintenance outage where the rescheduling is necessary because of a forced outage at another unit owned by the same entity; (4) clarify timetables for billing and remittance; (5) distinguish consistently between "requesting" and "directing" that an action be taken; (6) conform the terms and references in Attachments AA and BB with the defined terms and references in the TEMT; and (7) provide a redlined version of Attachment O.

In a July 5, 2005 Filing, in Docket No. ER04-458-000, Consumers Energy Company asserted that Midwest ISO had yet to file a redlined version of Attachment O, showing changes made in response to earlier orders in the Docket No. ER04-458 proceedings, as required by the April 15 Order. At P 61 of the August 5 Order, the Commission directed Midwest ISO to file a redlined version of Attachment O.

[8] LG&E intervened on behalf of its operating companies, Louisville Gas and Electric Company and Kentucky Utilities Company.

[9] August 5 Order at P 24.

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Midwest ISO's Compliance Filing

5. Midwest ISO's September 6 Filing addresses the directed changes and includes redlined Attachment O. The filing revises section B of Attachment AA to state, in pertinent part:

> Where a Generation Resource has cleared the Day-Ahead Energy Market, is directed by the Transmission Provider to reduce production below the Day-Ahead cleared level, and is required to settle the associated negative Day-Ahead imbalance at a higher Real-Time LMP, the Generation Resource shall be reimbursed for such cost based on the difference in Real-Time output from that cleared Day-Ahead multiplied by the difference in Real-Time and Day-Ahead LMP.

In its transmittal letter, Midwest ISO states that the Emergency Energy Offer price would not be applicable under these circumstances.[10]

6. Midwest ISO asks the Commission to make Attachments AA and BB, as revised by the September 6 Filing, effective on August 6, 2005, 60 days after Midwest ISO's June 7, 2005 initial filing of tariff revisions in Docket No. ER05-1085-000, and the date requested in that initial filing. Midwest ISO also asks the Commission to allow the revisions to Attachment O that were filed on November 8, 2004, but unaccompanied by a discernible redlined version, to become effective on November 9, 2004, the date Midwest ISO had originally requested in its November 2004 Filing.

Notices and Responsive Filings

7. Notices of Midwest ISO's September 6 Filing, and corrective filing of September 23, 2005,[11] were published in the *Federal Register*,[12] with motions to intervene or protest due on or before September 27 and October 14, 2005, respectively. In response, LG&E filed a Protest (LG&E Protest). On October 10, 2005, Midwest ISO filed an answer to LG&E's Protest (Midwest ISO Answer). On October 26, LG&E filed an answer to Midwest ISO's Answer (LG&E Response).

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[10] September 6 Filing transmittal letter at 3 n.6.

[11] *See* note 2, *supra*.

[12] 70 Fed. Reg. 55,366 (2005); 70 Fed. Reg. 58,211 (2005).

LG&E's Protest

8. LG&E protests that, in the August 5 Order, the Commission intended its directive that Midwest ISO must fully compensate Generation Owners to apply to all redispatch situations, both emergency and non-emergency, when generating facilities are directed to back down and when the prevailing LMP price has increased over the generation owner's settled Day-Ahead price. LG&E faults Midwest ISO's September 6 Filing for not differentiating between emergency and non-emergency situations, and for omitting compensation to generation owners forced to back down during non-emergency situations who then must purchase replacement energy at increased LMP prices.

9. LG&E supports the need for such provisions by stating that, since market operations began, on April 1, 2005, Midwest ISO has increasingly relied on Manual Redispatch Procedures as a congestion management/reliability tool. LG&E asserts that these Manual Redispatch Procedures, which are not part of the TEMT, allow Midwest ISO to manually redispatch generation in both emergency and non-emergency conditions outside the LMP and the North American Electric Reliability Council (NERC) Transmission Loading Relief (TLR) processes.[13] LG&E states that Manual Redispatch Procedures do not compensate generation owners forced to purchase replacement energy after being backed down from day-ahead schedules, and that the TEMT does not provide for compensation or cost recovery for generators subject to Manual Redispatch Procedures. Therefore, LG&E asks the Commission to require Midwest ISO to revise the TEMT to ensure that the compensation provisions now included only in Attachment AA apply also to generation redispatch in non-emergency situations, such as Manual Redispatch events.

10. Lastly, LG&E protests that, during recent Manual Redispatch events, Midwest ISO has not dispatched LG&E units despite these units having been bid below the prevailing LMP, and, when asked why LG&E's units were not dispatched, gives reliability as the reason. LG&E urges the Commission, in accordance with the August 5 Order, to clarify that Generation Resources in such situations will be compensated for their lost opportunity sales.

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[13] The NERC TLR Procedure is an Eastern Interconnection-wide procedure to allow Reliability Coordinators to mitigate potential or actual operating security limit violations while also respecting transmission service reservation priorities.

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Midwest ISO's Answer and LG&E's Response

11. Midwest ISO answers that LG&E has waived all issues for failure to include a Statement of Issues in its Protest, as the Commission has required since September 23, 2005.[14]

12. Substantively, Midwest ISO answers that LG&E's requests for compensation in non-emergency situations and in the situation of not-dispatched units are beyond the scope of the August 5 Order's directive. That directive, states Midwest ISO, applies only to backed-down generation in the context of an emergency, and to the difference between the cleared Day-Ahead price and any higher Real-Time LMP at which the generation owner must buy back the output that the unit was precluded from producing. In support of restricting the August 5 Order's directive to emergency situations, Midwest ISO cites the order's reference to LG&E's June 28 Protest, where LG&E complained of lack of compensation to Generators who respond to Midwest ISO's emergency directives to back down generation. Midwest ISO continues that the August 5 Order did not address the situation where a unit that was not bid in the Day-Ahead market is subsequently bid but not chosen (for reliability reasons) in the Real-Time market although the LMP is higher than such bid. Compensation for such bids, Midwest ISO continues, would not be compensation for costs incurred by backed down generation but would be rather for lost profits from "opportunity sales" allegedly lost.

13. LG&E's Response includes a Statement of Issues section that also describes the issues in its Protest. LG&E asks the Commission to reject Midwest ISO's Answer for failure to clarify any substantive issues, develop the record, or provide useful information. Substantively, LG&E disputes that P 24 of the August 5 Order limited the compliance filing to emergency conditions. The issues being looked into by the Midwest ISO Market Subcommittee, cited in P 24 and note 21 of the August 5 Order, specifically included non-emergency Manual Redispatch events and the compensation related to such redispatch events. Thus, LG&E contends, the Commission's compliance directives include scenarios not covered in the TEMT, such as non-emergency Manual Redispatch events and Midwest ISO's failure to dispatch generating units for reliability reasons even though such units have offered below the prevailing LMP price.

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[14] Midwest ISO refers to *Revision of Rules of Practice and Procedure Regarding Issue Identification*, Order No. 663, 70 Fed. Reg. 55,723 (September 23, 2005), FERC Stats & Regs. ¶ 31,193 (2005) (Order No. 663).

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Discussion

Procedural Matters

14. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2005) prohibits an answer to a protest or an answer unless otherwise ordered by the decisional authority. We will accept Midwest ISO's Answer and LG&E's Response because they have provided information that assisted us in our decision-making process.

Waiver of Issues

15. Order No. 663[15] applies to all pleadings. It requires that any issues that a movant wishes the Commission to address must be specifically identified in a section entitled "Statement of Issues," and states that issues not so listed in a separate section will be deemed to have been waived. Order No. 663 became is effective September 23, 2005.[16] LG&E's Protest omits a Statement of Issues section. While LG&E attempted to cure this deficiency in its Response, the cure was untimely; LG&E filed its Response twelve days after the October 14, 2005 Comment Date established in the Commission's notice of Midwest ISO's corrective filing. For this reason, we deem LG&E to have waived the issues in its Protest. Moreover, even were we to consider LG&E's arguments, we would find its requests for tariff changes beyond the scope of this proceeding, as discussed below.

Compliance with Commission Directives

16. We find that Midwest ISO has complied fully with the directives in the Commission's August 5 Order and we will accept the September 6 Filing. The directive, at P 24 of the August 5 Order, applies to Attachment AA and, in particular, to the situation that LG&E described in its June 28 Protest. Attachment AA concerns only the transmission provider's authority to act during an emergency or emergency system conditions and the compensation given to Resources that have provided service during this period. LG&E's June 28 Protest was concerned specifically with generators who responded to Midwest ISO's emergency directives to back down generation and the situation of generation that had cleared the Day-Ahead market then being backed down so that generation owners had to buy back energy at high real-time prices.[17] That Midwest ISO's Market Subcommittee may have addressed issues other than

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[15] *Id.*

[16] *Id.* at P 7, 15.

[17] LG&E's June 28 Protest at 5.

compensation for backed-down generation during emergencies does not mean that the Commission intended all issues discussed by the subcommittee to become part of this compliance proceeding. We find that Midwest ISO's proposed tariff revisions satisfactorily address the situation indicated in the August 5 Order.

17. Although the issues raised by LG&E are beyond the scope of this compliance proceeding, LG&E may present them to the Commission by initiating a complaint proceeding where they can be fully developed. Midwest ISO will have opportunity to respond and other entities will have opportunity to comment.

Effective Dates

18. Section 205(d) of the FPA specifies that, unless the Commission otherwise orders, no change shall be made by a public utility to its rates, charges, classifications, or service except after 60 days' notice to the Commission and the public.[18] The 60-day notice period required by our regulations[19] starts to run on the first day after the date of filing. Thus, the earliest date that a filing may become effective, absent waiver of the notice requirements, is the day after the 60-day notice period has expired, the sixty-first day after filing.[20] We will interpret Midwest ISO's request for an effective date for Attachments AA and BB of 60 days after the attachments' original June 7, 2005 Filing date, to be instead after 60 days notice to the Commission. Thus, we will grant, for Attachments AA and BB, an effective date of August 7, 2005. For Attachment O, we will grant the requested effective date of November 9, 2004, one day after submission of the November 2004 Filing, as stated in the April 14 Order.[21]

The Commission orders:

(A) Midwest ISO's September 6, 2005 compliance filing, revising Attachments AA and BB and submitting redlined Attachment O, is hereby accepted, as discussed in the body of this order, with effective dates of August 7, 2005 and November 9, 2004, respectively.

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[18] 16 U.S.C. § 824d(d) (2000).

[19] 18 C.F.R. § 35.3 (2005).

[20] *See San Diego Gas & Electric Co.*, 111 FERC ¶ 61,426 at P 11 n.9 (2005).

[21] *See* note 5, *supra*.

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(B) Midwest ISO's June 7, 2005 and September 6, 2005 compliance filings in Docket Nos. ER05-1085-000 and ER05-1085-001, respectively, are hereby deemed to satisfy the Commission's directives in Docket No. ER04-458 proceedings.

By the Commission. Commissioner Kelly dissenting in part with a separate statement attached.

(S E A L)

Magalie R. Salas,
Secretary.

UNITED STATES OF AMERICA
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(Issued December 15, 2005)

KELLY, Commissioner, *dissenting in part*:

While I agree with the substantive outcome of this order, I take issue with the procedural approach it takes. Order No. 663 became effective on September 23, 2005; only four days later, LG&E filed its protest in this proceeding. This order waives LG&E's issues because of non-compliance of a procedural rule issued only four days earlier. That is troubling enough. However, the order accepts Midwest ISO's answer to LG&E's protest and LG&E's response to the answer, even though both are normally prohibited under Rule 213(a)(2), because, as this order asserts here, they "assisted us in our decision-making process."

It is troubling that we flexibly apply one procedural rule to this proceeding, yet use a heavy hand in applying another, particularly one that is brand new. It is unreasonable to expect LG&E to have been aware of, much less be familiar with, the requirements set forth in Order No. 663, given that the rule was only announced at the Commission's September 15 open meeting, and was not (and still is not) posted on the Commission's web site. Moreover, LG&E attempted to cure the Order No. 663 deficiency by including in its response the necessary Statement of Issues, which the Commission rejects as "untimely" because it was filed twelve days after the deadline for comments. Under these circumstances, I believe LG&E did everything reasonably possible to comply with Order No. 663. Accordingly, at a minimum, the Commission should have accepted LG&E's response comments as late-filed.[1]

Finally, after all of this, the Commission addresses LG&E's so-called "waived issues" (to the extent they are deemed beyond the scope of the instant proceeding). If the Commission wished to convey the message that it intends to strictly enforce Order No. 663, then it should have waived LG&E's issues

[1]This is particularly true because, while the order purports to accept both Midwest ISO's answer and LG&E's response, it is questionable whether we indeed accepted the latter, given that the Commission waived the issues addressed in the response because it was untimely filed.

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altogether, as the rule directs. Although for the reasons stated above I still would have disagreed with this approach, strict enforcement would have at least resulted in a more consistent order.

Therefore, I respectfully dissent in part from this order.

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Suedeen G. Kelly