

115 FERC ¶ 61,174
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. ER06-321-000,
ER06-321-001, and ER06-321-002

ORDER ACCEPTING AMENDED FILING, WITH MODIFICATION AND
DIRECTING COMPLIANCE FILING

(Issued May 12, 2006)

I. Introduction

1. In this order we conditionally accept revisions to Midwest Independent Transmission System Operator, Inc.'s (Midwest ISO) Open Access Transmission and Energy Markets Tariff (TEMT). We also conditionally accept for filing the agreement (IMM-BA Agreement) between Midwest ISO's Independent Market Monitor (IMM), Midwest ISO, and Midwest ISO's Balancing Authorities (Balancing Authorities) subject to further modifications to the TEMT and the IMM-BA Agreement as discussed below.

II. Background

2. On October 5, 2004, the Midwest ISO together with Midwest ISO Balancing Authorities submitted an offer of settlement detailing the relationship between Midwest ISO and the Balancing Authorities when implementing the Midwest ISO's "Day 2" wholesale energy markets. On February 18, 2005, the Commission accepted this offer of

settlement.¹ Among other things, through this settlement, the proposed TEMT language that would have applied to Control Areas (Balancing Authorities)² was removed and more detailed terms were set forth in an executed contract between the Midwest ISO and the Balancing Authorities (“BA Agreement”). The BA Agreement did not address the Balancing Authorities’ relationship with the IMM.

3. On August 6, 2004, the Commission ordered Midwest ISO to submit tariff revisions to provide for IMM monitoring of Balancing Authorities.³ In response, on October 5, 2004, Midwest ISO submitted revisions to Module D of the TEMT that, among other things: (1) established IMM monitoring and reporting related to the operation of the Control Areas and actions taken by Control Area Operators; (2) described general and specific conduct of Control Area Operators to be monitored; and (3) required referral of problematic conduct of Control Area operators to the Commission.⁴ Certain entities challenged the Commission’s jurisdiction to provide for IMM monitoring of Control Areas through a tariff on file with the Commission. The Commission accepted these revisions but required modifications to provide greater clarity and include objective standards, and stated that it would address the jurisdictional issue if and when the issue arose.⁵

¹ See *Midwest Independent Transmission System Operator, Inc.*, 110 FERC ¶ 61,177 (BA Settlement Order), 111 FERC ¶ 61,367 (2005) (BA Settlement Clarification Order).

² In previous orders, the Commission has used the terms “Control Area” and “Control Area Operator.” The term now used under the North American Electric Reliability Council (NERC) Functional Model is “Balancing Authority.” In this order, we will use “Control Area” or “Control Area Operator” when referring to the existing TEMT language and will use “Balancing Authority” when referring to this filing or for general purposes.

³ See *Midwest Independent Transmission System Operator, Inc.*, 108 FERC ¶ 61,163 at P 254 and 256 (TEMT II Order), *order on reh’g*, 109 FERC ¶ 61,157 (2004) (TEMT II Rehearing Order).

⁴ See TEMT sections 50.1, 50.3, 53.1.g and 53.3.b.

⁵ See *Midwest Independent Transmission System Operator, Inc.*, 109 FERC ¶ 61,285 at P 141 (2004) (Compliance Order I).

III. Proposed Filing

4. On December 14, 2005, Midwest ISO, the Midwest ISO Transmission Owners,⁶ Michigan Electric Transmission Company, LLC, International Transmission Company, WPS Resources Corporation, Wisconsin Electric Power Company, and Duke Energy Vermillion LLC (Filing Parties) submitted for filing revisions to Module D of the Midwest ISO's TEMT. The Filing Parties propose to revise Module D by deleting provisions that govern the relationship of the IMM and the Balancing Authorities. In place of the deleted provisions, the Filing Parties propose an agreement that sets forth the relationship of the IMM and the Balancing Authorities (IMM-BA Agreement).⁷ They request an effective date of February 12, 2006.

A. Proposed Revisions to the TEMT

5. As part of this section 205 filing,⁸ the Filing Parties submit revised tariff sheets that excise all provisions of Module D that address the relationship between the IMM and the Balancing Authorities. In lieu of the excised Module D provisions, the Filing Parties propose an IMM-BA Agreement to become a rate schedule under the TEMT. The

⁶ The Midwest ISO Transmission Owners for this filing consist of: Alliant Energy Corporate Services, Inc. on behalf of its operating company affiliate Interstate Power and Light Company (f/k/a IES Utilities Inc. and Interstate Power Company); Ameren Services Company, as agent for Union Electric Company d/b/a AmerenUE, Central Illinois Public Service Company d/b/a AmerenCIPS, Central Illinois Light Co. d/b/a AmerenCILCO, and Illinois Power Company d/b/a AmerenIP; American Transmission Systems, Incorporated, a subsidiary of FirstEnergy Corp.; Cinergy Services, Inc. (for Cincinnati Gas & Electric Co., PSI Energy, Inc., and Union Light Heat & Power Co.); City of Columbia Water and Light Department (Columbia, MO); City Water, Light & Power (Springfield, IL); Great River Energy; Hoosier Energy Rural Electric Cooperative, Inc.; Indianapolis Power & Light Company; LG&E Energy Corporation (for Louisville Gas and Electric Co. and Kentucky Utilities Co.); Minnesota Power (and its subsidiary Superior Water, L&P); Montana-Dakota Utilities Co.; Northern Indiana Public Service Company; Northern States Power Company and Northern States Power Company (Wisconsin), subsidiaries of Xcel Energy Inc.; Northwestern Wisconsin Electric Company; Otter Tail Corporation d/b/a Otter Tail Power Company; Southern Illinois Power Cooperative; Southern Indiana Gas & Electric Company (d/b/a Vectren Energy Delivery of Indiana); and Wabash Valley Power Association, Inc.

⁷ The signatories to the IMM-BA Agreement are provided in Appendix A.

⁸ Section 205 of the Federal Power Act (FPA), 16 U.S.C. § 824d (2000).

proposed agreement defines the relationship between the IMM and the Balancing Authorities, and proposes modifications to the monitoring provisions in Module D.

B. Proposed IMM-BA Agreement

6. Section 4 of the proposed IMM-BA Agreement provides a detailed description of the monitoring role of the IMM. Specifically, it limits the role of the IMM to data collection and evaluation and, reporting to the Commission when the IMM believes that a Balancing Authority may have engaged in favoritism or discriminatory behavior. It specifies the actions that the IMM may consider in assessing the Balancing Authority's behavior. This section also identifies matters that in the ordinary course of operation would not be considered to be favoritism or discriminatory behavior. It also defines the IMM's responsibilities to notify and investigate a Balancing Authority when a potential act of favoritism or discriminatory treatment is identified.

7. Section 5 of the proposed IMM-BA Agreement describes the data and information that the IMM can obtain from the Balancing Authority. This section also details the means to resolve disputes regarding data and information collection through the use of a standing Discovery Arbitrator. Section 5 describes, in tabular form, the data that the IMM may request and obtain and requires that the Balancing Authorities retain the specified data for a period of one year. This section describes the Filing Parties' intent to provide the IMM access to the data necessary for the IMM to meet its responsibilities to the Commission and the Midwest ISO Board. This section also limits the data that the IMM may request and obtain to that which on a routine basis would not be unduly burdensome or expensive.

8. Section 6 of the proposed IMM-BA Agreement states that actions taken by Balancing Authorities to comply with the IMM-BA Agreement will not violate the Commission's standards of conduct rules. It specifies that no Balancing Authority shall be obligated to restructure its operations to separate personnel that perform balancing functions from marketing personnel.

9. Section 7 of the proposed IMM-BA Agreement defines the dispute resolution process for the IMM-BA Agreement. This dispute resolution process is closely modeled on the process included in the BA Agreement.

10. Section 8 of the proposed IMM-BA Agreement sets out the effective date and term provisions that will govern the IMM-BA Agreement. It provides that the effective date of

the agreement shall be the date on which the Commission approves the agreement and provides the effective term of the agreement.⁹

11. Section 9 of the proposed IMM-BA Agreement details the processes and standards for modifying and amending the IMM-BA Agreement. It states that there will be no modifications to the agreement absent the agreement of the parties to the IMM-BA Agreement and provides that the *Mobile-Sierra* “public interest” standard of review applies to any proposed modifications from whatever source.¹⁰

12. Section 10 of the proposed IMM-BA Agreement contains the miscellaneous provisions of the IMM-BA Agreement. It addresses assignment of the IMM-BA Agreement and jurisdictional issues. It reserves the right of the parties to seek redress of unresolved issues in proceedings at the Commission and in the courts. This section also allows Balancing Authorities that are not already signatories to the agreement to become signatories to the IMM-BA Agreement.

IV. Notice of Filing and Responsive Pleadings

13. Notice of the December 12 filing was published in the *Federal Register*, 71 Fed. Reg. 107 (2006), with interventions and protests due on or before January 4, 2006. Wisconsin Public Service Corporation, Upper Peninsula Power Company, WPS Energy Services Inc, and WPS Power Development LLC (collectively WPS Companies) filed a motion to intervene without substantive comment. Consumers Energy Company also filed a motion to intervene without substantive comment. Steel Dynamics-Bar Products Division (SDI) filed a motion to intervene and protest and an amended protest. Madison

⁹ Section 8.1 also provides that the IMM-BA Agreement shall be in effect for a term of five years from the effective date and shall remain in effect on a year to year basis unless Midwest ISO, the IMM, or three-quarters of the Balancing Authorities then subject to the IMM-BA Agreement exercises its (their) right to terminate the agreement by providing one year written notice. Section 8.1 is modeled after section 12.1 of the BA Agreement.

¹⁰ See *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956) and *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) (*Mobile-Sierra*).

Gas & Electric Co., Missouri River Energy Services, and Wisconsin Public Power, Inc. (collectively MMW) filed a motion to intervene and protest.¹¹

14. On February 10, 2006, the Commission issued a letter order requesting additional information from the Filing Parties with respect to how monitoring would be retained and/or established for newly created Balancing Authorities that were not signatories to the IMM-BA Agreement. On February 27, 2006, the Filing Parties submitted their response. Notice of the February 27, 2006 filing was published in the *Federal Register*, 71 Fed. Reg. 48 (2006), with comments, interventions, and protests due before March 20, 2006. No comments, interventions, or protests were filed. On March 15, 2006, the Filing Parties submitted signature pages that added two more Balancing Authorities as parties to the IMM-BA Agreement.¹² Notice of the March 15, 2006 filing was published in the *Federal Register*, 71 Fed. Reg. 16,300 (2006), with comments, interventions, and protests due before April 3, 2006. No comments, interventions, or protests were filed.

V. Discussion

A. Procedural Matters

15. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,¹³ the timely, unopposed motions to intervene serve to make the entities that filed those motions parties to this proceeding.

B. Substantive Matters

16. We believe that the revisions directed in this order will clarify the IMM's and Balancing Authorities' roles and responsibilities. However, we note that the proposal would retain no language in the TEMT to address future Balancing Authorities that have not yet signed the proposed agreement. Accordingly, we will require, as discussed below, that general tariff language that pertains to IMM monitoring, reporting and referral be

¹¹ In addition to its protest of several proposed sections, MMW supports section 6.2 of the IMM-BA Agreement. MMW points out that section 6.2 retains the status quo, *i.e.* Balancing Authorities that currently are not obligated to separate balancing authority and marketing functions will not be required to restructure their operations as the result of the IMM-BA Agreement. *See* MMW Protest at 6.

¹² The additional Balancing Authorities are City Water Light & Power (Springfield, Illinois) and Madison Gas & Electric Company.

¹³ 18 C.F.R. § 385.214 (2005).

retained in the TEMT. As to the proposed agreement, we will accept it subject to limited modifications discussed below.

1. Proposed Revisions to the TEMT

17. The monitoring language that the Filing Parties propose to remove from the TEMT includes language providing for monitoring, data acquisition, reporting and referral to the Commission of Control Area Operators' actions.¹⁴ For example, TEMT section 50.1 (Purposes and Objections [of Independent Market Monitoring Plan]) states that the plan is intended to provide for the independent, impartial and effective monitoring and reporting on a number of matters. The proposal seeks to delete the following from the list of actions that the IMM is obliged to monitor and report:

(iv) the operation of the Control Area and actions taken by Control Area Operators that unduly discriminate among the market participants or affect the competitiveness or economic efficiency of the Markets and Services

18. Likewise, TEMT section 50.3 (Persons and Entities Subject to the Plan) lists the parties and entities subject to the IMM monitoring plan. The proposal strikes the language "Control Area Operators" from this list, thus removing the Balancing Authorities from the market monitoring plan under the TEMT.

19. The proposal also deletes TEMT section 53.1.g, which details the Control Area Operators' conduct to be monitored, and section 53.3.b, which requires referral of problematic conduct of Control Area Operators to the Commission.

20. In its February 27, 2006 response to the Commission's February 10, 2006 Letter Order requesting additional information, the Filing Parties answer the question of how monitoring would be retained and/or established for newly created Balancing Authorities by stating that any new Balancing Authority would become a party to the IMM-BA Agreement voluntarily or that the Midwest ISO, as administrator of the rate schedule, would either: 1) file an unexecuted signature page and seek Commission authorization to bind the non-signing party to the IMM-BA Agreement; or 2) revise the TEMT to include provisions identical to the IMM-BA Agreement, specifically governing the Balancing Authority that refused to sign the IMM-BA Agreement.

¹⁴ Other proposed tariff changes include the removal from sections 54 and 61 of the list of data that IMM can access under the tariff. Proposed changes to the list of control area operator data to be accessible are discussed in later sections of this order.

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21. As we stated in the Compliance Order II, we expect the IMM to propose refined monitoring procedures for Balancing Authorities and possibly different thresholds, based on its analysis of the Midwest ISO energy market.¹⁵ We find that the monitoring provisions proposed here add substantial definition to the monitoring plan with respect to Balancing Authorities.

22. While the proposed agreement, as further modified, will be helpful, especially as a means to avoid protracted litigation, certain general language related to monitoring, reporting and referral of the actions of Balancing Authorities must remain in the tariff. In part, this is because only the actions of the signatories are controlled by the proposed IMM-BA Agreement. Removal from the TEMT of all references to monitoring, reporting, and referral of questionable Control Area Operators' actions to the Commission, as proposed, could hinder appropriate monitoring, reporting, and referral for new (such as replacement) Balancing Authorities, or for any parties if a new IMM was selected.

23. Moreover, proposed section 10 permits each Balancing Authority to assign its rights and obligations under the IMM-BA Agreement to another entity. However, section 10 only requires that Midwest ISO act in good faith to secure the execution of the IMM-BA Agreement by the new Balancing Authority. With respect to the IMM, section 10 provides that if Midwest ISO terminates its contractual relationship with Potomac Economics, Inc., Midwest ISO will use its best effort to secure and will negotiate its contractual arrangements with the successor IMM to include the appropriate provisions to require that successor IMM to execute this IMM-BA Agreement or to acknowledge in writing that its relationship to and with the Balancing Authorities shall be governed by this IMM-BA Agreement. Thus, section 10 highlights the difficulty of imposing rights and responsibilities that arise from an agreement on entities that have not yet signed that agreement.

24. The Filing Parties also propose that the IMM-BA Agreement be effective for five years from the effective date and from year to year thereafter unless (i) Midwest ISO, (ii) the IMM, or (iii) three-fourths of the Balancing Authorities then subject to the IMM-BA Agreement give one year advance notice that they wish to terminate the agreement. Thus, it appears that monitoring and mitigation of the actions of Balancing Authorities could disappear within six years, even at the behest of three-fourths of the entities being monitored.

¹⁵ See *Midwest Independent Transmission System Operator, Inc.*, 111 FERC ¶ 61,053 at P 102 (2005) (Compliance Order II).

25. The most effective way to ensure that the appropriate monitoring, reporting, and referral processes continue is to retain language in the TEMT that commits the IMM to monitor, report, and to refer questionable practices to the Commission for enforcement. We also believe that addressing the specific details of such monitoring in the IMM-BA Agreement is appropriate; however, the IMM-BA Agreement must be referenced in the tariff.

26. We will reject the proposed modifications to TEMT sections 50.1, 50.3, and 53.3.b. Leaving this language in the TEMT will ensure that such monitoring, reporting and referral occurs, regardless of changes in the identity of a Balancing Authority or the IMM. We find that having such general language in the tariff would provide sufficient and timely oversight to ensure that new Balancing Authorities are subject to monitoring immediately upon their formation. Rather than accept the Filing Parties' proposed solutions of either: (1) filing an unexecuted signature page and requesting the Commission to bind the non-signing parties, or (2) adding individual Balancing Authority specific language to the TEMT that duplicates the details found in the IMM-BA Agreement, we find that it is better to maintain general language in the tariff as discussed above.

27. We will allow the removal of more detailed provisions regarding activities to be monitored from section TEMT 53.1.g, so long as the general statements concerning monitoring remain in accordance with Commission precedent.¹⁶ Thus, the pertinent part of section 53.1.g (*i.e.*, relating to item numbers previously labeled as a) through g)) must be revised to read:¹⁷

...The conduct of Control Area Operators, including: a) affiliate favoritism or preference, b) operating the Control Area in an unduly discriminatory manner, or c) anti-competitive behavior that could result in harmful market impacts to Transmission Provider customers; and

28. We also find that placement of monitoring details in the proposed IMM-BA Agreement requires that Module D of the TEMT be modified to state that additional details are specified in the IMM-BA Agreement or successor agreement. In addition, the definition of the IMM-BA Agreement must be added to the Definitions section of the TEMT.

¹⁶ See Compliance Order II at P 100. The additional items in section 53.1.g primarily addressed the third category of actions to be reported, anti-competitive actions.

¹⁷ We note that retaining section 53.3.b will limit the reporting of the anti-competitive behavior (but not the affiliate favoritism or discriminatory conduct) to that conduct which causes more than a specified impact.

29. We will accept the executed signature sheets adding two more Balancing Authorities as parties to the IMM-BA Agreement and the corrected tariff sheet designations provided in response to the Commission's February 10 Letter.

2. Proposed IMM-BA Agreement

a. Provisions Relating to Commission Jurisdiction

30. Proposed section 10.3 (Jurisdiction) of the IMM-BA Agreement purports to exclude actions of the Balancing Authorities and activities of the IMM with regard to Balancing Authorities from the Commission's jurisdiction and oversight.¹⁸ The Filing Parties point out that the Commission has stated that it will address the issue of jurisdiction in each specific instance and not in the abstract.¹⁹ They argue that since the Commission may not have jurisdiction over every Balancing Authority the proposed IMM-BA Agreement and the proposed TEMT revisions enable the parties to limit their disputes and develop a structure that is enforceable.²⁰ The Filing Parties also argue that replacing TEMT provisions applicable to Balancing Authorities with an agreement has been accepted by the Commission and should be accepted here as well.²¹

¹⁸ Proposed section 10.3 states:

By entering into this Agreement, which shall be filed with the Commission, and notwithstanding any provision in this Agreement, the Balancing Authorities are not in any way agreeing individually or collectively that their activities under this Agreement, the activities of the IMM with regard to Balancing Authorities, as specified under this Agreement, or their agreement to respond to data requests from the IMM are subject to Commission jurisdiction. In addition, nothing in this Agreement shall be construed (1) to confer Commission jurisdiction over Balancing Authorities that are not public utilities, or (2) as a consent or waiver with respect to such jurisdiction, or (3) to cause a non-public utility to take any action or participate in any filing or appeal that would confer Commission jurisdiction over a non-public utility or require a non-public utility to comply with any Order or Rule issued by the Commission. A Party's actions, decisions, and performance under this Agreement, including without limitation the exercise of its rights to withdraw from or terminate this Agreement, shall not be subject to Commission approval.

¹⁹ See Compliance Order I at P 141.

²⁰ See Transmittal Letter at 3.

²¹ See BA Settlement Order.

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31. Given that a concrete dispute over jurisdiction has not been raised here, we will not address that issue. As we stated in Compliance Order I, we will address jurisdictional issues as they occur.²² Accordingly, because the last sentence of proposed section 10.3 prematurely addresses the exercise of Commission jurisdiction we will direct the Filing Parties to delete that sentence. So as not to prematurely address this, the Commission will reserve judgment on this issue.²³

b. Provisions Relating to Commission Enforcement of the FPA and the EAct 2005

32. The IMM-BA Agreement proposes to limit Commission enforcement authority. Proposed section 4.2 states:

A Balancing Authority's actions will not be subject to an enforcement action by the Commission where it is following the rules of NERC or local reliability councils, the directions of the Midwest ISO, or the rules, orders or directives of individual states.

33. MMW asserts that proposed section 4.2 impermissibly broadens the protection set forth in section 53.1.g²⁴ of the TEMT. According to MMW, the Commission directed that Midwest ISO's TEMT be amended to protect Control Area Operators from IMM enforcement actions if they are following the directive of NERC, the Transmission Provider (as specified in the Balancing Authority Agreement), reliability councils, or individual state commissions.²⁵ MMW points out that proposed section 4.2 of the IMM-BA Agreement protects Balancing Authorities from Commission enforcement actions if they are following the directive of NERC, the Transmission Provider (as specified in the Balancing Authority Agreement), reliability councils, or individual state commissions.

²² See Compliance Order I at P 141.

²³ Clearly, there are situations where the Commission could enforce its anti-manipulation regulation against any entity, as elaborated in ¶ 36 below. See also, Energy Policy Act of 2005, Pub. L No. 109-59, 119 Stat. 594 (2005), 1281.

²⁴ Section 53.1g states in pertinent part:

g. Control Area Operators shall not be subject to enforcement action by the IMM if they are following the directives of NERC, the Transmission Provider (as specified in the Balancing Authority Agreement), local reliability councils, or individual state commissions.

²⁵ See MMW Protest at p. 8 *citing*, Compliance Order I at P 141.

MMW argues that this broad protection is inconsistent with Compliance Order II because in that order the Commission did not express an intention to limit its enforcement authority.

34. MMW points out that the proposal could arguably shield the Balancing Authorities' conduct from a Commission enforcement action under the new anti-manipulation provision set forth in the Energy Policy Act of 2005 (EPAct 2005) section 1283²⁶ which applies to any entity, not just one that is a public utility.²⁷

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35. We agree with MMW's argument that proposed section 4.2 impermissibly restricts the Commission's authority to institute enforcement actions. In the Compliance Order II we allowed the parties to specify limitations on the enforcement authority of the IMM. That limitation is consistent with our decision that the IMM is to be monitor and not an enforcer.²⁸ Here, the Filing Parties propose to limit the Commission's enforcement authority, an essential function of its mission.²⁹

36. On January 19, 2006, the Commission issued the Anti-Manipulation Final Rule that is designed, among other things, to implement section 1283 of EPAct 2005. By this Final Rule the Commission "prohibit[s] the use or employment of manipulative or deceptive devices or contrivances in connection with the purchase or sale of . . . electric energy, or . . . transmission services subject to the jurisdiction of the Commission."³⁰ In addition,

²⁶ See Section 1283 of the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005).

²⁷ See MMW Protest at 8.

²⁸ See Compliance Order II at P 100 where the Commission said:

We clarify that, although we expect the IMM to monitor all control area operator actions and notify the Commission of anti-competitive behavior that could result in harmful market impacts to Midwest ISO customers, we do not require that the IMM report each of those instances that do not have a market impact. We do, however, require that all instances of affiliate favoritism or discriminatory control area operations be reported to the Commission, since these actions may violate Market Behavior Rule 2.

²⁹ See *Prohibition of Energy Market Manipulation*, Order No. 670, 114 FERC ¶ 61,047 (2006); 71 FR 4,244 (2006), FERC Stats. & Regs. ¶ 31,202 (2006) (Anti-Manipulation Final Rule).

³⁰ Anti-Manipulation Final Rule at P 6.

the Final Rule provides that the Commission interprets this rule to apply to “any entity” including “any person or form of organization, regardless of legal status, function or activities.”³¹

37. Proposed section 4.2 could interfere with the application of the Anti-Manipulation Final Rule prohibiting energy market manipulation to any party of the IMM-BA Agreement. Thus, such a provision is inconsistent with the Anti-Manipulation Final Rule, as well as with the Congressional mandate contained in section 1283 of EPAct 2005. We continue to believe that the Commission should consider whether the Balancing Authorities are following the rules of NERC or reliability councils, the directions of Midwest ISO, or the rules, orders or directives of individual state commissions prior to determining whether penalties should be imposed.³² However, if a Balancing Authority violates a statute that the Commission is charged with implementing because it has been directed to do so by NERC or reliability councils, Midwest ISO, or individual states, this fact may support mitigation of a possible penalty but would not obviate the need for the Commission to direct compliance with the appropriate statute (*i.e.*, enforcement). Therefore, to avoid any confusion on this matter we will direct the Filing Parties to delete section 4.2 from the IMM-BA Agreement. In addition, we will direct the parties to revise the IMM-BA Agreement to include the terms “ERO” and “regional entities” in sections where “NERC” and “local reliability councils/coordinators” are used.³³

³¹ *Id.* at P 18.

³² *See* Compliance Order I at P 142.

³³ We also note that in the future the Balancing Authorities may be obliged to act under the direction of an Electric Reliability Organization (ERO) or that of regional entities. Furthermore, in several sections of the IMM-BA Agreement, the terms “NERC” and “local reliability councils/coordinators” are used. After the ERO is certified, it and the regional entities may supplement or replace NERC and the local reliability councils/coordinators as overseers of the Balancing Authorities activities. Accordingly, we will direct the parties to revise the IMM-BA Agreement to include the terms “ERO” and “regional entities” in those sections.

c. Provisions Relating to Commission Standard of Review

38. Proposed section 9.2 of the IMM-BA Agreement³⁴ imposes a *Mobile-Sierra* “public interest” standard of review on all changes to the IMM-BA Agreement sought by any entity, including non-parties and the Commission acting *sua sponte*, except that the “public interest” standard shall not apply to a filing by the IMM or the IMM and the Midwest ISO together to alter the IMM’s monitoring rights as to a Balancing Authority that has repeatedly breached the agreement.

39. MMW objects to proposed section 9.2 because it has the effect of protecting a number of the TEMT’s generally applicable tariff provisions against all complainants because it imposes the higher *Mobile-Sierra* “public interest” standard of review.³⁵ MMW notes that the IMM-BA Agreement is intended to replace parts of Midwest ISO’s TEMT, and all TEMT customers’ interests will be affected. MMW argues that a subset of market participants should not be able to “privatize” portions of the tariff that support this market.³⁶ MMW argues that, since the Commission has been unwilling to allow use of the *Mobile-Sierra* “public interest” standard of review in tariffs of general applicability, it should not approve the use here in the IMM-BA Agreement. Alternatively, MMW suggests that the Commission only permit the higher *Mobile-Sierra* “public interest” standard of review to apply to parties to the IMM-BA Agreement and not to non-parties or the Commission.³⁷

³⁴ Section 9.2 states:

Absent the agreement of the Parties as detailed in Section 9.3, the standard of review for changes or conditions to this Agreement, whether proposed by a Party, a non-Party or the Federal Energy Regulatory Commission acting *sua sponte* shall be the “public interest” standard of review set forth in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956) and *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) (the “*Mobile-Sierra*” doctrine), except that the “public interest” standard shall not apply to a filing by the IMM or the IMM and the Midwest ISO together to alter the IMM’s monitoring rights as to a Balancing Authority that has repeatedly breached the Agreement.

³⁵ See MMW Protest at 13.

³⁶ See MMW Protest at 14.

³⁷ See MMW Protest at 14.

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40. We will accept the Filing Parties' proposal to impose a *Mobile-Sierra* "public interest" standard of review on changes to the IMM-BA Agreement.³⁸ In response to concerns raised by MMW, we note that if the public interest justified a change to the IMM-BA Agreement, the Commission retains its indefeasible statutory right to make such a change.³⁹

d. Provisions Relating to Specific Monitoring and Reporting of Control Area Operations

41. Proposed section 4 of the IMM-BA Agreement addresses the monitoring, reporting, and referral role of the IMM. It states that: (1) the IMM shall not have any oversight role with regard to Balancing Authorities and (2) the IMM shall be limited to obtaining and evaluating data, and if necessary, making a report to the Commission, Midwest ISO, and the Balancing Authority where the IMM believes there is a basis for filing a report that a Balancing Authority may have engaged in affiliate favoritism or may have operated a control area in an unduly discriminatory manner.⁴⁰

42. Proposed section 4.3 lists the matters which the IMM may consider in making an assessment as to whether "(i) affiliate favoritism or preference or (ii) operations of a control area that are unduly discriminatory or preferential" are occurring. These include: "a) the amount of spinning, non-spinning and operating reserves; b) the units committed through the Reliability Assessment Commitment (RAC) process; c) the resolution of imbalances in the control area; d) Area Control Error (ACE) levels; and e) re-dispatching of generation resources." Proposed section 4.3 of the IMM-BA Agreement also specifies a number of matters that in the ordinary course of a Balancing Authority's actions would not constitute affiliate favoritism or preference, such as communications and actions necessary to address reliability issues during periods when the standard of conduct is suspended for reliability reasons.

43. Proposed section 4.5 provides for reporting to the Commission, Midwest ISO and the subject Balancing Authority when the IMM believes there is a basis for filing a report that the Balancing Authority may have engaged in affiliate favoritism or operated the Control Area in an unduly discriminatory or preferential manner when such conduct has a substantial impact on market outcomes. Proposed section 4.5 defines substantial impact as

³⁸ See BA Settlement Order.

³⁹ See *Metropolitan Edison Co. v. FERC*, 595 F.2d 851, 856 n.29 (D.C. Cir. 1979).

⁴⁰ See proposed section 4.5 of IMM-BA Agreement.

an effect on locational marginal prices (LMP prices) of more than \$50 per MWH or results in uplift costs for a day of more than \$10 per MW within the control area. Proposed section 4.5 specifies that, after the completion of the assessment, the IMM shall report the results of the assessment to the Commission, Midwest ISO and the subject Balancing Authority. Such assessment shall include the IMM's basis for the report, identify the source and type of data relied upon by the IMM in making the report, provide a description of the assessment process the IMM followed and include a list of the persons with whom the IMM communicated during its assessment.

44. MMW contends that the proposed IMM-BA Agreement impermissibly narrows Commission oversight of Balancing Authority conduct and it objects to the proposed language that pertains to monitoring and reporting. MMW points to the Commission's orders establishing monitoring and reporting requirements regarding Balancing Authority conduct. These orders address three categories of conduct: (1) affiliate favoritism or preference; (2) unduly discriminatory control area operation; and (3) anticompetitive conduct that could adversely affect rates. MMW states that the first two categories relate, at least in part, to the FPA's requirement that rates, terms and conditions not be unduly discriminatory or preferential. MMW asserts that the latter category concerns, at least in part, the fundamental principle that rates that are the result of anti-competitive conduct are not just and reasonable. MMW points out that while the Commission's orders and the TEMT provisions define three broad categories of monitored conduct as stated above, the IMM-BA agreement eliminates the third category by demoting that category to a mere consideration for whether affiliate favoritism, preference or unduly discriminatory control area operations have occurred or are occurring.

45. MMW asserts that the proposed IMM-BA Agreement also does not track the current TEMT provisions when it comes to the IMM's reporting of Balancing Authority conduct. MMW argues that consistent with the Commission precedent, the TEMT requires reporting of all instances of affiliate preference/favoritism and unduly discriminatory control area operations and applies a market impact test to defined anti-competitive conduct. According to MMW, Commission precedent does not provide that the unduly discriminatory control area operation be subject to the market impact test, as the IMM-BA Agreement provides, rather, Commission precedent requires that this type of conduct be reported to the Commission without the screen of the market impact test. According to MMW, the Commission requires that a market impact test apply only to anti-competitive behavior, a category of conduct that the proposed IMM-BA Agreement eliminates. MMW argues that these changes are not just and reasonable and that the IMM-BA Agreement should be modified to implement the Commission's directives.

Commission Determination

46. As discussed earlier, we are ordering the placement of a modified 53.1.g and the retention of section 53.3.b in the tariff. Section 53.1.g (as modified) will state that the IMM must monitor for affiliate favoritism or preference, for operation of the control area in an unduly discriminatory manner and for anti-competitive behavior that could result in harmful market impacts to Transmission Provider customers. Section 53.3.b provides for referral of that behavior to the Commission.

47. We agree with MMW that the language in the proposed IMM-BA Agreement does not provide for monitoring or referral of anti-competitive behavior that could result in harmful market impacts to Transmission Provider customers as was previously required.⁴¹ In particular, it is not provided for in proposed sections 4.1, 4.3, and 4.5 of the IMM-BA Agreement. We also agree with MMW that the construction of section 4.5 inappropriately limits reporting of actions associated with affiliate favoritism or preference and unduly discriminatory operations to circumstances where there is a market impact. This limitation is contrary to the Commission's holding that all instances of such behavior must be reported to the Commission, even if they have no impact.⁴²

48. Thus, we will direct that the Filing Parties modify proposed sections 4.1 and 4.5 of the IMM-BA Agreement so that the IMM also monitors for anti-competitive behavior that could result in harmful market impacts to Midwest ISO's customers and refers the questionable activity to the Commission once the threshold for such anti-competitive behavior (provided for in section 53.3 of the TEMT) has been met. We will also direct the Filing Parties to modify proposed section 4.3 so it is clear that items currently listed as a) through e) are each to be monitored for, and *not* as a condition for assessing the occurrence of either (i) affiliate favoritism or preference; or (ii) operations of the control area that are unduly discriminatory or preferential.

49. In addition, proposed section 4.5 must be modified so that the proposed threshold (of \$50/MWH or \$10 per MW in uplift costs) is applied only to anti-competitive behavior that could result in harmful market impacts to Midwest ISO customers. The Filing Parties must also modify this proposed section to indicate that *all* acts of affiliate favoritism or preference by Balancing Authorities and *all* unduly discriminatory control area operations are to be reported to the Commission.

⁴¹ See TEMT II Order at P 256.

⁴² See Compliance Order II at P 100.

50. We are also concerned about the language in proposed section 4.5 of the IMM-BA Agreement that provides for information on the IMM's assessment be provided to the subject Balancing Authority. Module D of the TEMT does not provide for such reporting. We believe that this provision could have a chilling effect upon the referral, especially where other entities suspect there is affiliate favoritism or preference, and fear retribution by the Balancing Authority for any complaints they make. There may also be information about other market players to which the Balancing Authority should not be privy. The Commission should examine the information that the IMM refers to it before that information is shared with the Balancing Authority. Prior Commission review will ensure that the Balancing Authority does not receive information that it should not. Thus, we will direct the Filing Parties to remove this language from the IMM-BA Agreement. The Filing Parties may include language that states that the IMM will notify the subject Balancing Authority that its conduct is being referred to the Commission. That notice may contain a general specification of the questionable behavior (*e.g.* manipulation of ACE levels during a specified period).

e. Provisions Relating to Data Requests by the IMM

51. Proposed section 5 of the IMM-BA Agreement governs the IMM's data requests. Section 5.1.1 contains a table of the data or information that the IMM may request and obtain from the Balancing Authorities. Balancing Authorities are required to keep the information in the table for one year. Section 5.2 of the proposed IMM-BA Agreement states "[t]he categories of data or information that may be requested by the IMM shall be limited to data or information the routine provision of which would not be unduly burdensome or unduly expensive, which has been reasonably determined by the IMM to be relevant to the purposes and objectives of an IMM assessment *and* (emphasis added) which are listed in 5.1.1."

52. SDI objects to the proposed section 5 of the IMM-BA Agreement because it limits "the data and information that the IMM may request and obtain from a Balancing Authority." SDI asserts that this limitation on the IMM is "inappropriate and unadvisable" because it impinges on the IMM's ability to request and obtain data. This in turn, SDI argues, may adversely affect the IMM's ability to ensure that the market is efficient and distortion free. SDI points to section 5.2 of the proposed IMM-BA Agreement in which data acquisition is limited to the data listed in the table in 5.1.1.

53. To remedy its concerns, SDI proposes the following alternative language: "[t]he categories of data or information that may be requested by the IMM shall be limited to data or information the routine provision of which would not be unduly burdensome or unduly expensive, and which has been reasonably determined by the IMM to be relevant to the purposes and objectives of an IMM assessment, *such as* (emphasis added) that contained in 5.1.2 (5.1.1)." According to SDI, their proposed language is superior to that

in the proposed section 5.2 because the IMM is prevented from abusing its powers while the language ensures that the IMM has access to necessary information based on a demonstration of good cause. Finally, SDI notes that a Balancing Authority has the right, under the terms of the proposed agreement, to seek recourse via the Discovery Arbitrator (proposed section 5.3) if it believes that the IMM is acting beyond its mandate.

54. MMW points out that proposed section 5.1.1 of the IMM-BA Agreement substitutes a one-year data retention requirement for section 61.1 of the TEMT which provides for a two-year data/information retention requirement. MMW argues that the shortened data retention time is not reasonable given the complexity of control area operations. MMW contends that by the time the IMM discovers offending balancing authority conduct, the Balancing Authority's data retention obligation may have expired, allowing the destruction of data needed for the IMM and/or the Commission's investigation of the Balancing Authority's conduct. It also asserts that the one-year retention period is unreasonable given the three year retention requirement imposed under the Commission's Market Behavior Rules. At a minimum, MMW contends that the IMM-BA Agreement should retain the two-year requirement of the TEMT that it proposes to replace.

Commission Determination

55. We believe that proposed section 5.1.1's specification of data to be exchanged is a major step forward in facilitating the monitoring process. Specification of the data to be monitored and agreement as to what data will be provided upon request, can substantially speed up the monitoring process and reduce the possibility of litigation for that data. We believe that this is a sufficient list of the data that may be needed for monitoring.

56. Proposed section 5.3 of the IMM-BA Agreement provides for a Discovery Arbitrator that may be used for, among other things, disputes about the scope of the data requested or its existence. We believe this provision will be sufficient to protect the Balancing Authorities from unnecessary data requests, while allowing the IMM to request data that it needs to conduct an adequate investigation.

57. We also find that the one-year period for data and information retention proposed in the IMM-BA Agreement is insufficient. As the Commission explained in the Market Behavior Rule Order,⁴³ "[t]o permit a shorter retention period may not allow sufficient time for the investigations into possible violations." It may also be important for data comparisons to be made across years such as comparing a particular season with and without an alleged violation. Such a comparison would necessitate more than a single

⁴³ *Id.* at P 125.

year's worth of data. As discussed by MMW in their protest, Market Behavior Rule 5⁴⁴ requires market-based rate sellers to retain, for a period of three years, data and information. The Filing Parties have not offered any explanation or justification for the proposed retention period. Furthermore, we note that the data at issue here is the type of data that would facilitate the Commission's enforcement of the Anti-Manipulation Final Rule, for which we adopted a five-year statute of limitations.⁴⁵ Thus, we direct the Filing Parties to change the data or information retention period, as proposed in section 5.1.1, from one year to five years, consistent with the Anti-Manipulation Final Rule.

f. Provisions Relating to the Commission's Standards of Conduct

58. Midwest ISO claims that proposed section 6 was included to ensure that Balancing Authorities can provide non-public transmission information to the IMM through off-OASIS communications without violating the Standards of Conduct. As a result, proposed section 6.1 of the IMM-BA Agreement states that the actions of the Balancing Authority in compliance with the Agreement including, but not limited to responding to data requests from the IMM, are not intended to and shall not be deemed to be incompatible with or in violation of the Standards of Conduct under Order No. 2004.

59. Midwest ISO provides no explanation for including proposed section 6.2, which states:

No Obligation to Restructure. By entering into this Agreement, no Balancing Authority shall be obligated to restructure its operations (in place as of the time of its execution of the Balancing Authority Agreement) to separate Balancing Authority personnel from marketing personnel. In addition, actions reasonably required to satisfy the Balancing Authority's obligations and to operate the Control Area reliably by continued use of personnel who perform both Balancing Authority and marketing functions shall not trigger referral and reporting by the IMM pursuant to this Agreement.

60. In addition to its protest of several proposed sections, MMW supports section 6.2 of the IMM-BA Agreement. MMW points out that section 6.2 retains the status quo, *i.e.*

⁴⁴ See *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 105 FERC ¶ 61,218 at P 120-125 (2003).

⁴⁵ See Anti-Manipulation Final Rule at P 63. Clearly this statute of limitations would provide little protection if the offending entity had no obligation to retain the relevant data for the entire five-year statutory period.

Balancing Authorities that currently are not obligated to separate balancing authority and marketing functions will not be required to restructure their operations as the result of the IMM-BA Agreement. *See* MMW Protest at 6.

Commission Determination

61. Generally, the Standards of Conduct contain information sharing prohibitions that restrict the ability of a Transmission Provider to share non-public transmission or customer information with its Marketing and Energy Affiliates. 18 C.F.R. §358.5(a) and (b)(1) and (2) (2005). However, we require adherence to the Standards of Conduct only by public utilities, not other utilities that may be Balancing Authorities.

62. Proposed section 6.1 permits the Balancing Authority to respond to data requests from the IMM without violating information sharing prohibitions of the Standards of Conduct. This is acceptable since the Balancing Authority is not providing information to its Marketing or Energy Affiliates.

63. Under the independent functioning requirements of the Standards of Conduct, the transmission and reliability functions of a Transmission Provider must operate independently of the its Marketing and Energy Affiliates, including marketing functions. 18 C.F.R. § 358.2(a). In light of this, the effect of section 6.2 is ambiguous. We believe the applicants' intent in this section could be reflected in the agreement as follows:

This Agreement does not require any Balancing Authority to separate Balancing Authority personnel from marketing personnel; nor does this Agreement waive any requirement of the Commission's Standards of Conduct or exempt any public utility Balancing Authority from the Standards of Conduct.

64. Accordingly, we direct Applicants to delete section 6.2 as too ambiguous. Applicants may replace section 6.2 with the language we have suggested above, if it reflects their concerns.

The Commission orders:

(A) The proposed IMM-BA Agreement, as amended, and the proposed TEMT revisions are hereby conditionally accepted for filing and made effective on February 12, 2006, as requested, subject to modification as discussed in the body of this order.

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(B) The Filing Parties are hereby directed to make a compliance filing consistent with this order within 30 days of the date of this order.

By the Commission. Commissioner Kelly dissenting in part with a separate statement to be issued at a later date.

(S E A L)

Magalie R. Salas,
Secretary.

Appendix A

Signatories to the IMM-BA Agreement

David Patton of Potomac Economics, the IMM for the Midwest ISO
Midwest ISO
Alliant Energy Corporate Services, Inc.
Ameren Services Company, as agent for Union Electric Company d/b/a AmerenUE,
Central Illinois Public Service Company d/b/a AmerenCIPS, Central Illinois Light
Co. d/b/a AmerenCILCO, and Illinois Power Company d/b/a AmerenIP
Cinergy Corp.
City of Columbia Water and Light Department (Columbia, MO)
City Water, Light & Power (Springfield, IL)
Duke Energy, Vermillion, LLC
FirstEnergy Corp.
Great River Energy
Hoosier Energy Rural Electric Cooperative
Indianapolis Power & Light Co.
International Transmission Company
Kentucky Utilities Company
Louisville Gas & Electric Company
Madison Gas & Electric
Michigan Electric Transmission Company, LLC
Minnesota Power
Montana-Dakota Utilities Co.
Northern Indiana Public Service Company
Otter Tail Power Company
Southern Indiana Gas & Electric Company d/b/a Vectren Energy Delivery
Southern Illinois Power Cooperative
Wisconsin Electric Power Company d/b/a We Energies
Wisconsin Public Service Corporation
Upper Peninsula Power Company;
Xcel Energy Services Inc. as agent for Northern States Power Company and Northern
States Power Company (Wisconsin).