

119 FERC ¶ 61,207
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
and Jon Wellingshoff.

Midwest Independent Transmission System
Operator, Inc.

Docket Nos. ER04-691-080
EL04-104-068

ORDER ON REHEARING

(Issued May 31, 2007)

1. This order addresses requests for rehearing and clarification of the Commission's November 1, 2006 Order on the allocation of the marginal loss surplus refund within Midwest Independent Transmission System Operator, Inc. (Midwest ISO).¹ In that order the Commission accepted filings made by Midwest ISO on March 27 and June 8 respectively, and directed Midwest ISO to submit a further filing analyzing the methods proposed by certain intervenors for determining refunds of over-collected marginal losses. This order denies rehearing of the November 1 Order.

I. Background

2. On August 6, 2004, the Commission approved the Midwest ISO's Transmission and Energy Markets Tariff (TEMT or tariff), which was designed to initiate Day 2 operations in Midwest ISO's 15-state region.² Midwest ISO's Day 2 operations include, among other things, a transition period during which market participants that over-pay for

¹ *Midwest Independent Transmission System Operator, Inc.*, 117 FERC ¶ 61,142 (2006) (November 1 Order).

² *Midwest Independent Transmission System Operator, Inc.*, 108 FERC ¶ 61,163 (TEMT II Order), *order on reh'g*, 109 FERC ¶ 61,157 (2004) (TEMT II Rehearing Order), *order on reh'g*, 111 FERC ¶ 61,043 (2005) (April 2005 Order). The TEMT defines "Transmission Provider" as Midwest ISO or any successor organization. *See* Module A, section 1.320, Original Sheet No. 133. For clarity, we will refer to Midwest ISO wherever the TEMT refers to the Transmission Provider.

losses receive rebates for the difference between their marginal losses and their historical or average losses, and a procedure for refunding the over-collected losses.³

3. Specifically, the TEMT II Order, among other things, directed Midwest ISO to file a marginal loss refund method applicable to the transition period within 60 days,⁴ and, after consultation with stakeholders, file a revised marginal loss surplus refund method within 270 days from market start that considered rules that encourage market participants to make efficient purchases from the spot market and addressed concerns of some market participants that will find themselves significantly exposed to marginal loss charges.⁵

4. On October 5, 2004, Midwest ISO made a compliance filing (October 5 Filing) in response to the TEMT II Order's various 60-day requirements, including those relating to a transitional marginal loss refund method. In that October 5 Filing, Midwest ISO proposed to refund over-collected marginal losses based on the share of losses in each balancing authority area rather than through previously proposed "loss pools."⁶ On December 20, 2004, the Commission issued an order conditionally accepting Midwest ISO's October 5 Filing, finding the proposal just and reasonable. The Commission found that the refund of marginal loss surpluses on a balancing authority area basis has greater granularity than the previous "loss pools" approach; the Commission determined that Midwest ISO's proposal is consistent with the goal of protecting participants from charges in excess of their average actual losses, has stakeholder support, and can be implemented. However, the Commission also expressed concern about market participants with remote generation outside the territory of the balancing authority area that would not be eligible for a sufficient refund share and directed Midwest ISO to explain its method for determining the marginal loss surpluses for such entities.⁷

³ Marginal loss surpluses, also referred to as over-collected marginal losses, are the difference between marginal losses and historical or average losses that are refunded to load.

⁴ TEMT II Order at P 73-76.

⁵ *Id.* at P 79, 239, 649.

⁶ *See* October 5 Filing at 6-8.

⁷ *See Midwest Independent Transmission System Operator, Inc.*, 109 FERC ¶ 61,285 at P 171-72 (2004) (Compliance Order I).

5. On January 21, 2005, Midwest ISO made a compliance filing to address the additional requirements of Compliance Order I. On April 15, 2005, the Commission issued an order that addressed rehearing requests of Compliance Order I and Midwest ISO's January 21, 2005 compliance filing.⁸ The April 15 Order reiterated the filing requirements that Midwest ISO had to meet within 270 days after market start. The April 15 Order directed Midwest ISO to submit within 270 days from market start an informational filing that addresses different losses among market participants within a balancing authority area and the possibility that these differences could result in significant cross-subsidies, and to specifically provide information and analysis bearing on the issue of whether certain market participants are paying more in losses in the energy market compared to before the market started and the extent of any cross-subsidies.

6. On March 27, 2006, as supplemented on June 8, 2006, Midwest ISO submitted a filing to update the Commission on its analysis of its marginal loss surplus data in order to comply with the 270-day filing requirement. In that filing, Midwest ISO, among other things, stated that it was unable to provide the data and perform the analyses requested on marginal loss surplus refunds for certain market participants. According to Midwest ISO, its data and systems were unable to match specific buyers with specific sellers, or estimate losses on this basis, and noted it does not allocate marginal losses or average losses by market participant.

7. As a result of Midwest ISO's representations and in consideration of the intervenors' comments, the Commission issued the November 1 Order. The November 1 Order accepted Midwest ISO's filings, but directed Midwest ISO to submit a further filing analyzing the method proposed by certain intervenors for determining refunds of over-collected marginal losses. The Commission stated that, to the extent Midwest ISO found their methods acceptable for calculating the marginal loss surplus refunds, Midwest ISO must determine if their methods could be applied to all market participants and would result in a more equitable allocation of marginal loss surplus refunds than the current allocation.⁹ The November 1 Order also found that, while a refined allocation to certain market participants with distant generation would be ideal, there was no data supporting a conclusion these customers were not already receiving an equitable refund.¹⁰

⁸ *Midwest Independent Transmission System Operator, Inc.*, 111 FERC ¶ 61,053 (2005) (April 15 Order).

⁹ See November 1 Order at P 28.

¹⁰ See *id.* at P 29.

II. Requests for Rehearing

8. The Midwest Transmission – Dependent Utilities (Midwest TDUs)¹¹ and Wisconsin Public Service Corporation and Upper Peninsula Power Company (collectively, WPS Companies) filed requests for rehearing.

9. Midwest TDUs assert that the November 1 Order is inconsistent with prior Commission orders in this proceeding.¹² According to Midwest TDUs, the purpose of the TEMT II Order and the April 2005 Order was to determine whether Midwest ISO's method achieved the equitable result of refunding to each market participant its own contribution to the marginal loss surplus - and, if not, whether and to what extent the divergence from such individualized refunds discriminates against market participants who have made long-term commitments to remote resources. The November 1 Order, they argue, accepts the compliance filing without requiring Midwest ISO to make the determination required by the previous orders and instead requires Midwest ISO to evaluate the Midwest TDUs' proposed refund mechanism. Instead of directing Midwest ISO to analyze and report on the data submitted by the intervenors, Midwest TDUs assert that the Commission should have convened a technical conference or convened an evidentiary hearing or drawn adverse inferences from Midwest ISO's lack of data.

10. Additionally, Midwest TDUs argue that the Commission erred in concluding that the data is not available to further refine the marginal loss surplus refund method.¹³ Midwest TDUs assert there is no basis to assume real-time losses would exceed day-ahead losses and, in fact, the summed marginal losses for the day-ahead market systematically exceed those for the real-time market.¹⁴ Midwest TDUs explain that since

¹¹ Midwest TDUs participating in the rehearing request are: Great Lakes Utilities, Indiana Municipal Power Agency, Lincoln Electric System, Madison Gas and Electric Company, Midwest Municipal Transmission Group, Missouri Joint Municipal Electric Utility Commission, Missouri River Energy Services, Southern Minnesota Municipal Power Agency, Upper Peninsula Transmission Dependent Utilities, and Wisconsin Public Power Inc.

¹² *Citing Midwest Independent Transmission System Operator, Inc.*, 108 FERC ¶ 61,163 (TEMT II Order), *order on reh'g*, 109 FERC ¶ 61,157 (2004) (TEMT II Rehearing Order), *order on reh'g*, 111 FERC ¶ 61,043 (2005) (April 2005 Order).

¹³ *See* November 1 Order at P 26.

¹⁴ Midwest TDUs provide data from Midwest ISO's 2005 State of the Market Report by the Midwest ISO Independent Market Monitor which they claim shows the total load scheduled day-ahead exceeded actual load since market start, with the exception of the East zone.

the sum of marginal losses is a function of all generation and load and since marginal losses generally increase quadratically as the generation and load increase, day-ahead marginal losses can be expected to exceed actual real-time physical losses by more than a two-to-one ratio if the two markets have the same volume. Therefore, Midwest TDUs claim Midwest ISO has not shown how differences between the two markets could preclude returning to each market participant half of its marginal loss charges in the day-ahead market plus half of its own marginal losses in the real-time market. Midwest TDUs conclude variations between day-ahead and real-time markets cannot account for why market participants such as Missouri River, with a heavy dependence on generation located outside their local control area, are falling far below 50 percent of the marginal losses charged in the day-ahead market. Rather, Midwest TDUs contend that the record shows market participants such as Missouri River have been inequitably required to pool their loss refunds with their host control area utility and, accordingly, the Commission should have required Midwest ISO's prompt provision of data adequate to show whether that is the case.

11. WPS Companies do not challenge the reasonableness of Midwest ISO's TEMT methodology; however they do question the reasonableness of Midwest ISO's application of the marginal loss calculation. They assert that, since Midwest ISO may be under-collecting the refund amounts, the Commission should defer ruling on the appropriate refund period until after it evaluates the compliance filing required by the November 1 Order.

12. WPS Companies further argue that, if Midwest ISO's application of the TEMT methodology is found to be deficient, or that the pool of loss collections from which refunds are being made is insufficient, then refunds would be appropriate. They further maintain that, if Midwest ISO is not applying the TEMT calculation correctly, it is violating the filed rate doctrine and refunds back to market start would be appropriate regardless of whether the TEMT provisions are just and reasonable.

III. Discussion

13. Contrary to Midwest TDUs' assertions, the requirement in our November 1 Order that Midwest ISO perform further analysis of certain proposals is not inconsistent with prior orders. In the TEMT II and April 2005 Orders, the Commission required more analysis by Midwest ISO to determine whether its method achieved the equitable refunding to each market participant of its own contribution to the marginal loss surplus - and, if not, whether and to what extent the divergence from such individualized refunds discriminates against market participants who have made long-term commitments to remote resources. However, in response to those orders, Midwest ISO stated that it did not have the data necessary to perform such an analysis. Thus, in the November 1 Order, we required Midwest ISO to review the Midwest TDUs' claims that their individual customer analysis and their data proved Midwest ISO's method for allocating surplus

losses was not equitably refunding the customer's contribution to the marginal loss surplus. The analysis we required of Midwest ISO in the November 1 Order was intended to address the veracity of the intervenors' claim. Such analysis goes directly to the issue of equitable refunds.¹⁵ The absence of data that could provide a basis for refining the refund of the marginal loss surplus warranted our declining to make adverse inferences or to hold a technical conference or a hearing; the process we adopted was the process best suited to the circumstances.¹⁶

14. Finally, we do not consider our conclusion, *i.e.*, that data is not available to further refine the marginal loss surplus refund method, to be in error. That statement was based on the record, *i.e.*, Midwest ISO's analysis and representations mentioned above that indicated its systems were unable to track adequate and reliable market participant specific data on marginal, average or actual losses.¹⁷ However, an important element missing from a day-ahead only analysis, such as that proposed by Midwest TDUs, is that it does not reflect the losses associated with the actual generators used in real-time.¹⁸ This data gap is still not addressed in the Midwest TDU analysis of day-ahead and real-time losses in its request for rehearing. We further note that our companion order on the compliance filing in Docket No. ER04-691-082 shows that, contrary to Midwest TDUs' statements, adjustments to real-time loss sensitivity estimates increase marginal losses, as estimated from the day-ahead schedule.¹⁹ Therefore, the record in this proceeding continues to support the conclusion that divergences between day-ahead and real-time losses are a factor in ensuring that day-ahead only analyses will not be accurate.

15. With regard to the refund issue, WPS Companies misunderstand the Commission's decision not to require refunds back to market start. The Commission made that determination because the current refund allocation had previously been found

¹⁵ *See id.* at P 28 (to the extent Midwest ISO found their methods acceptable for calculating the marginal loss surplus refunds, we directed Midwest ISO to determine if that method could be applied to all market participants and would result in a more equitable allocation of marginal loss surplus refunds than the current allocation.).

¹⁶ *Id.* We note that we have discretion in the management of our proceedings. *See, e.g., Domtar Maine Corp. v. FERC*, 347 F.2d 304, 314 (D.C. Cir. 2003); *Michigan Public Power Agency v. FERC*, 963 F.2d 1574, 1579 (D.C. Cir. 1992).

¹⁷ *See* June 8 Filing at 2.

¹⁸ As Midwest ISO explained in its June 8 Filing, its system was not designed to track what a specific load is buying from a specific source. *See id.* at 3.

¹⁹ *See* January 30, 2007 Midwest ISO Information Filing at 10.

Docket No. ER04-691-080, *et al.*

7

to be just and reasonable.²⁰ Any change in the method used to refund marginal loss surplus revenues, as a result of the analysis required by Midwest ISO in our November 1 Order, would be prospective.²¹ Hence there was no basis for refunds back to market start.

16. While we agree with the parties that if Midwest ISO is not applying the TEMT correctly it is violating the filed rate doctrine, we do not see a basis to grant rehearing and to order refunds since we have not found that Midwest ISO is violating its TEMT. Furthermore, there is no evidence, as discussed in the companion compliance order in Docket No. ER04-691-082 that indicates Midwest ISO is not following the terms of the TEMT in determining the marginal loss refunds.

The Commission orders:

The requests for rehearing are hereby denied.

By the Commission. Commissioner Moeller not participating.

(S E A L)

Kimberly D. Bose,
Secretary.

²⁰ See November 1 Order at P 29.

²¹ See Section 206 of the Federal Power Act, 16 U.S.C. § 824e (2000).