

120 FERC ¶ 61,202
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Midwest Independent Transmission System
Operator, Inc.

Docket No. ER07-550-002

ORDER DENYING REHEARING

(Issued August 30, 2007)

1. In this order, the Commission addresses requests for rehearing and clarification of the Commission order issued June 22, 2007,¹ which rejected without prejudice the tariff revisions and amendments filed by the Midwest Independent Transmission System Operator, Inc. (Midwest ISO) to implement a day-ahead and real-time ancillary services market (ASM) for operating reserves. The Commission denies rehearing, as discussed below.

I. Background

2. On February 15, 2007, the Midwest ISO filed its ASM proposal.² The Midwest ISO's filing proposed tariff revisions to implement an ASM for operating reserves that would be simultaneously co-optimized with the Midwest ISO's existing energy markets,

¹ *Midwest Independent Transmission System Operator, Inc.*, 119 FERC ¶ 61,311 (2007) (ASM Order).

² For a description of the events and Commission orders implementing Day-2 energy markets and establishing reliability functions in the Midwest ISO leading up to the filing of the Midwest ISO's ASM proposal, *see id.* P 3-6.

and revisions to transfer and consolidate Balancing Authority³ responsibility in the Midwest ISO.

3. In the ASM Order, the Commission rejected the Midwest ISO's ASM proposal without prejudice, finding it deficient in two areas. First, the Commission found the ASM proposal deficient because the Midwest ISO had not submitted a market power analysis, thus preventing the Commission from undertaking a full evaluation of the proposal. Accordingly, the Commission set out the requirements for a market power analysis. Second, the Commission found the ASM proposal deficient for its failure to lay out in sufficient detail a readiness plan and safeguards needed to accommodate the Midwest ISO's transition to operating a centralized ASM. The ASM Order provided guidance on these deficiencies to aid the Midwest ISO in preparing and re-filing a complete proposal.

4. The ASM Order also provided guidance on certain major design elements of the ASM proposal, including the use of scarcity demand curves, use of demand resources during shortages and emergencies, hedging of ancillary services costs through self-supply or bilateral agreements, use of dynamic reserve zones, cost allocation methodology, must-offer requirement for reserve markets, tolerance band for uninstructed deviation penalties, and long-term resource adequacy plan details. The ASM Order did not address all issues raised by commenters, nor did it make findings as to the justness and reasonableness of any element of the Midwest ISO's proposal. Guidance was directed at the proposal's major design elements to allow the Midwest ISO and its stakeholders to focus their efforts and to facilitate a timely and productive subsequent review of a revised ASM proposal.

II. Requests for Rehearing and/or Clarification

5. The Commission received timely requests for rehearing and/or clarification of the ASM Order from MISO Industrial Customers,⁴ Indianapolis Power & Light Company

³ A Balancing Authority is responsible for maintaining the load-resource balance within the Balancing Authority Area, which is defined as the collection of generation, transmission, and loads within the metered boundaries of the applicable Balancing Authority. Currently, the Midwest ISO splits reliability functions with 24 individual Balancing Authorities, who have delegated certain functions to the Midwest ISO. Under the Midwest ISO's ASM proposal, the current Balancing Authorities would transition to reduced roles as Local Balancing Authorities.

(IP&L), Integrys Energy Group, Inc. (Integrys), and Reliant Energy, Inc. (Reliant). On August 10, 2007, Organization of MISO States (OMS) filed an untimely request for clarification of the ASM Order.

III. Discussion

A. Procedural Matters

6. We will dismiss OMS's untimely request for clarification of the ASM Order because it is, in essence, an untimely request for rehearing.⁵ The courts have repeatedly recognized that the time period within which a party may file an application for rehearing of a Commission order is statutorily established at 30 days by section 313(a) of the Federal Power Act (FPA), 16 U.S.C. § 8251(a) (2000), and that the Commission has no discretion to extend that deadline.⁶ Accordingly, the Commission has long held that it lacks the authority to consider requests for rehearing filed more than 30 days after issuance of a Commission order.⁷

⁴ MISO Industrial Customers include the Coalition of Midwest Transmission Customers, the Illinois Industrial Energy Consumers, and the Midwest Industrial Consumers, collectively.

⁵ OMS states that it submits its pleading "to ensure that the OMS does not inadvertently fail to exhaust its rights to administrative remedies should the Commission interpret its [ASM] Order to have made a finding regarding the justness and reasonableness of the Midwest ISO's February 15 ASM cost allocation proposal." OMS' August 10, 2007 Request for Clarification, Docket No. ER07-550-002, at 1.

⁶ See *City of Campbell v. FERC*, 770 F.2d 1180, 1183 (D.C. Cir. 1985) ("The 30-day time requirement of [the FPA] is as much a part of the jurisdictional threshold as the mandate to file for a rehearing."); *Boston Gas Co. v. FERC*, 575 F.2d 975, 977-98, 979 (1st Cir. 1978) (describing identical rehearing provision of the Natural Gas Act as "a tightly structured and formal provision. Neither the Commission nor the courts are given any form of jurisdictional discretion.").

⁷ See, e.g., *Arkansas Power & Light Co.*, 19 FERC ¶ 61,115 at 61,217-18, *reh'g denied*, 20 FERC ¶ 61,013 at 61,034 (1982). See also, *Public Service Company of New Hampshire*, 56 FERC ¶ 61,105 at 61,403 (1991); *CMS Midland, Inc.*, 56 FERC ¶ 61,177 at 61,623 (1991).

B. Substantive Matters**1. Market-Based Rate Authorization**

7. MISO Industrial Customers argue that the Commission erred in the ASM Order by failing to identify, before market-based sales of ancillary services can be approved, that the Midwest ISO bears the burden of proving both that a competitive market exists for the relevant products, and that individual sellers cannot exercise market power. MISO Industrial Customers contend that, as a prerequisite to reliance upon market-based pricing to produce just and reasonable rates, the Commission must make separate, independent findings that a competitive market exists and that the applicant lacks or has adequately mitigated market power.⁸ Additionally, MISO Industrial Customers aver that the Commission must find that the burden of proof is on the Midwest ISO to submit “empirical proof” that the ASM will constitute a competitive market as required under *Farmers Union*.⁹ They contend that the ASM Order did not directly address these arguments. Accordingly, MISO Industrial Customers request that the Commission grant rehearing and find that the Midwest ISO bears the burden of proof to demonstrate both that a competitive market exists for the relevant products, and that individual sellers cannot exercise market power.

8. In addition, MISO Industrial Customers request that the Commission clarify that the Midwest ISO’s market power analysis of its proposed ASM, required by the ASM Order, must reflect the use of dynamically defined reserve zones as the relevant geographic market, if the Midwest ISO proposes again to use dynamically defined reserve zones.

Commission Determination

9. The Commission rejects MISO Industrial Customers’ argument that, as a prerequisite to reliance upon market-based rate pricing to produce just and reasonable rates, the Commission must, in addition to finding that applicants lack or have adequately mitigated market power, make a separate and independent finding that a competitive market exists. In the Commission’s recent market-based rate rulemaking, commenters

⁸ MISO Industrial Customers’ July 23, 2007 Reh’g Request, Docket No. ER07-550-002, at 3-4 & n.6 (directing the Commission to MISO Industrial Customers’ March 30, 2007 Protest, Docket No. ER07-550-000, at 11-14).

⁹ *Farmers Union Cent. Exchange v. FERC*, 734 F.2d 1486 (D.C. Cir. 1984).

raised these same general arguments.¹⁰ We therefore incorporate by reference the Commission's discussion in its final rule on market-based rates (Order No. 697) of the legality of its approach to market-based rates.¹¹ The Commission's long-established approach involves assessing whether a seller lacks market power, which includes an assessment of seller-specific market power.¹² This approach, combined with the Commission's filing requirements and ongoing monitoring, allows the Commission to ensure that market-based rates remain just and reasonable. Additionally, for sellers in RTO/ISO organized markets, the Commission has in place market monitoring and mitigation rules to mitigate the exercise of market power, including price caps where appropriate, and the Commission also uses RTO/ISO market monitors to help oversee market behavior and market conditions.

10. MISO Industrial Customers have read a "separate and independent finding" requirement into precedent where it does not exist. Indeed, the Commission has never imposed such a requirement and MISO Industrial Customers provide no justification for doing so in this proceeding. Moreover, no court has taken exception to the Commission's approach of focusing on applicants' market power in determining whether to approve market-based rate pricing.

11. In *La. Energy and Power Authority v. FERC*, the United States Court of Appeals for the District of Columbia Circuit affirmed the Commission's approval of an

¹⁰ See *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity, and Ancillary Services by Public Utilities*, Order No. 697, 72 Fed. Reg. 39,904 (July 20, 2007), FERC Stats. & Regs. ¶ 31,252, at P 940 (2007) (Order No. 697). See also, Industrial Customers' August 7, 2006 Rulemaking Comments, Docket No. RM04-7-000.

¹¹ Order No. 697, 119 FERC ¶ 61,295, at P 943-71.

¹² See, e.g., *Heartland Energy Services, Inc.*, 68 FERC ¶ 61,223, at 62,060-61 (1994); *Louisville Gas and Electric Co.*, 62 FERC ¶ 61,016, at 61,143 n.16 (1993) (and the cases cited therein); *Citizens Power & Light Corp.*, 48 FERC ¶ 61,210, at 61,776 & n.11 (1989); *Pacific Gas and Electric Co. (Turlock)*, 42 FERC ¶ 61,406, at 62,194-98, *order on reh'g*, 43 FERC ¶ 61,403 (1988); *Pacific Gas and Electric Co. (Modesto)*, 44 FERC ¶ 61,010, at 61,048-49, *order on reh'g*, 45 FERC ¶ 61,061 (1988). See also, e.g., *La. Energy and Power Authority v. FERC*, 141 F.3d at 365; *Consumers Energy Co.*, 367 F.3d 915 at 922-23 (D.C. Cir. 2004) (upholding Commission orders granting market-based rate authority, noting that the Commission's longstanding approach is to assess whether applicants for market-based rate authority do not have, or have adequately mitigated, market power).

application by Central Louisiana Electric Company (CLECO) to sell electric energy at market-based rates.¹³ The D.C. Circuit found reasonable the Commission's conclusion that there were no market power considerations that should bar CLECO's application to sell at market-based rates. In *Lockyer v. FERC*, the United States Court of Appeals for the Ninth Circuit cited with approval the Commission's dual requirement of an *ex ante* finding of the absence of market power and sufficient post-approval reporting requirements.¹⁴ The Ninth Circuit determined that initial grant of market-based rate authority, together with ongoing oversight and timely reconsideration of market-based rate authorization under section 206 of the Federal Power Act,¹⁵ enables the Commission to meet its statutory duty to ensure that all rates are just and reasonable. The Ninth Circuit did not articulate a need for the Commission to make a separate and independent finding with regard to the market in general.¹⁶

12. With regard to MISO Industrial Customers' argument that the Midwest ISO is required to submit "empirical" proof that the ASM will constitute a competitive market as required by *Farmers Union*, we deny rehearing on this issue. MISO Industrial Customers misread *Farmers Union*. This case holds that the Commission may rely on non-cost factors in setting just and reasonable rates but that the Commission may not rely on largely undocumented market forces as the principal means of rate regulation. Further, *Farmers Union* holds that the Commission must have in place sufficient monitoring to ensure that rates remain within a zone of reasonableness. The Commission's market-based rate program does not rely on undocumented market forces, nor does it lack monitoring. The Commission only permits a public utility to sell energy or ancillary services using market-based pricing if the Commission finds that the seller lacks market power in the relevant market. Sellers are also subject to market power mitigation rules approved by the Commission. In addition, market monitoring by both the RTO/ISO market monitors and by the Commission help ensure that rates remain

¹³ *La. Energy and Power Authority v. FERC*, 141 F.3d 364 (D.C. Cir. 1998).

¹⁴ *State of California, ex rel. Bill Lockyer v. FERC*, 383 F.3d 1006 (9th Cir. 2004).

¹⁵ 16 U.S.C. § 824e(a) (2000).

¹⁶ *See id.* at 1012 (in summarizing the findings of *La. Energy and Power Authority v. FERC*, the Ninth Circuit acknowledged a relationship between the existence of a competitive market and the finding that a seller and its affiliates lack, or have adequately mitigated, market power, but did not draw a "separate and independent" distinction between the two).

within a zone of reasonableness. Thus, the Commission's market-based rate program is fully consistent with *Farmers Union*. Further, in the ASM Order, the Commission required the Midwest ISO to submit the information and analysis needed for the Commission to assess market power. In this regard, the ASM Order was also consistent with *Farmers Union*.

13. Finally, the Commission will not provide the clarification requested by MISO Industrial Customers that the Midwest ISO's market power analysis must reflect the use of dynamically defined reserve zones in the definition of the relevant geographic market. To do so would prejudge the Midwest ISO's proposal. The Commission has directed the Midwest ISO to include in its market power analysis a definition of the relevant product markets for ancillary services, including estimates of demand and available supply. In that analysis we expect the Midwest ISO to propose and justify the geographic market for each product studied, and the Commission will, in turn, evaluate the Midwest ISO's market analysis accordingly.

2. Guidance on Major Design Issues

14. MISO Industrial Customers request that the Commission grant rehearing and/or clarify that, if and when the Midwest ISO submits a revised ASM proposal, the Commission will consider *de novo* all aspects of the proposed tariff modifications, including all aspects of the Midwest ISO's scarcity pricing proposal, all cost allocation matters, and all issues associated with demand resources. MISO Industrial Customers also request the Commission to clarify that the Midwest ISO should cease making premature software modifications necessary to implement the ASM, given the many issues that are outstanding. They request that the Commission direct the Midwest ISO to cease modifications and re-initiate them only if and when the Commission renders a final decision on a new ASM proposal.

15. IP&L states that it requests rehearing, or in the alternative clarification, out of caution that the Commission would consider its ASM Order to be binding precedent. In such case, IP&L argues that the Commission should grant rehearing and order that the Midwest ISO conduct a thorough cost-benefit analysis to serve as a fundamental predicate for approval of an ASM and as a benchmark to determine if the ASM is achieving the predicted results. IP&L seeks clarification, or in the alternative rehearing, on the issue of self-supply of ancillary services; specifically, IP&L argues that any proposal by the Midwest ISO regarding self-supply must place a customer in the same financial position as supplying ancillary services on its own behalf. IP&L also seeks Commission clarification that a load-ratio share cost allocation methodology is not just and reasonable. IP&L requests that the Commission revisit guidance given in the ASM Order with respect to scarcity pricing, arguing that the Commission's findings in the ASM Order are unsupported by the record, that a \$3,500/MWh scarcity price level is

unjust and unreasonable, that scarcity pricing (if adopted) should be consistent with cost causation principles rather than socialized across the Midwest ISO footprint, and that the Commission must evaluate scarcity pricing together with resource adequacy in determining whether scarcity pricing is just and reasonable.

16. IP&L further requests that the Commission grant rehearing and order the Midwest ISO to expand the time period for its optimization program, which, as proposed in the Midwest ISO's ASM filing, will be run based on a ten minute look-ahead time frame. IP&L requests that the Commission grant rehearing and require the Midwest ISO to modify its proposal regarding dynamic reserve zones and also work with stakeholders on developing the tolerance band for uninstructed deviation penalties. IP&L states that the Commission should follow its precedent with respect to Business Practice Manuals (BPMs) by requiring the Midwest ISO to complete them by a specific date prior to implementation of any ASM, and by requiring the Midwest ISO to develop and include in its tariff a process for implementing changes to the BPMs. Finally, IP&L requests that the Commission condition implementation of the ASM on the receipt of any state approvals necessary to implement changes in Balancing Authority Area roles and responsibilities.

17. Integrys requests rehearing of the Commission's determination that the allocation of contingency reserve costs on a load share ratio basis is just and reasonable. Integrys submits that the Commission erred because the allocation is not consistent with principles of cost causation.

18. Reliant requests that the Commission clarify that the Phase II December 2007 filing (i.e., the long-term resource adequacy proposal) should be a comprehensive filing containing proposed tariff language implementing the elements and details contained in the "Resource Adequacy Plan" submitted as Attachment A to the Midwest ISO's February 15, 2007 filing. Also, Reliant seeks clarification that the Commission intended the Midwest ISO's tolerance band to be subject to further stakeholder discussion.

Commission Determination

19. The Commission, in rejecting the Midwest ISO's ASM proposal without prejudice for lack of a market power analysis and readiness plan, made no determinations regarding the justness and reasonableness of any design elements featured in the Midwest ISO's filing. Therefore, the Commission denies all requests for rehearing of guidance provided in the ASM Order. Excepting the Commission's substantive decision to reject the Midwest ISO's ASM proposal in light of certain deficiencies (i.e., lack of a market power analysis and readiness plan), the ASM Order is advisory in nature and the guidance it

provides with regard to any design element of the Midwest ISO's ASM proposal is not a decision on the merits, and therefore, not subject to rehearing.¹⁷ If and when the Midwest ISO re-files a revised ASM proposal, the Commission will review *de novo* the entire proposal, and at such time, parties may raise *de novo* the issues they have raised in this proceeding.

The Commission orders:

- (A) OMS's request for clarification is hereby dismissed.
- (B) Rehearing of the ASM Order is hereby denied, as discussed above.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

¹⁷ See *Midwest Independent Transmission System Operator, Inc.*, 105 FERC ¶ 61,147, at P 3 & n.6 (2003) (stating that, because the Commission's order provides guidance only and the matters discussed are subject to further proceedings and orders, the order is advisory in nature and not subject to rehearing).