

130 FERC ¶ 61,069
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
and John R. Norris.

Midwest Independent Transmission
System Operator, Inc.

Docket No. ER10-316-000

ORDER CONDITIONALLY ACCEPTING TARIFF REVISIONS

(Issued January 28, 2010)

1. On November 24, 2009, Midwest Independent Transmission System Operator, Inc. (Midwest ISO) submitted,¹ under section 205 of the Federal Power Act (FPA),² revisions to the Midwest ISO Open Access Transmission, Energy and Operating Reserve Markets Tariff (Tariff) to address non-substantive issues.³ In this order, we conditionally accept the proposed revisions, effective January 6, 2009 and February 1, 2010, as requested, subject to a compliance filing, as discussed below.

I. Background

2. In Order No. 714, the Commission adopted a set of standards for electronic tariff filings.⁴ Among other requirements, Order No. 714 provides that open access transmission tariffs must be filed electronically pursuant to a set of standards developed by the Commission and the North American Energy Standards Board.⁵ Under Order No.

¹ Midwest Indep. Transmission Sys. Operator, Inc., Clean-Up Filing for the Midwest ISO Tariff, Docket No. ER10-316-000 (filed November 24, 2009) (Filing).

² 16 U.S.C. § 824d (2006).

³ Open Access Transmission, Energy and Operating Reserve Markets Tariff, FERC Electric Tariff, Fourth Revised Volume No. 1.

⁴ *Electronic Tariff Filings*, FERC Stats & Regs. ¶ 31,276 (2008) (Order No. 714).

⁵ *Id.* P 13; 18 C.F.R. § 35.7 (2009).

714, each regulated entity is required to make a filing to establish its baseline tariff, which will be used to establish an electronic version of the tariff.⁶ The initial baseline tariffs are to begin on April 1, 2010 and continue for a six-month transition period in which parties will move to the electronic filing system.⁷

II. Filing

3. Midwest ISO states that, as part of its effort to prepare for the electronic baseline filing requirements of Order No. 714, it is proposing revisions to the Tariff designed to address typographical errors, formatting issues, incorrect references to Tariff sections or defined terms, and out-of-date provisions.⁸ Midwest ISO asks the Commission to accept certain revisions effective January 6, 2009. Midwest ISO asserts that these revisions will update the Tariff to reflect Commission orders issued in 2009 that accepted revisions to language in its previous tariff, Midwest ISO's Open Access Transmission and Energy Markets Tariff (EMT).⁹ Specifically, Midwest ISO states that the Commission accepted tariff revisions to the EMT in Docket Nos. ER07-478-007, ER08-1435-002, ER08-1485-001, and ER08-1486-002 that had been submitted in order to comply with Commission orders that were issued prior to the implementation of the Tariff on January 6, 2009 and that therefore Midwest ISO's requested effective date should be granted. Midwest ISO requests an effective date of February 1, 2010 for the remaining revisions proposed in this proceeding.

4. Among other things, Midwest ISO proposes to remove a number of out-of-date schedules from the Tariff.¹⁰ Specifically Midwest ISO proposes to delete Schedules 14 "Regional Through and Out Rate," 18 "Sub-Regional Rate Adjustment," and 19 "Zonal Transition Adjustment" because these schedules contained transitional cost recovery mechanisms that have expired.¹¹ Similarly, Midwest ISO proposes to delete both Schedule 21, detailing the monthly Seams Elimination Charge/Cost Adjustments/Assignments (SECA) amounts to be paid by entities that are part of the PJM

⁶ Order No. 714, FERC Stats & Regs ¶ 31,276 at P 92.

⁷ *Id.* P 104.

⁸ Filing, Transmittal Letter at 1.

⁹ Open Access Transmission and Energy Markets Tariff, FERC Electric Tariff, Third Revised Volume No. 1

¹⁰ Filing, Transmittal Letter at 2-3.

¹¹ *Id.* at 2-3.

Interconnection, LLC, and Schedule 22, detailing the SECA amounts to be paid by customers in Midwest ISO pricing zones and sub-zones, because they are no longer in effect. Finally, Midwest ISO proposes to delete Schedule 27-A, which deals with compensation for Manual Redispatch in the Real-Time Energy Market, because it is no longer relied upon in the settlement of Midwest ISO's Energy and Operating Reserve Markets.

5. Midwest ISO also proposes to revise the definition of Targeted Demand Reduction Level as follows: "The amount of demand reduction in MW that can be provided by a Demand Response Resource-Type 1 in response to a Contingency Reserve Deployment Instruction or Energy Commitment within the Contingency Reserve Deployment Period."¹²

6. Midwest ISO also proposes to replace Attachment P "Listing of Grandfathered Agreements" in its entirety. The new version of Attachment P lists the grandfathered agreements sequentially by contract number as opposed to the current method of listing contracts for each of Midwest ISO's Transmission Owners, which, in turn, are listed alphabetically. Midwest ISO explains that the proposed reorganization of the contracts is intended to present the listing of Grandfathered Agreements in a more efficient manner.¹³

7. Midwest ISO further proposes revisions to section 12.B that it asserts are designed to facilitate the interaction of the Western Area Power Administration (Western) with Midwest ISO.¹⁴ Most notably, Midwest ISO proposes the addition of paragraph 12B.2.b and section 12B.5. Paragraph 12B.2.b provides as follows:

In order to receive and expend funds advanced by Parties/Customers necessary for the continued performance of the obligations of the United States under the Tariff, additional authorization may be required. In case such authorization is not received, the Parties/Customers and the United States are hereby released from their contractual obligations and from all liability as a result of the lack of such authorization.¹⁵

Section 12B.5, "Enforcement Authority," provides that:

¹² *Id.* at First Revised Sheet No. 290.

¹³ *Id.*, Transmittal Letter at 6.

¹⁴ *Id.*

¹⁵ *Id.* at First Revised Sheet No. 420.

By entering into a transaction under the Tariff, the Western Area Power Administration shall not be construed as having or will be deemed to have consented to the jurisdiction of any enforcement authority (such as FERC, [the North American Electric Reliability Corporation (NERC)], WECC, or similar entity), conceded that any enforcement authority may exercise authority over it or its operations, waived or conceded any defense it may have, including sovereign immunity, intergovernmental immunity, or lack of subject matter jurisdiction, accepted any liability, responsibility, or obligation to pay any penalty imposed by an enforcement authority to which it would not have been subject in the absence of the Tariff, or accepted or assumed any obligation to act, or refrain from acting, in a manner that would violate, or exceed the authority conferred on it by, any applicable statute, regulation, or lawfully promulgated court or regulatory order.¹⁶

III. Notice of Filing and Responsive Pleadings

8. Notice of the Filing was published in the *Federal Register*, 74 Fed. Reg. 65,110 (2009), with interventions and protests due on or before December 15, 2009.

9. Consumers Energy Company, Duke Energy Corporation (Duke),¹⁷ American Municipal Power, Inc., Wisconsin Electric Power Company, and Ameren Services Company (Ameren Services)¹⁸ filed motions to intervene. On December 13, 2009, the Midwest ISO Transmission Owners (Transmission Owners)¹⁹ filed a motion to intervene,

¹⁶ *Id.* at First Revised Sheet No. 421.

¹⁷ Duke filed on behalf of its affiliates, Duke Energy Indiana, Inc., Duke Energy Ohio, Inc., Duke Energy Kentucky, Inc., and Duke Energy Business Services, LLC.

¹⁸ Ameren Services files on behalf of Union Electric Company, Central Illinois Public Service Company, Central Illinois Light Company, Illinois Power Company, Ameren Energy Marketing Company, Ameren Energy Generating Company, and AmerenEnergy Resources Generating Company.

¹⁹ For the purposes of this proceeding, the Midwest ISO Transmission Owners consists of Ameren Services; American Transmission Systems; Incorporated; City of Columbia Water and Light Department (Columbia, MO); City Water, Light & Power (Springfield, IL); Duke; Great River Energy; Hoosier Energy Rural Electric Cooperative, Inc.; Indiana Municipal Power Agency; Indianapolis Power & Light Company; International Transmission Company; ITC Midwest LLC; Michigan Public Power Agency; MidAmerican Energy Company; Minnesota Power (and its subsidiary Superior (continued...))

protest, and comments. On December 30, 2009, Midwest ISO filed an answer to the protest and comments of the Transmission Owners. On January 14, 2010, Western filed a motion to intervene out-of-time and answer to the Transmission Owners' protest. On January 15, 2010, Midwest ISO filed an answer to Western's answer.

10. The Transmission Owners argue that Midwest ISO's proposed revisions to section 12B have not been adequately justified or explained, go beyond non-substantive changes that are necessary for Order No. 714 implementation, and are vague. Among other things, the Transmission Owners argue that Midwest ISO has failed to justify the addition of paragraph 12B.2.b and section 12B.5. The Transmission Owners point out that Western already participates in the Midwest ISO market and argues that Midwest ISO has failed to explain why the addition of paragraph 12B.2.b and section 12B.5 are necessary to facilitate Western's participation in the market.²⁰ In addition, the Transmission Owners argue that the Commission should reject proposed paragraph 12B.2.b, even if Western requires statutory authorizations to fulfill its obligations under the Tariff, because Market Participants, including Western, should have necessary authorizations in place before incurring obligations. According to the Transmission Owners, the Commission should not approve Tariff provisions that allow parties to evade their obligations after-the-fact.²¹

11. The Transmission Owners also argue that proposed paragraph 12B.2.b is vague and difficult to interpret. The Transmission Owners state that it is unclear who requires additional authorization to receive and expend funds. In addition, the Transmission Owners argue that it is unclear whether the additional authorizations that may be required refer to obligations of the United States, Midwest ISO, or Parties/Customers, or some combination of them all. The Transmission Owners further contend that it is not clear

Water, L&P); Montana-Dakota Utilities Company; Northern Indiana Public Service Company; Northern States Power Company, a Minnesota corporation, and Northern States Power Company, a Wisconsin corporation, subsidiaries of Xcel Energy Inc.; Northwestern Wisconsin Electric Company; Otter Tail Power Company; Southern Illinois Power Cooperative; Southern Indiana Gas & Electric Company; Southern Minnesota Municipal Power Agency; Wabash Valley Power Association, Inc.; and Wolverine Power Supply Cooperative, Inc.

²⁰ Midwest ISO Transmission Owners December 15, 2009 Protest at 5 (Transmission Owners Protest).

²¹ *Id.* at 6.

who is to provide these authorizations or who is to determine whether the authorizations are required.²²

12. Finally, the Transmission Owners contend that proposed section 12B.5 should be rejected as contrary to Commission policy and recent Commission orders. The Transmission Owners argue that section 12B.5 amounts to a collateral attack on the Commission's order in *North American Electric Reliability Corporation*,²³ in which the Commission held that federal entities that use, own, or operate the bulk-power system must comply with mandatory Reliability Standards.²⁴ In addition, the Transmission Owners assert that the proposed language would grant Western a broad exemption from any enforcement authority to which Western would not have been subject to in the absence of the Tariff. According to the Transmission Owners, this exemption would apply not only to Western in its role as a Midwest ISO transmission customer and Market Participant, but in its role as a Reliability Coordination Customer as well.²⁵

13. The Transmission Owners also ask the Commission to require Midwest ISO to make a number of other minor edits to section 12C.2 and 12B.4. The Transmission Owners state that there is a double comma in revised section 12C.2 that should be corrected. The Transmission Owners further state that the last sentence of section 12B.4 should be amended as follows in order to make it consistent with the preceding sentence: "the Contractor will include the following provisions set forth in section 12 C"

14. With respect to Midwest ISO's proposed deletion of Schedules 21 and 22, the Transmission Owners assert that these schedules should be retained until the proceedings concerning SECA in Docket No. ER05-6 *et al.* are resolved.²⁶ Regarding Midwest ISO's proposed deletion of Schedule 27-A, the Transmission Owners state that they do not oppose deletion of Schedule 27-A at this time but reserve the right to comment once they review Midwest ISO's answer.²⁷ The Transmission Owners also identify a number of

²² *Id.* at 5-6.

²³ 129 FERC ¶ 61,033 (2009) (*NERC*).

²⁴ Transmission Owners Protest at 7-8 (citing 16 U.S.C. § 824o(b)(1); *Xcel Energy Operating Cos.*, 129 FERC ¶ 61,203 (2009) (*Xcel*); *NERC*, 129 FERC ¶ 61,033).

²⁵ Transmission Owners Protest at 8.

²⁶ *Id.* at 9.

²⁷ *Id.* at 10.

corrections to Attachment P that should be made.²⁸ Finally, the Transmission Owners argue that Midwest ISO has failed to explain the basis for its proposed revision to the definition of Targeted Demand Reduction Level in section 1.649. The Transmission Owners explain that conversations with counsel for Midwest ISO have led them to understand that Midwest ISO's proposed revision to section 1.649 is to clarify that the term "Targeted Demand Reduction Level" applies when a Demand Response Resource-Type I responds to both a Contingency Reserve Deployment Instruction and Energy Commitment and ask that Midwest ISO provide any additional clarifications in its answer in this proceeding.²⁹

15. In its answer, Midwest ISO explains that the proposed changes to section 12B of the Tariff were submitted at the request of Western. While Midwest ISO states that it does not object to the inclusion of the proposed language in the Tariff, it does not take any position at this time regarding the issues raised by the Transmission Owners and will defer to Western to address the objections raised by the Transmission Owners.³⁰ Midwest ISO states that it does not oppose the Transmission Owners' request to retain Schedules 21 and 22 until the conclusion of all SECA proceedings before the Commission.³¹ In response to the Transmission Owners' request for additional clarification of Midwest ISO's revisions to the definition of Targeted Demand Reduction Level in section 1.649, Midwest ISO explains that its proposed revision to the section is meant to reflect the fact that, in practice, the Targeted Demand Reduction Level can apply to either a Contingency Reserve Deployment Instruction or an Energy Commitment for a Demand Response Resource-Type I.³²

16. Midwest ISO responds to the Transmission Owners comments regarding Schedule 27-A by stating that Schedule 27-A is no longer necessary because the transactions previously settled under Schedule 27-A are settled under Schedule 27 of the current Tariff. According to Midwest ISO, Schedule 27-A provides for the Real-Time Energy Market Compensation for Manual Redispatch and was necessary under the EMT because this process was separate and distinct from Schedule 27 of the EMT, which provided for the Price Volatility Make-Whole Payments. However, upon the implementation of the

²⁸ *Id.* at 10-11.

²⁹ *Id.* at 9-10.

³⁰ Midwest ISO December 30, 2009 Answer at 4 (Midwest ISO Answer). *See* discussion *infra* P 18-19.

³¹ *Id.* at 4.

³² *Id.* at 5.

Tariff on January 6, 2009, Schedule 27-A became unnecessary because the transactions previously settled under that Schedule are now settled using the Real-Time Revenue Sufficiency Guarantee Payment and Day-Ahead Margin Assurance Payment under Schedule 27 of the Tariff.³³

17. Lastly, Midwest ISO states that it does not object to the additional corrections to Attachment P requested by the Transmission Owners and will make such revisions as directed by the Commission.³⁴

18. In its answer, Western argues that section 12B.2.b reflects the restrictions on Western's ability to spend funds advanced by third parties as an agency of the United States.³⁵ Although Western admits that it does not currently use funds advanced to it by third parties to participate in Midwest ISO's energy markets, it states that "it may choose to do so in the future" and that the "[e]xpenditure of third party advanced funds is expected to become a more important fiscal vehicle . . . in the future."³⁶ Western explains that, before it can spend funds advanced to it by third parties, it must receive authorization from the Office of Management and Budget within the Executive Office of the President (OMB) through OMB's apportionment process.³⁷ Western states that "in most instances it should not be a problem to expend third party funds" because it usually obtains the necessary authorizations at the beginning of the fiscal year before accepting advances from third parties. Western states that the language of 12B.2.b recognizes that there may be situations where Western is required to seek additional authorization to expend third party funds through an additional apportionment during a fiscal year. According to Western, such a "situation could arise under certain [Midwest ISO Tariff] provisions for future membership as a transmission owning member in the Midwest ISO or under certain conditions to participate in the Midwest ISO's energy market."³⁸ Western states that the proposed language would release Western and the other parties from any contractual obligations they have, pending Western's receipt of additional authorization necessary under the OMB apportionment process. Noting that the Commission has approved "substantially the same language" in Western's currently

³³ *Id.* at 6.

³⁴ *Id.* at 7.

³⁵ Western January 14, 2010 Answer at 4 (Western Answer).

³⁶ *Id.* at 5.

³⁷ *Id.* at 4.

³⁸ *Id.* at 4-5.

approved open access reciprocity tariff,³⁹ Western asks the Commission to accept paragraph 12B.2.b or, to the extent that the Commission believes that the language is vague, direct Midwest ISO to revise the language to clarify that the section is referring to authorization by OMB.⁴⁰

19. Western argues that section 12B.5 is necessary to clarify that Western cannot pay civil monetary penalties levied to enforce regional compliance standards.⁴¹ Western further claims that section 12B.5 is needed to notify third parties of Western's position regarding its ability to pay civil monetary penalties. While Western states that it will not reiterate the Department of Energy's position on the Commission's authority to approve and enforce mandatory reliability standards under the Federal Power Act, as amended by the Energy Policy Act of 2005, which has been outlined in detail in Docket No. NP09-26-000, Western makes two points: (1) to the extent Western is considered a federal entity as described by section 201(f) of the FPA, it is subject to electric reliability standards properly adopted by FERC pursuant to section 215 of the FPA; and (2) in exercising its jurisdiction to enforce reliability standards under FPA section 215, the Commission may impose non-monetary penalties upon Western but may not levy monetary civil fines upon Western under the plain language of FPA section 316(A).⁴² Western states that section 12B.5 is not intended to state that Western is not subject to reliability standards, but only provides notice to third parties that Western is unable to pay monetary civil fines and that Western does not waive any defense it might have regarding the applicability of those fines, such as sovereign immunity.⁴³ Western asks the Commission to approve section 12B.5 under the same conditions as it approved similar language in *Xcel Energy Operating Cos.*,⁴⁴ by specifically stating that the language does not bind a party to any particular outcome and that acceptance by the Commission is not an endorsement of Western's language.⁴⁵

³⁹ *Id.* at 5 (citing Attachment J, paragraph 2.2 of Western's Open Access Transmission Tariff).

⁴⁰ Western Answer at 5.

⁴¹ *Id.* at 2-3.

⁴² *Id.* at 6.

⁴³ *Id.*

⁴⁴ 129 FERC ¶ 61,203 (2009) (*Xcel*).

⁴⁵ Western Answer at 7.

20. In its answer to Western's answer, Midwest ISO requests, to the extent that the Commission denies Western's motion to intervene in this matter, that the Commission allow Midwest ISO to withdraw paragraph 12B.2.b and section 12B.5 without prejudice, prior to any final Commission action on the proposed Tariff revisions at issue.⁴⁶

IV. Discussion

A. Procedural Matters

21. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2009), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. We will also grant the untimely, unopposed intervention by Western given its interest in the proceeding, the early stage of this proceeding, and the absence of any undue prejudice or delay caused by the filing.

22. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2009), prohibits an answer to a protest or an answer unless otherwise ordered by the decisional authority. We will accept the answers filed by Midwest ISO and Western because they have provided information that assisted us in our decision-making process.

B. Substantive Matters

23. We conditionally accept the proposed revisions, subject to the exceptions and revisions discussed below. We find that good cause exists to grant Midwest ISO waiver of the 60-day prior notice requirement to permit an effective date of January 6, 2009 for those revisions that Midwest ISO has identified as reconciling Commission accepted EMT tariff language with the current Tariff.⁴⁷ Therefore, we conditionally accept Midwest ISO's proposed revisions, effective January 6, 2009 and February 1, 2010, subject to Midwest ISO making a compliance filing within 30 days of this order.

24. While we have approved tariff revisions designed to accommodate the characteristics of, for example, a public power district,⁴⁸ we will reject paragraph 12B.2.b

⁴⁶ Midwest ISO January 15, 2010 Answer at 1-2.

⁴⁷ See Central Hudson Gas & Electric Corp., 60 FERC ¶ 61,106, order on reh'g, 61 FERC ¶ 61,089 (1992).

⁴⁸ For example, we permitted tariff revisions designed to acknowledge an entity's non-jurisdictional status, accommodate their obligations under state and municipal law, and prevent any changes to their tax-exempt status when such entity joined an RTO.

(continued...)

as premature and unsupported at this time. Western acknowledges that it does not currently use funds advanced to it by third parties to participate in Midwest ISO and that “in most instances it should not be a problem to expend third party funds.” While Western states that it expects expenditure of third party funds to become an important financial vehicle in the future and that situations “could” arise in the future where Western is unable to obtain authorizations necessary for the expenditure of third party funds, Western may request appropriate accommodations at that time. Therefore, we will direct Midwest ISO to remove paragraph 12B.2.b.

25. Similarly, we find that section 12B.5 has not been shown to be just and reasonable, and must be rejected as unsupported. Western’s argument that section 12B.5 is needed to notify third parties of Western’s position fails for a number of reasons. First, Western fails to identify who these third parties are and why they require additional notice of Western’s position regarding its ability to pay monetary penalties for violation of regional compliance standards. Second, even assuming that there are third parties requiring additional notice, Western does not explain why the Tariff is the appropriate vehicle for doing so. Western’s reliance on *Xcel* is misplaced. *Xcel* concerned a provision in a transmission-to-transmission interconnection agreement between three parties, including Western, that recited Western’s position on monetary civil penalties for violation of reliability standards and provided notice to the parties to the agreement that Western had informed the Commission and NERC of its position. This case, however, concerns a provision stating Western’s position on the jurisdiction of the Commission, NERC, and other enforcement authorities that, if accepted, would be contained in a tariff of general applicability. While such a provision may be appropriate in a bilateral agreement, such as an interconnection agreement, we are not persuaded that it is appropriate to include such a provision in the Tariff. Further, proposed section 12B.5 is broader than the language at issue in *Xcel*,⁴⁹ despite the interpretation offered by Western. Accordingly, we will direct Midwest ISO to remove section 12B.5.

26. We also find that Midwest ISO must make two additional changes to section 12: (1) the last sentence of section 12B.4 should be amended to eliminate the incorrect

Southwest Power Pool, Inc., 125 FERC ¶ 61,239 (2008); *Southwest Power Pool, Inc.*, 127 FERC ¶ 61,078 (2009).

⁴⁹ See *Xcel*, 129 FERC ¶ 61,203 at P 54 (“No party shall be responsible for sanctions it is not legally obligated to pay, or for any acts, omissions, or violations of another party. Western hereby provides notice that it has informed FERC and NERC that as a Federal governmental agency it is not subject to any monetary civil penalties that may arise from FERC, NERC, Midwest ISO, MRO or a successor Regional Entity’s standards or rules.”).

reference to the “following provisions” and instead refer to the “provisions set forth in Section 12C” in order to make it consistent with the preceding sentence; and (2) the double comma in section 12C.2 must be corrected.

27. Regarding Midwest ISO’s proposed deletions of Schedules 14, 18, 19, and 27-A, we agree that these schedules are no longer in use and will permit their deletion. We note that the deletion of these schedules does nothing to their having been in effect for the relevant periods. With regard to Schedules 20 and 21, the Transmission Owners have requested, and Midwest ISO has agreed, to retain these schedules while the SECA proceedings in Docket No. ER05-6 *et al.* are still pending. We will allow this retention of Schedules 20 and 21, and, accordingly, reject the proposed deletion of these schedules.

28. We find that Midwest ISO must make further revisions to its Tariff in order to conform the language of the Tariff with the language of the EMT that the Commission accepted on February 4, 2009 in Docket No. ER07-478-007. Specifically, Midwest ISO must make two additional changes to section 44.1: (1) remove the word “with” from the first sentence;⁵⁰ and (2) remove “and the FTR corresponding to the ARR reserved for the Option B and Carve Out from the last Annual ARR Allocation (Adjusted Annual FTR Capability)” from the second sentence.⁵¹ Accordingly, we will direct Midwest ISO to remove this language.

29. We will accept Midwest ISO’s proposed revision to section 1.649, as clarified by Midwest ISO’s answer, because it makes that section consistent with how Midwest ISO deploys its markets and, thus, eliminates a potential source of confusion in Midwest ISO’s operational activities. Similarly, in light of Midwest ISO’s answer, we will also direct Midwest ISO to make the corrections to Attachment P identified by the Transmission Owners.⁵²

⁵⁰ Compare Midwest Independent Transmission Sys. Operator, Inc., Docket No. ER07-478-008, at Third Substitute Third Revised Sheet No. 649 (filed September 26, 2008) (September 26 Filing), *with* Filing, at First Revised Sheet No. 1278.

⁵¹ Compare September 26 Filing, *and* Midwest Independent Transmission Sys. Operator, Inc., Docket No. ER07-478-007, at Second Substitute Third Revised Sheet No. 649 (filed June 16, 2008), *with* Filing, at First Revised Sheet No. 1278.

⁵² Transmission Owners Protest at 10-11.

The Commission orders:

(A) Midwest ISO's proposed revisions to the Midwest ISO Tariff are hereby conditionally accepted, effective January 6, 2009 and February 1, 2010, as discussed in the body of this order.

(B) Midwest ISO is hereby directed to submit a compliance filing, within 30 days of the date of this order, as discussed in the body of this order.

(C) Waiver of the 60-day prior notice requirement is hereby granted, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

WESTERN AMENDMENTS TO MEMBERSHIP AGREEMENT

1. Terminology: Use of the undefined term "federal participation provisions" in Subsection A1.1

Section A1 of the Western Amendments document is entitled "Participation by the Western Area Power Administration-Upper Great Plains Region." The first subsection under the umbrella of Section A1 is Subsection A1.1, entitled "Subject to Acts of Congress, contains two references in its final sentence to "these federal participation provisions."

Denise understands the phrase "federal participation provisions" can arguably be ascertained in the context of the umbrella of Section A1, but she thought it prudent to raise before the CGC the question of whether that phrase should be defined and capitalized or perhaps more clearly stated.

2. Terminology: reference to "firm electric service customers" in Subsection A1.2

Beginning with its second sentence, Subsection A1.2, entitled "Federal Service Exemption," contains the following language:

. . . By law, the Department of the Army (Corps) or the U.S. Bureau of Reclamation (Bureau of Reclamation) provide [sic] Federal power resources to its project use customers. By law, Western-UGP markets Federal power resources to its *firm electric service customers*. These are both considered Statutory Load Obligations that will be provided for under the Western-UGP Federal Service Exemption. . . . (emphasis added)

Denise wonders if clarification is needed as to whether "firm electric service" customers are the same category as "preference" customers, as that latter term is used elsewhere in the relevant documents.

3. Terminology: reference to "marketing criteria" vs. "marketing plan" in Subsection A1.2

The following sentence begins eight lines down in Subsection A1.2: "Use of transmission facilities that Western-UGP owns, operates, or to which it has contract rights for delivery of Federal long-term firm capacity and energy to project use and electric service customers is a Western-UGP responsibility under the terms and conditions of *marketing criteria* and electric service contracts implementing statutory obligations to market Federal power." (emphasis added).

Denise raises the question of whether the term "marketing criteria" should be better aligned with the term "marketing plan" as used in the Membership Agreement's definition of "Statutory Load Obligations," which is copied below:

Statutory Load Obligations

Western-UGP's power marketing function obligations under Federal law to deliver power and energy from the output of the Federal hydroelectric projects operated by the Department of the Army and the Bureau of Reclamation to loads which include project use loads, preference power customer loads defined pursuant to a *power marketing plan*, and other loads required to be served under Federal law. (emphasis added).

4. Terminology: "Power and Energy" vs "Capacity and Energy" in Subsection A1.2

Beginning ten lines down in Subsection A1.2, the term "capacity and energy" is used twice. Denise recalled the term "power and energy" being used in other documents and wondered whether this terminology should be reconciled.

Term searches reveal the phrase "power and energy" appearing in the Membership Agreement in the definitions of "Federal Power-Western-UGP" and "Statutory Load Obligations." The phrase "power and energy" also appears in Western's Amendments to the Membership Agreement at Section A1.6, entitled "Federal Projects."

5. Terminology: Capitalization and Definitions

Western Amendments: Tom Hesterman has pointed out that "eastern interconnection" should be capitalized in Subsection A1.2.1 of the Western Amendments.

All Governance Documents: Tom also raised the following issues:

(a) "Eastern Interconnection" and "Western Interconnection" should be defined in relevant documents;

(b) Definitions appearing in more than one document should be cross-referenced so as to better ensure that any definition change in one document will also be made to other documents containing that definition; and

(c) appearances of "federal vs. Federal" be checked for consistency.

BASIN/HEARTLAND AMENDMENTS TO THEIR MEMBERSHIP AGREEMENTS

Triggering Event for Basin or Heartland's Withdrawal in Section A2.

In Subsection A2, entitled "Withdrawal Rights," both Basin and Heartland's Amendments state:

Basin [Heartland] also may terminate this Agreement in the event that SPP files and FERC approves unilateral,—material changes to the OATT or Basin's [Heartland's] Network Integration Transmission Service Agreement or Network Operating Agreement that have a substantial adverse effect on Basin [Heartland].

Denise raises the issue of whether Basin/Heartland's ability to terminate in this section should be triggered by changes to the "Federal Power Marketing Agency Amendments" to be consistent with that defined term's usage in other parts of the Governance Documents.

BYLAWS

1. Western's Liability for Penalties – Section 8.7.5(b) of the Bylaws and Section A1.7 of Western's Amendments to the Membership Agreement

Both Denise and Tom have raised the issue of whether the language addressing the handling of penalties is broad enough to cover Western's role in situations where penalties are assessed due to SPP's acts or omissions. The currently-proposed version of Section 8.7.5(b) of the Bylaws reads as follows:

(b) Provided further, notwithstanding any language to the contrary in these Bylaws, a Federal Power Marketing Agency has not waived or conceded any defense it may have, including sovereign immunity, intergovernmental immunity, or lack of subject matter jurisdiction in any action against it by an Enforcement Authority, nor has it accepted any liability, responsibility, or obligation to pay any civil monetary penalties or fines imposed by an Enforcement Authority to which it would not have been subject in the absence of these Bylaws. SPP, in accepting Western-UGP as a member, does not thereby concede or accept responsibility for

any portion of a penalty or fine attributable to the actions or omissions of Western-UGP. SPP will identify the amount of any such penalty or fine that SPP determines is attributable to Western-UGP and will identify that amount to FERC as uncollectable and not owed by SPP. Western-UGP's liability for any penalty or fine assessed by an Enforcement Authority is a matter to be adjudicated between Western-UGP and the relevant Enforcement Authority, including any and all appeal rights. that may be imposed by an Enforcement Authority. Enforcement Authority in these Bylaws means the Federal Energy Regulatory Commission (FERC), Electric Reliability Organization (ERO), or Regional Entities with enforcement authority pursuant to a delegation from an ERO or FERC for the purpose of proposing and enforcing reliability standards. (italics added).

Denise and Tom wonder how the foregoing language would be applied in instances where SPP is assessed a penalty no portion of which is attributable to any action or omission of Western. This penalty liability language also appears in Section A1.7 of Western's Amendments to the Membership Agreement.

One potential remedy for this concern may be the striking of "such" and the addition of "allocates to Western-UGP or" as indicated below:

SPP will identify the amount of any ~~such~~ penalty or fine that SPP allocates to Western-UGP or determines is attributable to Western-UGP and will identify that amount to FERC as uncollectable and not owed by SPP.

2. 2010 FERC Order Regarding Western and Penalties

The foregoing language from 8.7.5(b) of the Bylaws and A1.7 of Western's Amendments is also implicated in a FERC order in Docket No. ER10-316-000. In that order, FERC rejected similar penalty language that MISO proposed on Western's behalf. Specifically, MISO had proposed an additional paragraph ("section 12B.5") in its tariff that provided:

By entering into a transaction under the Tariff, the Western Area Power Administration shall not be construed as having or will be deemed to have consented to the jurisdiction of any enforcement authority (such as FERC, [the North American Electric Reliability Corporation (NERC)], WECC, or similar entity), conceded that any enforcement authority may exercise authority over it or its operations, waived or conceded any defense it may have, including sovereign immunity, intergovernmental immunity, or lack of subject matter jurisdiction, accepted any liability, responsibility, or obligation to pay any penalty imposed by an enforcement authority to which it would not have been subject in the absence of the Tariff, or accepted or assumed any obligation to act, or refrain from acting, in a manner that would violate, or exceed the authority conferred on it by, any applicable statute, regulation, or lawfully promulgated court or regulatory order.

130 FERC ¶ 61,069 P 7. MISO took no position in response to protests and comments regarding the language quoted above, and MISO explained that the language was submitted at Western's request. *See Id.* at P 15.

FERC rejected the proposed language, calling it "a provision stating Western's position on the jurisdiction of the Commission, NERC, and other enforcement authorities that, if accepted, would be contained in a tariff of general applicability." *Id.* FERC added, "While such a provision may be appropriate in a bilateral agreement, such as an interconnection agreement, we are not persuaded that it is appropriate to include such a provision in the Tariff." *Id.*