

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;  
William L. Massey, and Nora Mead Brownell.

Midwest Independent Transmission System Docket No. ER03-1277-000

ORDER CONDITIONALLY ACCEPTING REVISIONS TO MIDWEST  
INDEPENDENT TRANSMISSION SYSTEM OPERATOR, INC.'S TARIFF

(Issued October 28, 2003)

1. In this order, the Commission conditionally accepts for filing Midwest Independent Transmission System Operator, Inc.'s (Midwest ISO) Schedule 10-FERC of its Open Access Transmission Tariff (OATT), to become effective September 1, 2003, as requested. This action benefits customers because it helps Midwest ISO comply with Commission requirements concerning annual charges set forth in Order No. 641 (involving annual charges).<sup>1</sup>

**I. Background**

**A. Order No. 641**

2. As a result of Section 3401 of the Omnibus Budget Reconciliation Act of 1986,<sup>2</sup> the Commission is required to recover its costs through, among other means, its annual charges.<sup>3</sup> The Commission's electric annual charges (annual charges) in any fiscal year are based on its estimated electric regulatory program costs for that year (that are not otherwise recovered through, for example, filing fees), and during the next fiscal year, the Commission adjusts the annual charges up or down to eliminate any over- or under-recovery by recalculating the annual charges and carrying any over- or under-charge from the prior year as a credit or debit on the next fiscal year's bill.

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<sup>1</sup> See Revision of Annual Charges Assessed to Public Utilities, Order No. 641, 65 Fed. Reg. 65,757 (November 2, 2000), FERC Stats. & Regs. Regulations Preambles July 1996-December 2000 ¶ 31,109 (2000), reh'g denied, Order No. 641-A, 66 Fed. Reg. 15793 (March 21, 2001), 94 FERC ¶ 61,290 (2001).

<sup>2</sup> 42 U.S.C. § 7178 (2000).

<sup>3</sup> See 18 C.F.R. Part 382 (2003).

3. Public utilities that provide transmission service are subject to annual charges and must submit FERC Reporting Requirement No. 582 (FERC Form 582) to the Office of the Secretary by April 30 of each year, providing data for the previous calendar year.<sup>4</sup> The Commission uses that data to allocate the Commission's costs among the public utilities that provide transmission service. The Commission issues bills for annual charges, and public utilities that provide transmission service must pay those bills within 45 days from the date on which the Commission issues the bills.

**B. Summary of Midwest ISO's Filing**

4. On August 29, 2003, Midwest ISO filed its proposed Schedule 10-FERC, which contains Midwest ISO's proposed formulae for collecting the costs associated with annual charges and an expected 2003 make-up billing. The 2003 make-up billing stems from corrections to the 2003 Assessment Midwest ISO received in August 2003.<sup>5</sup> Midwest ISO is aware that the 2003 Assessment is understated. Corrections to the 2003 FERC Assessment are expected, and will result in an increase to Midwest ISO's 2004 FERC Assessment.<sup>6</sup>

5. Midwest ISO expects to be billed annual charges based on total volume of transmission service in 2003, plus a "true-up" amount in 2004 that will capture a corrected volume of transmission service during 2002. Midwest ISO expects the make-up billing amount to be \$12,439,256.<sup>7</sup> Based on the decision of Midwest ISO's Advisory Committee, the make-up billing will be collected for each transmission customer who used the system during the period of February 1, 2002 through December 31, 2002, in 12 monthly installments beginning in September 2003, based on their portion of the total MWhs reported by Midwest ISO on FERC 582, for that period.<sup>8</sup>

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<sup>4</sup> 18 C.F.R. § 382.201 (2002).

<sup>5</sup> Midwest ISO's Schedule 10-FERC Filing at 4.

<sup>6</sup> Id.

<sup>7</sup> Midwest ISO's Answer at Exhibit 1.

<sup>8</sup> Id.

## II. Interventions, Protests, and Answers

6. Midwest ISO's requests waiver of the Commission's 60-day prior notice requirement to allow a September 1, 2003 effective date.<sup>9</sup> Midwest ISO also requests waiver of the service requirements set forth in 18 C.F.R. § 385.2010 (2003).

7. Notice of Midwest ISO's filing was published in the Federal Register, 68 Fed. Reg. 54,222 (2003), with comments, protests and interventions due on or before September 19, 2003.<sup>10</sup>

8. Midwest ISO Transmission Owners and Consumers Energy Company (Consumers) filed timely motions to intervene. A timely motion to intervene and protest was filed by Wabash Valley Power Association, Inc. (Wabash Valley). Wisconsin Electric Power Company (Wisconsin Electric) filed a motion to intervene out-of-time and protest, and Wisconsin Public Service Corporation and Upper Peninsula Power Company (jointly, Operating Companies) filed a motion to intervene out-of-time. On October 6, 2003, Midwest ISO submitted an answer to the protests (Midwest ISO Answer). Michigan Public Power Agency and Michigan South Central Power Agency (jointly, Michigan Agencies) filed a motion to intervene out-of-time and protest on October 8, 2003. Wisconsin Electric filed an answer to Midwest ISO's Answer on October 22, 2003.

## III. Discussion

### A. Procedural Matters

9. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, the timely, unopposed motions to intervene serve to make the Intervenors parties to this proceeding.<sup>11</sup>

10. Pursuant to Rule 214, we also will grant Wabash Valley's, Operating Companies' and Michigan Agencies' motions to intervene out-of-time given their interests in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

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<sup>9</sup> 18 C.F.R. § 35.3 (2003).

<sup>10</sup> Motions to intervene were accepted after the September 19, 2003 comment date because the Commission's offices and computer systems were unavailable due to the effects of Hurricane Isabel.

<sup>11</sup> 18 C.F.R. § 385.214 (2003).

11. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, prohibits an answer to a protest or answer unless otherwise ordered by the decisional authority. We will accept Midwest ISO's and Wisconsin Electric's answers because they provide information that assisted us in our decision-making process.<sup>12</sup>

**B. Waiver**

12. The Midwest ISO has requested waiver of the Commission's regulations which require that a participant filing a document in a proceeding must serve a copy of the document on each person whose name is on the official service list or applicable restricted service list, for the proceeding or phase of the proceeding.<sup>13</sup>

13. No party opposes this request. Moreover, the Midwest ISO represents that it has electronically served a copy of its filing, with attachments, upon all the Midwest ISO members, member representatives of transmission owners and non-transmission owners, the Midwest ISO Advisory Committee participants, policy subcommittee participants, and all state commissions within the region, in addition to posting the filing on its website. Given this representation, as well as the volume of interested parties in this proceeding, we find that good cause exists to grant the waiver.

**C. Alleged Defects in Midwest ISO's Proposed Electric Annual Recovery Charge Mechanism**

**1. Advance Collection of Anticipated Adjustments in Midwest ISO's Annual Charge Billing**

**a. Intervenors' Comments**

14. Consumers does not oppose Midwest ISO's proposal to establish a separate mechanism for recovering the cost of annual charges, but Consumers objects to certain details of the proposed mechanism and requests that the Commission require Midwest ISO to implement various improvements in the mechanism. One of Consumers' objections concerns Midwest ISO's proposed Schedule 10-FERC treatment of the expected 2003 make-up billing differently than recovery of the annual charges during subsequent years. Until all the data is in and the 2003 make-up billing is made part of the 2004 annual charge billings, Consumers argues that no one can forecast the expected

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<sup>12</sup> 18 C.F.R. § 385.213(a)(2) (2003).

<sup>13</sup> 18 C.F.R. § 385.2010 (2003).

2003 make-up billing, Consumers argues, and trying to collect for this unknown make-up billing in advance would be speculative, improper and unnecessarily complicated.<sup>14</sup>

**b. Midwest ISO's Answer**

15. Midwest ISO's Answer explains that Midwest ISO developed a comprehensive set of options for collecting the costs of the annual charges, as well as the costs of the expected 2003 make-up billing. These options were presented and explained to Midwest ISO's Advisory Committee at the monthly meeting held on August 20, 2003. Advisory Committee members are comprised of representatives from each of Midwest ISO's stakeholder groups and are chosen by the participants belonging to that group. Additionally, all stakeholders have the right to attend and participate in these meetings.

16. Following a discussion and debate concerning the alternatives presented by Midwest ISO, the Advisory Committee took a straw vote that expressed a preference for Midwest ISO to collect the costs of the Commission's annual charge and the costs of the expected 2003 make-up billing contained in the proposed Schedule 10-FERC. The straw vote indicated a preference for the as-filed methodology by a ratio of 3:1.

**c. Commission Determination**

17. Consumers has failed to provide sufficient evidence that Midwest ISO's collecting the costs of the expected 2003 make-up billing in advance would be speculative, improper and unnecessarily complicated.<sup>15</sup> In this regard, the Commission has previously stated that Part 35 of its regulations "provides great flexibility in how public utilities, including RTOs, may develop their electric rates, including their electric transmission rates. Thus, RTOs have the ability and the flexibility to recover their costs, including the annual charges assessed to them, in their rates."<sup>16</sup> Therefore, we will accept Midwest ISO's 2003 make-up billing, subject to changes described below.<sup>17</sup>

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<sup>14</sup>See Consumers' Protest at 3-4. Consumers also argues in its Protest that there is a better, much simpler way to calculate Schedule 10-FERC charges for all years on a consistent basis. Id. at 5-7. Consumers' second argument is subsumed within Consumers' concern that advance collection for an anticipated adjustment in Midwest ISO's 2003 annual charge would be speculative, improper and unnecessarily complicated.

<sup>15</sup> See 18 C.F.R. § 35.13 (b)-(d) (2003)(allowing rates to be developed based on a future test year, and on estimated costs).

<sup>16</sup> Midwest Independent Transmission System Operator, Inc., 103 FERC ¶ 61,048 at P15 (2003)(citations omitted)(Midwest ISO).

## 2. Time Value for Advance Payments

### a. Intervenors' Comments

18. Consumers contends that if the Commission permits the proposed collection of the expected 2003 make-up billing, prior to the Commission invoicing Midwest ISO for this adjustment, then Midwest ISO should credit its customers for carrying charges it avoids as a result of receiving Midwest ISO customer's advance payments.<sup>18</sup> The carrying charge should be at the same rate as Midwest ISO applies to its cost deferrals.

19. Wisconsin Electric's Protest states that it is concerned that Midwest ISO's filing is inconsistent with assurances Midwest ISO made in its discussion with Midwest ISO Advisory Committee at the August 20-21, 2003 meeting. Specifically, Midwest ISO assured the Advisory Committee that interest would accrue on the payments made for the modifications to previous assessments that were anticipated by Midwest ISO but not yet assessed by the Commission.<sup>19</sup> While Midwest ISO previously acknowledged that interest would accrue on the payments for modifications to previous assessments that were anticipated by Midwest ISO, but not yet assessed by the Commission, it has failed to carry through on this promise by including these carrying costs in its filing.

20. Wisconsin Electric requests that the Commission require Midwest ISO to amend its filing to provide that the amounts billed will accrue interest at the Commission interest rate, from the date of receipt of the payments until the date Midwest ISO remits the additional assessment to the Commission. Wisconsin Electric also argues that because Midwest ISO's annual charge recovery is based on past activity, the Commission should require Midwest ISO to include in the Schedule 10-FERC the amounts that it will be billing its customers. Wisconsin Electric contends that the annual charge figure must be known by Midwest ISO; therefore, Midwest ISO should include the figure in Schedule 10-FERC to provide certainty to the customers who will be responsible for the annual charge.

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<sup>17</sup> It is noteworthy that Consumers' Protest explains that it does not oppose Midwest ISO's proposal to establish a separate mechanism for recovering the cost of annual charges.

<sup>18</sup> Consumers' Protest at 5.

<sup>19</sup> Wisconsin Electric's Protest at 4.

**b. Midwest ISO's Answer**

21. In its Answer, Midwest ISO explains that there would be a credit; the interest earned on cash held by Midwest ISO in bank accounts would be "credited" to Transmission Customers each and every month in the form of a reduction to the capital and operating expenses to be recovered under Schedule 10.<sup>20</sup>

**c. Commission Determination**

22. We will conditionally accept Midwest ISO's proposed method of crediting the time value for advance payments by customers, but we will require that Midwest ISO revise Schedule 10-FERC, Section III to more explicitly specify how Midwest ISO intends to credit customers for these advance payments.

**3. Schedule 10-FERC Applicability to Non-Jurisdictional Utilities and Grandfathered Agreements****a. Intervenors' Comments**

23. Wabash Valley requests that the Commission order Midwest ISO to modify the proposed Schedule 10-FERC by eliminating its application to non-jurisdictional transmission customers, or, in the alternative, eliminating its application to Grandfathered Agreements. According to Wabash Valley, it joined Midwest ISO voluntarily and is not under the Commission's jurisdiction for its day-to-day operations.<sup>21</sup> Wabash Valley argues that the proposed Schedule 10-FERC makes all transmission customers, including non-jurisdictional entities and customers taking service under Grandfathered Agreements, responsible for paying a portion of the annual charges imposed on Midwest ISO.

24. Wabash Valley states that as a Rural Utilities Service borrower, it is not a jurisdictional public utility under the Federal Power Act. Therefore, Wabash Valley maintains that it is inappropriate and inequitable for Midwest ISO to allocate these FERC

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<sup>20</sup> Schedule 10 is designed to recover all costs of Midwest ISO's OATT that are not recovered under Schedule 1 (Scheduling, System Control and Dispatch Service), Schedule 16 (Financial Transmission Rights Administrative Service Cost Recovery Adder), or Schedule 17 (Energy Market Support Administrative Service Cost Recovery Adder). These costs include Midwest ISO's costs associated with building and operating the Security Center, "running" Midwest ISO and administering the Midwest ISO OATT.

<sup>21</sup> Wabash Valley's Protest at 3.

costs to Wabash Valley for its use of its own transmission facilities simply because it joined Midwest ISO.<sup>22</sup>

25. Wabash Valley also maintains that Midwest ISO does not have the authority to impose annual charges on Grandfathered Agreements.<sup>23</sup> According to Wabash Valley, it understood that existing Grandfathered Agreements would not be disturbed and would not be subject to Midwest ISO's charges. This understanding is documented in Appendix C of the Agreement of Transmission Facility Owners to Organize Midwest ISO (Organizational Document), which provides that "Grandfathered Agreements shall not be abrogated or modified by this Agreement."<sup>24</sup> "Except by mutual agreement of the parties to a Grandfathered Agreement, the Midwest ISO shall not collect or distribute any revenues for transmission service related to such agreements during the Transition Period."<sup>25</sup>

26. Wabash Valley contends that Article Two, Section D of the Midwest ISO's OATT, makes it clear that transmission owners reserved the right to use their own transmission system to the extent required to transmit electric power and energy to their customers being served under bundled rates. This would include Grandfathered Agreements. Wabash Valley argues that the Commission should not approve the treatment of Grandfathered Agreements contained in the proposed Schedule 10-FERC, and that the Commission should order Midwest ISO to treat these Agreements in a manner consistent with Commission policy and consistent with the treatment of Grandfathered Agreements envisioned in Midwest ISO's Organizational Documents. Wabash Valley argues that it is the Commission's policy not to apply the terms and

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<sup>22</sup> Id. at 5-6.

<sup>23</sup> Id. at 6-8.

<sup>24</sup> Id. at 6. Midwest ISO's OATT defines "Grandfathered Agreements" as:

[A]n agreement or agreements executed or committed to prior to the first Commission Order substantially approving Midwest ISO proposal that are not subject to the specific terms and conditions of this Tariff consistent with the Commission's policies. These agreements are set forth on the list which is Attachment P to this Tariff.

Id. at 8-9, citing Midwest ISO's OATT at Section 1.19.

<sup>25</sup> Id., citing Midwest ISO Agreement, Appendix C, § II.B.2.

conditions of the OATT to these Grandfathered Agreements, and the Commission can only change its policy based on substantial evidence that such a policy change is necessary and in the public interest.<sup>26</sup>

**b. Midwest ISO's Answer**

27. In its Answer, Midwest ISO addresses Wabash Valley's concerns by clarifying that the billing calculations underlying Midwest ISO's proposed Schedule 10-FERC are based on the total MWhs billed for each transmission customer. In accordance with Midwest ISO's OATT, Schedule 10, Section II, Part B.2, the loads served under Grandfathered Agreements are subject to payment of fees assignable to each Transmission Owner. The MWhs provided under Grandfathered Agreements were reported to Midwest ISO and would have been reported by the Midwest ISO in its FERC 582, and as such are subject to Schedule 10-FERC. Midwest ISO request that the Commission find Wabash Valley's arguments are moot and without merit.<sup>27</sup>

**c. Commission Determination**

28. The Commission has previously addressed the issues raised in Wabash Valley's Protest. Municipal utility systems and rural electric cooperative utility systems that are financed by the Rural Utilities Services are not required to pay annual charges.<sup>28</sup> However, the Commission noted that as transmission customers, they may be charged rates by the transmission provider that reflect annual charges assessed to the transmission provider.<sup>29</sup>

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<sup>26</sup> *Id.* at 9, citing Public Service Commission of New York v. Federal Energy Regulatory Commission, 813 F.2d 448, 451 (D.C. Cir. 1987).

<sup>27</sup> Midwest ISO's Answer at 6.

<sup>28</sup> Order No. 641 at 31,845.

<sup>29</sup> Order No. 641 at 31,845 n.34.

29. Consistent with this analysis, the Commission recently issued an order in which it held:

How the [annual charge] is recovered is a matter of the public utility's ratemaking. Just as a public utility recovers its other transmission-related costs in its rates, so a public utility's annual charges may be recovered in its rates. That the entity paying these rates may not itself be jurisdictional does not mean it should not have to pay these rates.<sup>30</sup>

30. We likewise disagree with Wabash Valley's claim that Grandfathered Agreements should be exempt from these costs. Prior to the Commission's issuance of Order No. 641, the Commission billed the Midwest ISO Transmission Owners (TOs) for transmission services reported by the TOs in their FERC Form 582. This included transmission services provided under Grandfathered Agreements. Pursuant to Order No. 641, the Midwest ISO will be billed the annual assessment by the Commission, based on Midwest ISO's Form 582. With respect to the Grandfathered Agreements, Midwest ISO may bill its TO members for the Commission's annual assessment assignable to the Grandfathered Agreements. We believe that the TOs have been collecting the annual assessments under the Grandfathered Agreements and we are not aware of any impediment to the continuance of such cost recovery.

31. Accordingly, we will reject Wabash Valley's claims.

**4. Assessment of Schedule 10-FERC on Customers Currently Subject to a Zonal Rate in Michigan Electric Transmission Company's Pricing Zone**

**a. Intervenors' Comments**

32. Michigan Agencies argue that Midwest ISO's Schedule 10-FERC has the unintended effect of double charging customers in Michigan Electric Transmission

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<sup>30</sup> Midwest ISO, 103 FERC ¶ 61,048 at P 15 n.25. See also Midwest Independent Transmission System Operator, Inc., 104 FERC ¶ 61,060 at P 19 n.35 (2003).

Company's (METC) pricing zone.<sup>31</sup> Midwest ISO recently assumed responsibility for reporting transmission volume to the Commission. It is Midwest ISO, not METC that is billed for annual charges and it is Midwest ISO, not METC, attempting to collect the rates at issue here. According to Michigan Agencies, Midwest ISO's rates are in addition to METC's stated rate of \$.98 kW per month. The result is that customers in the METC zone are paying for the FERC annual charges twice: (1) as part of the \$.98 per kW-month zonal rate; and (2) again through Midwest ISO's Schedule 10-FERC invoice.<sup>32</sup>

33. Michigan Agencies explain that METC is collecting a rate that assumed METC would incur the annual charges, but those annual charges are now being levied on Midwest ISO, not METC.<sup>33</sup> To avoid a windfall to METC, Michigan Agencies argues that Midwest ISO should bill METC for annual charges, not METC's customers or Midwest ISO's customers that pay the METC zonal rate. Michigan Agencies requests that the Commission direct Midwest ISO to amend its proposed Schedule 10-FERC accordingly.

**b. Commission Determination**

34. We agree with Michigan Agencies' rate recovery claim. Midwest ISO's proposed Schedule 10-FERC filing contains its proposed methodology for the recovery of the cost of the Commission's annual charges. Michigan Agencies acknowledge that it is Midwest ISO, not METC, which is billed for the annual charges, and it is Midwest ISO, not METC, proposing to collect the charge at issue here. However, as we stated above, prior to the Commission's issuance of Order No. 641, the Commission billed the Midwest ISO TOs for transmission services reported by the TOs in their FERC Form 582. Therefore, we believe that the Midwest ISO should be billing METC, as a TO, for the annual cost that it is assessed by the Commission. If the Michigan Agencies continue to believe that

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<sup>31</sup> Michigan Agencies' Protest at 2.

Michigan Agencies contend that on November 21, 2001, Consumers, METC, Trans-Elect and Michigan Transco Holdings filed a joint application for authorization to transfer jurisdictional assets and for approval of rates, terms and conditions of transmission service. Michigan Agencies Protest at 4-5. In its filing, METC sought and received a rate of \$.98 per kW-month, to be effective for a period of five years, ending on December 31, 2005. Michigan Agencies argue that FERC annual charges were incorporated into METC's rate of \$.98 per kW-month, which it adopted from its predecessor, Consumers. Id. at 5.

<sup>32</sup> See id. at 4-6.

<sup>33</sup> Id. at 5.

they are being double charged, then they may file a complaint under Section 206 of the Federal Power Act against METC with the Commission .

The Commission orders:

(A) Midwest ISO's Schedule 10-FERC is hereby conditionally accepted, subject to changes as described in the body of this order, to become effective September 1, 2003, as requested. Within 30 days of the date of this order, Midwest ISO must revise, and file with the Commission, a revised Schedule 10-FERC, as discussed in the body of this order.

(B) Midwest ISO's request for waivers of the Commission's 60-day prior notice requirement and service requirements set forth in 18 C.F.R. § 385.2010 (2003) are hereby granted, as discussed in the body of this order.

By the Commission.

( S E A L )

Linda Mitry,  
Acting Secretary.