

111 FERC ¶ 61,249
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suede G. Kelly.

Midwest Independent Transmission
System Operator, Inc.

Docket No. ER04-691-029

Public Utilities With Grandfathered Agreements
in the Midwest ISO Region

Docket No. EL04-104-028

ORDER ON COMPLIANCE FILING

(Issued May 26, 2005)

1. In an order dated August 6, 2004, the Commission approved the Midwest Independent Transmission System Operator, Inc.'s (Midwest ISO) proposed Transmission and Energy Markets Tariff (TEMT), which has allowed the Midwest ISO to initiate Day 2 operations in its 15-state region.¹ The Midwest ISO's Day 2 operations include, among other things, day-ahead and real-time energy markets and a financial transmission rights (FTR) market for transmission capacity. These markets incorporate the major features used successfully in three eastern ISOs – PJM Interconnection, L.L.C. (PJM), New York Independent System Operator, Inc. (NYISO) and ISO New England (ISO-NE).

¹ *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) (Compliance Order III). The TEMT contemplates that all services provided pursuant to its terms and conditions will be provided by a Transmission Provider. In turn, the TEMT defines "Transmission Provider" as the Midwest ISO or any successor organization. *See* Module A, section 1.320, Original Sheet No. 133. For clarity, we will refer to the Midwest ISO wherever the TEMT refers to the Transmission Provider.

2. On October 5, 2004, the Midwest ISO filed the first in a series of compliance filings that the TEMT II Order required it to make prior to energy market start-up. The Commission ruled on that filing on December 20, 2004,² and required additional filings.

3. Today's order accepts certain proposed revisions to the TEMT, and requires modification to others that relate to the Midwest ISO's FTR allocation procedures that apply to the second annual FTR allocation process.³ This order benefits customers because it provides additional guidance and clarification to the Midwest ISO and its stakeholders regarding the details of the Midwest ISO's Day 2 energy market operations.

I. Background

4. In the TEMT II Order, the Commission accepted certain tariff sheets to be effective on August 6, 2004, subject to conditions and further order. The Commission has since accepted, subject to modification, a number of Midwest ISO filings to comply with the TEMT II Order and subsequent orders. Compliance Order I addressed the first two of those filings, which, *inter alia*: (1) proposed to revise the TEMT to eliminate Michigan-specific energy imbalance provisions; (2) developed tariff language for market startup safeguards; (3) modified the FTR allocation process; (4) made new proposals for automatic market power mitigation and control area mitigation; and (5) revised various other aspects of the TEMT.⁴ The Midwest ISO was required to make further filings to comply with Compliance Order I, which the Commission subsequently ruled on.⁵

II. Compliance Filing

5. On March 10, 2005, the Midwest ISO made the compliance filing at issue here (March 10 Filing) responding to requirements of Compliance Order I. The March 10 Filing proposes revised tariff sheets that provide FTR entitlements for Network Integration Transmission Service (network transmission service) customers that have

² *Midwest Independent Transmission System Operator, Inc.*, 109 FERC ¶ 61,285 (2004) (Compliance Order I).

³ The second annual FTR allocation process is scheduled to commence on May 9, 2005, with nominations scheduled to start on June 1, 2005.

⁴ *See supra* note 2. Most of these changes were proposed in a Midwest ISO compliance filing dated October 5, 2004 (October 5 compliance filing).

⁵ *Midwest Independent Transmission System Operator, Inc.*, 111 FERC ¶ 61,053 (2005).

designated network resources for at least one full season and delete the transitional mechanism that allowed for the assignment of FTRs during the initial allocation period only. The March 10 Filing also explains the analysis and Market Subcommittee actions with respect to aggregate nominations of FTRs across control areas.

6. Notice of the Midwest ISO's March 10 Filing was published in the *Federal Register*, 70 Fed. Reg. 13,494 (2005), with interventions and protests due on or before March 31, 2005. The Coalition of Midwest Transmission Customers (Coalition MTC); Constellation Energy Commodities Group, Inc., Constellation NewEnergy, Inc., Quest Energy, L.L.C. and WPS Energy Services, Inc. (Constellation); American Municipal Power-Ohio, Inc. (AMP-Ohio); WPS Resources Corp., on behalf of Wisconsin Public Service Corporation, Upper Peninsula Power Company, WPS Power Development Inc. and WPS Energy Services Inc. (WPS Resources); MidAmerican Energy Company (MidAmerican); and Indiana Municipal Power Agency and Wisconsin Public Power Inc. (IMPA and WPPI) filed comments on and protests to the March 10 Filing. The Midwest ISO filed an answer on April 15, 2005 (Midwest ISO Answer) and Cinergy Services, Inc., on behalf of Cincinnati Gas & Electric Company, PSI Energy, Inc. and The Union Light, Heat and Power Company (Cinergy) filed an answer to protests on April 15, 2005. Constellation filed an answer to the answers of the Midwest ISO and Cinergy on May 2, 2005.

III. Discussion

A. Procedural Matters

7. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2004), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept the Midwest ISO's and Cinergy's answers because they have provided information that assisted us in our decision-making process. We are not persuaded to accept Constellation's answer and will, therefore, reject it.

B. Seasonal FTRs

1. Background and Compliance Filing

8. In the TEMT II Order, the Commission required the Midwest ISO to offer nomination of monthly, peak and off-peak FTRs if possible by the first allocation and if

not, then by the subsequent reallocation.⁶ In its October 5 compliance filing, the Midwest ISO indicated the earliest time it could offer monthly FTRs would be during the second allocation.

9. In Compliance Order I, the Commission required the Midwest ISO to clarify the relationship between short-term, annual and longer-term network resource designation and eligibility for FTRs in the FTR allocations subsequent to the initial Day 2 allocation. The Commission also noted that the tariff as filed does not provide adequate explanations for the continued allocation of FTRs to such resources, and therefore required that the Midwest ISO file the relevant tariff sections at least 90 days prior to the second FTR allocation.⁷

10. In response, the Midwest ISO explains that it will provide FTRs for existing entitlements registered through the FTR registration process to participants based on a multi-tiered allocation/nomination methodology. The Midwest ISO states that in each tier it will provide market participants with the opportunity to be allocated FTRs from network resources that have been designated for a period of one year or longer or on a full seasonal basis. According to the Midwest ISO, it will determine four nomination and allocation tiers. For each tier, the Midwest ISO explains that FTR nomination eligibility will be equal to maximum nomination eligibility multiplied by a tier factor⁸ less the megawatt quantity of FTRs allocated in previous tiers.

11. The Midwest ISO proposes to clarify that those transmission entitlements suitable for conversion to FTR entitlements for network transmission service incorporate all network resources designated for at least one full season.⁹ Under the proposal, designated network resources must line up exactly with the Midwest ISO's defined seasons. According to the Midwest ISO, network resources that have been designated for less than one full season do not meet the definition of long-term service, which forms the basis for FTR entitlements during the annual allocation. In addition, the Midwest ISO deleted the transitional mechanism in section 43.2 of the TEMT, which allowed for the

⁶ See TEMT II Order at P 190.

⁷ See Compliance Order I at P 81-82.

⁸ The tier factors are tier I – 35%, tier II - 50%, tier III – 75% and tier IV – 100%.

⁹ The TEMT defines the four seasons to be as follows: winter – December, January, February; spring – March, April, May; summer – June, July, August; and fall – September, October, November. Module C, section 43.3.b, First Revised Sheet No. 631.

assignment of FTRs to entities with network integration transmission service from network resources that are designated for less than one full season during the initial allocation period. The Midwest ISO asserts this section is no longer needed since it only applied to the initial FTR allocation. The Midwest ISO asserts the proposed revised section 43.2 now allows entities to receive FTR entitlements for network transmission service from network resources that are designated for at least one full season.

12. According to the Midwest ISO, continuation of the transitional mechanism in the initial allocation would be fundamentally inconsistent with both the FTR allocation procedures developed through the stakeholder process and with long-standing Commission precedent concerning the priority assigned to long-term (versus short-term) transmission service. The Midwest ISO claims that allowing less-than-seasonal, *i.e.*, short-term, transmission service equal rights to FTRs unfairly diminishes the rights of long-term transmission customers and would undermine the principles upon which the current allocation procedure is based, by doing away with the notion that those with existing, long-term firm transmission service should have those rights protected in the FTR allocation process.

13. In its filing, the Midwest ISO also requests the Commission's approval to remove the "annual" nomination restriction from tier I of the FTR allocation procedures in section 43.2.4.a.i of the TEMT. According to the Midwest ISO, the FTR nomination and allocation procedures at this time require a single candidate FTR nomination for all FTRs nominated in tier I of the FTR allocation process that is constant across all seasons and periods. The Midwest ISO claims this restriction, if left unaltered, would prohibit market participants that rely on seasonal contracts from fully nominating such contracts in tier I of the FTR allocation process.

2. Comments

14. Coalition MTC objects to the requirement that resources must be designated over a full season under the proposal or they will not receive FTRs. Coalition MTC, as well as WPS Resources, consider the season designations to be arbitrary restrictions on network transmission service customers that the Midwest ISO has failed to justify and that result in discriminatory treatment of network transmission service customers. Therefore, they urge the Commission to reject the proposed tariff changes. Coalition MTC explains that network transmission service customers are likely to have a mix of resources devoted to serving network load that will change over time based on variations in load and generating unit availability.

15. Coalition MTC also contends the Midwest ISO filing confuses the contract term associated with long-term transmission service agreements with the issue of how long-term transmission service customers manage designated network resources.

Constellation makes a similar argument, stating that the Midwest ISO's arguments are founded upon the fatally flawed premise that a network customer that relies on a portfolio of shorter duration network resources is a short-term transmission service customer. Therefore, they urge the Commission to reject the instant proposal because it provides inferior rights to certain classes of long-term network customers. AMP-Ohio states that the Midwest ISO filing fails to recognize the difference between the need for long-term transmission service and the duration of contracts for individual generation resources.

16. According to Coalition MTC and Constellation, network transmission service, by definition, is long-term transmission service with an annual or greater term and there is no such thing as seasonal network transmission service under the TEMT. Constellation cites to Commission precedent that confirms that "the fact that the [network] resource was used for three months does not transform [Wisconsin Power & Light Company's] long-term network service into a short-term transaction"¹⁰ and that "pursuant to Order No. 888, [all] network service is long-term service."¹¹ Constellation also argues the Midwest ISO filing is counter to the TEMT II Order requirement that long-term customers, including all network customers, must have their rights protected in the FTR allocation process to the maximum extent possible.¹² WPS Resources cites to provisions in the TEMT¹³ that do not separate network transmission service into long- and short-term service with different rights.

17. Constellation disputes the Midwest ISO statement that awarding FTRs for resources that have a duration of one full season strikes a balance between long-term and short-term customers. Constellation explains that the more accurate statement would be that the Midwest ISO proposal imposes harsh, unnecessary and unreasonable penalties on those long-term network customers that rely on a portfolio of shorter term purchases to meet their load requirements. Furthermore, Constellation contends that the Midwest ISO proposal to transform a long-term transmission customer into a short-term transmission customer based on the duration of its supply resources creates an imbalance where none currently exists and deprives an entire class of customers of the opportunity to request FTRs and thereby hedge their congestion costs. The result of the Midwest ISO proposal,

¹⁰ *Madison Gas & Electric Co. v. Wisconsin Power & Light Co.*, 80 FERC ¶ 61,331 at 62,103 (1997), *reh'g denied*, 82 FERC ¶ 61,099 (1998).

¹¹ *Id.* at 62,103 n.4.

¹² TEMT II Order at P 156.

¹³ See Module B, section 28.3, First Revised Sheet No. 298.

according to Constellation, is to penalize suppliers that seek the flexibility of shorter duration resources, to create unnecessary costs and barriers to new entry, to deter efficiencies that are provided when markets have many and flexible procurement choices, to unduly discriminate against certain classes of suppliers (primarily those that do not own generation resources and rely on contractual procurements) and to prevent competitive retail suppliers that rely on shorter duration resources from meeting load requirements.

18. WPS Resources contends the Midwest ISO has provided neither an overriding policy nor practical software limitations that would justify permitting FTR allocations only for resource contracts that begin and end with the beginning and ending of a season¹⁴ and withholding FTR allocations with respect to short-term resource contracts. Accordingly, WPS Resources recommends that the TEMT should be revised to provide an FTR allocation to each network customer for each appropriately-identified resource. It adds that the allocated FTRs should have a duration equivalent to the duration of the resource contract, irrespective of whether the contract duration matches a seasonal period, and that short-term and long-term resource contract FTR allocations should be subject to the same TEMT terms and conditions and business practice rules. WPS Resources also recommends that monthly FTR allocations be allowed in the FTR allocation process starting in June 2005, and the Midwest ISO improve its process to provide resource contract-equivalent FTRs by the start of the next FTR period.

19. AMP-Ohio argues that network customers should be allowed to designate network resources and nominate FTRs for a period of a single month or less, and that, if the allocation of FTRs for shorter periods is not permitted in the annual allocations, it should be allowed in subsequent allocations. According to AMP-Ohio, network transmission customers designating resources on a short-term basis do not have the same rights, and hence are at a disadvantage, compared to firm point-to-point transmission customers that are eligible for FTRs.

20. MidAmerican takes no position on the Midwest ISO proposal for the limited purpose of the second round of FTR allocations, although it expresses reservations as to whether the proposal is acceptable as a long-term solution. MidAmerican avers that the allocation methodology would be enhanced with additional stakeholder discussions, and

¹⁴ WPS Resources also notes that section 43.3 of the TEMT defines the four seasons, whereas section 1.298, the definition of season, cites to the Business Practices Manuals, thereby resulting in an inconsistent definition of seasons within the TEMT; a fundamental term of service such as seasons should be defined in the TEMT and not in the Business Practices Manuals.

notes that, under either the initial FTR allocation methodology or the proposed methodology, it is possible that network load will be ineligible for an FTR allocation, *i.e.*, a resource designated for three months would be eligible for an FTR allocation if that three-month period coincided with a Midwest ISO season while a resource designated for four months, split between two seasons with two months in each of the two seasons, would not be eligible. Therefore, MidAmerican recommends that acceptance should be limited to the second round of FTR allocations and the Commission should order a further compliance filing for the next allocation round that should propose either a revised FTR allocation methodology or explain why no further revisions are necessary. MidAmerican also recommends that the Commission provide for additional stakeholder review and explain how the Midwest ISO FTR allocation procedure is compatible with development of a joint and common market involving the Midwest ISO, PJM and the Southwest Power Pool.

21. Coalition MTC states that the Midwest ISO filing further confuses the issue by creating a new seasonal network resource designation that has no definition in the tariff, and by creating a designation that is not recognized in the TEMT provisions that implement the designation and termination of network resources. These sections of the TEMT, state Coalition MTC, make no provision to differentiate on a temporal basis when a designated network resource may be available, and the approval for designated network resource status is not linked to whether a resource may be considered by the network transmission service customer to be short-term, seasonal, or annual in nature.¹⁵

22. According to Coalition MTC, the Midwest ISO has not explained whether provisions for designating new network resources, which state that approved new network resources are eligible for nomination in subsequent allocation periods,¹⁶ trump the new restrictions it proposes to add in this filing; and therefore it has failed to demonstrate that the proposed tariff modifications are necessary or reasonable. Coalition MTC recommends that the Midwest ISO: (1) maintain its current tariff provisions regarding FTR eligibility for the second FTR allocation period, scheduled to commence in June 2005; (2) work with stakeholders to address issues associated with network transmission service customer eligibility in the FTR allocation process; and (3) file any proposed changes resulting from such stakeholder discussions by January 1, 2006.

¹⁵ Coalition MTC also claims the Midwest ISO filing inaccurately defines seasonal resources to be resources with monthly transmission service, whereas network transmission service customers by definition do not utilize monthly transmission service.

¹⁶ See Module C, section 43.6.2, First Revised Sheet No. 643.

23. Finally, Coalition MTC claims the Midwest ISO has modified its proposed tariff language such that short-term point-to-point transmission service now appears to be eligible to participate in the annual FTR allocation process. According to Coalition MTC, the combined arbitrary restrictions on network transmission service customers and the expanded eligibility for short-term point-to-point customers have the net effect of providing short-term customers a higher priority than network transmission service customers in the annual FTR allocation process, thereby failing to recognize the Commission's policies requiring equal treatment of long-term firm service customers and the priority of long-term existing rights of one year or greater over short-term rights in the annual FTR allocation process.¹⁷ Coalition MTC contends that the Midwest ISO proposal increases the likelihood that network transmission service and long-term point-to-point transmission service customers will have their FTR requests pro-rated, and that this result is unreasonable and fails to comply with Commission directives.

3. Answers

24. In its answer, the Midwest ISO states that it inadvertently revised the TEMT language relating to point-to-point transmission service. According to the Midwest ISO, point-to-point transmission service of a seasonal duration mistakenly was made eligible for conversion to FTR entitlements, which was not the intent of the Midwest ISO. Accordingly, the Midwest ISO offers to correct this error, and revert to the relevant language that existed prior to the March 10 Filing so that only point-to-point transmission service of one year or longer is eligible for conversion to FTR entitlements.

25. The Midwest ISO explains that its decision to limit eligibility on a seasonal basis was made in an effort to balance the rights of holders of long-term transmission service customers in the FTR allocation process with those who choose to use a portfolio of shorter-term network resources. The Midwest ISO explains that granting FTR eligibility to shorter-term transmission transactions would reduce the FTRs available for longer-term transactions. Furthermore, the Midwest ISO asserts that the FTR allocation process is not intended to allocate FTRs to each and every transmission customer. Instead, the Midwest ISO clarifies the purpose of the FTR allocation process is to allocate FTRs in a way that protects the rights of customers with existing, long-term transmission service rights.

26. According to the Midwest ISO, it has evaluated and intends to implement a mechanism for allocating FTRs for monthly network transmission service customers, but is not prepared to do so in the allocation scheduled to commence on May 9, 2005. The

¹⁷ See TEMT II Order at P 182.

Midwest ISO claims its systems cannot be set up to accommodate nominations and allocations of FTRs on a monthly basis in time for such a change to be implemented for the next allocation period. The Midwest ISO explains that migration to an annual allocation based on monthly FTR nominations and allocations will require either a significant increase in the time required to perform the allocation or a major revision of allocation rules, processes and systems to accommodate the simultaneous clearing of multiple time periods. As a result, the Midwest ISO requests that any change ordered by the Commission to make FTRs available to customers in increments of less than a season be delayed until after the completion of the second allocation period.

27. In its answer, Cinergy argues that the request by other parties to maintain the transitional FTR allocation methodology constitutes an impermissible collateral attack on the Commission's prior orders, and that extending the transitional FTR allocation would result in continued discriminatory treatment of market participants that have physical network resources. Cinergy contends that, since the protesting parties did not challenge the duration of the transitional FTR allocation methodology, their request to extend the transition period beyond the six months provided for by Commission order¹⁸ must be rejected as a violation of the Federal Power Act.¹⁹ Cinergy also contends the protesting parties introduce issues beyond the scope of the previously-directed changes which should be rejected.²⁰ Finally, Cinergy claims that continued use of the transitional mechanism would reward those market participants that failed to make the adjustments contemplated by the Commission when it approved the mechanism on a transitional basis, and penalize those who made adjustments in good faith based on the requirements of Compliance Order I. The result, according to Cinergy, would be discriminatory and inequitable.

¹⁸ See Compliance Order I at P 80.

¹⁹ Section 313(a) of the Federal Power Act provides that “[a]ny person...aggrieved by an order issued by the Commission in a proceeding under this Act to which such person is a party...may apply for a rehearing within thirty days after the issuance of such order.” 16 U.S.C. § 8251(a) (2000).

²⁰ “The Commission has long established that compliance filings must be limited to the specific directives ordered by the Commission. The purpose of a compliance filing is to make the directed changes and the Commission’s focus in reviewing them is whether they comply with the Commission’s previously stated directives.” *AES Huntington Beach, LLC*, 111 FERC ¶ 61,079 at P 60 (2005).

4. Discussion

28. Our understanding of the Midwest ISO proposal, as clarified by the Midwest ISO Answer, is that the Midwest ISO intends to offer FTRs for eligible transmission service, with eligibility defined to be either network or point-to-point transmission service with a term of at least one year. With respect to network transmission service, FTRs will be offered for transmission service from network resources that have been designated for a full year or at least a full season. Therefore, to address concerns raised by commenters, the Midwest ISO is not proposing to offer FTRs to short-term point-to-point transmission service. We find this explanation, as well as the description of how the Midwest ISO proposes to handle FTRs for monthly (or less) designated resources, to be in compliance with the requirements of Compliance Order I.²¹ We direct the Midwest ISO to revise the proposed tariff sheets to reflect its clarification,²² within 30 days of the date of this order.

29. While a more flexible designation of seasonal resources or monthly designations could provide benefits to market participants, we will not require changes in the resource designations at this time in consideration of the fact that the Midwest ISO proposal makes progress toward the Commission's flexibility objective²³ and that further refinements to FTR procedures would disrupt and delay the FTR allocation process.²⁴ The Commission has required that the Midwest ISO maintain an FTR allocation process that synchronizes with the PJM process,²⁵ and we will not jeopardize the accomplishment of that objective.

30. Nonetheless, in recognition of the benefits that greater flexibility provides to market participants²⁶ and the Commission's ultimate objective that the Midwest ISO

²¹ See Compliance Order I at P 82.

²² See Midwest ISO Answer at 5.

²³ See TEMT II Order at P 190.

²⁴ We note that the FTR allocation schedule indicates that the designation of network resources has already been completed and that additional software modifications are required before monthly FTRs can be offered. See Midwest ISO Answer at 7, Attachment A.

²⁵ See TEMT II Order at P 194.

²⁶ Relevant in this regard is the statement by Constellation that it is a long-standing practice in the region to rely on monthly or other short duration contracts. See Constellation at 4.

offer nomination of monthly, peak and off-peak FTRs, we will require the Midwest ISO to evaluate additional flexibility in seasonal and other less-than-annual designations and discuss proposals with stakeholders for submission to the Commission prior to the next annual allocation. We require the Midwest ISO to file a proposal on these features no later than January 6, 2006, thereby providing sufficient time for comments and a Commission decision before the next annual allocation process commences. In the interim, the Midwest ISO should work closely and carefully with market participants whose seasonal FTRs do not overlap with their contractual positions in energy to reconfigure their FTRs through the monthly auctions.

31. We agree with commenters that all network transmission service is long-term transmission service, as we have noted in previous orders, and the fact that these customers use network resources of less than one year's duration does not alter the long-term nature of their transmission service. However, we also agree with the Midwest ISO that adding short-term resources to the pool of resources eligible for FTRs may result in more pro-rationing of FTRs. Therefore, we understand the concern of the Midwest ISO in making more resources eligible for FTRs and still maintaining adequate congestion hedges for long-term transmission customers. We expect the Midwest ISO to continue to discuss these issues with stakeholders as it develops its next FTR allocation proposal.

32. We agree with WPS Resources that the Midwest ISO needs to revise its tariff to ensure consistency in the definition of season. Accordingly, we direct the Midwest ISO to revise section 1.298 to have the same definition of season used in section 43.3.

33. We disagree with Constellation's contention that the Midwest ISO proposal discriminates against suppliers that do not own generation resources and rely on contractual procurement. Market participants can designate as network resources output that is under contract to a network customer,²⁷ and therefore these contractual resources are eligible for FTR allocation.

34. We agree with Coalition MTC that other tariff provisions should be revised to reflect the procedures outlined in section 43.6.2. Therefore, we direct the Midwest ISO to revise section 43.6.2 as follows (revisions indicated in brackets).

²⁷ See definition of Network Resource in Module A, section 1.217: Any designated Generation Resource or portion thereof, that is owned or leased by a Network Customer, *or whose output is under contract to a Network Customer* ... [emphasis added]

Requests to designate new Network Resources shall be accommodated subject to analysis by the Transmission Provider to determine deliverability. Approved new Network Resources are eligible for nomination in subsequent allocation periods [, provided they satisfy the eligibility requirements of section 43.2.1.a.]

35. Inasmuch as we are not requiring the Midwest ISO to retain the initial FTR allocation procedure and that the Midwest ISO proposal will be allowed to become effective, we believe we have addressed Cinergy's concerns that protestors' comments to maintain the initial allocation are a collateral attack on prior Commission orders.

C. Aggregate FTR Nominations

1. Background and Compliance Filing

36. As required by Compliance Order I,²⁸ the Midwest ISO and its stakeholders discussed the merits of allowing entities that operate network resources and load separately in multiple control areas to disaggregate their FTR requests by control area for purposes of FTR nominations and allocations. At the Market Subcommittee meeting on March 3, 2005, the stakeholders considered, but did not change, the existing nomination process. As a result, the Midwest ISO proposes no action on this item.

2. Comments

37. IMPA and WPPI argue that the Midwest ISO made no effort to contact them to discuss the issue, address implementation or devise solutions, and therefore the Midwest ISO's actions are not compliant with the Commission's directive. IMPA and WPPI explain that the Midwest ISO brought up the issue at the March 3, 2005 Market Subcommittee meeting and provided an illustration that the requested flexibility would enable a hypothetical utility with loads in multiple control areas to exceed the 35 percent limit on tier 1 nominations in certain circumstances. However, according to IMPA and WPPI, the presentation did not acknowledge that IMPA and WPPI load in separate control areas are treated separately for all other tariff purposes and that the Midwest ISO's aggregation of these loads for FTR purposes is fundamentally inconsistent with treating them separately for all other tariff purposes. As well, IMPA and WPPI state, the Midwest ISO did not tell stakeholders that it needed to meaningfully address the aggregation issue that had been explicitly recognized by the Commission.²⁹

²⁸ See Compliance Order I at P 86.

²⁹ See Compliance Order I at P 84 ("We understand IMPA and WPPI's concern
(continued)

38. IMPA and WPPI contend the Midwest ISO has an obligation to do more than present the issue and reject it without considering the hardships imposed on transmission-dependent utilities serving load in multiple control areas, particularly on an issue the Commission has expressly identified that affects only a minority of Midwest ISO stakeholders. According to IMPA and WPPI, the Midwest ISO cannot delegate its statutory duty to ensure that rates, terms and conditions are not unduly discriminatory to a process that invites minority interests to be tyrannized by the majority; further, its obligation to provide not unduly discriminatory transmission service requires it to make sure that customers that are not similarly situated are not unfairly treated by a rule that treats all customers the same.³⁰ IMPA and WPPI recommend that the Midwest ISO promptly evaluate, with input from stakeholders, any implementation issues associated with permitting market participants that serve load in multiple control areas to treat each control area separately for FTR nomination purposes, and propose a change in the FTR nomination process to accommodate such treatment in the second FTR allocation.

3. Discussion

39. IMPA and WPPI are market participants that have elected Option B for their grandfathered agreements and have load in multiple Balancing Authority Areas. Since all load associated with Option B is granted a 100 percent tier I allocation of FTRs,³¹ the distribution among Balancing Authority Areas of Tier I FTRs will be heavily influenced by the FTRs allocated to Option B, and there will be fewer tier I FTRs available for other locations, since the TEMT requires all market participants to restrict the FTR allocation to tier I to 35 percent.³² IMPA and WPPI propose to avoid this lack of flexibility by setting a separate tier I FTR allocation for each Balancing Authority Area, thereby allowing for an Option B allocation – which may exceed the 35 percent threshold – in one Balancing Authority Area and then obtaining a full 35 percent threshold in another

that their Option B GFAs should not crowd out Tier I awards of FTRs in parts of their systems that the Option B GFAs do not serve.”).

³⁰ See *Alabama Electric Cooperative, Inc., v. FERC*, 684 F.2d 20, 27-28 (D.C. Cir. 1982) (finding that a uniform rate that has disparate impacts on various customers may be unduly discriminatory).

³¹ See Module C, section 43.2.4.a, First Revised Sheet Nos. 616-20.

³² The exception to the 35 percent limit is for market participants that convert volumes in excess of the threshold to Option B. See Module C, section 43.2.4.a.iii, First Revised Sheet Nos. 619-20.

Balancing Authority Area. The result is that WPPI and IMPA will receive more than the tier I allocation of 35 percent. As required by Compliance Order I, the Midwest ISO discussed the issues with stakeholders, and stakeholders voted against the IMPA and WPPI proposal.

40. We find the Midwest ISO to be in compliance with the requirements of Compliance Order I, and no other action is needed with regard to aggregate FTR nominations. We consider the likely outcome of the IMPA and WPPI proposal, namely exceeding the tier I threshold, to be unacceptable since it violates TEMT provisions on FTR allocations. The terms of the TEMT do not contemplate an additional benefit of redistributing FTRs to ensure IMPA and WPPI, or other Option B market participants, will receive greater than the 35 percent tier I allocation. We note at the outset that IMPA and WPPI knew the terms of the FTR allocation process at the time they made their Option B election.³³ These parties also did not request rehearing on this issue.

41. While the Commission expressed an understanding of the IMPA and WPPI issue in Compliance Order I, the Commission did not make a finding to change the FTR allocation procedure. We disagree with the IMPA and WPPI's claim they are not similarly situated to other market participants. The circumstance of tier I FTRs in one Balancing Authority Area reducing the amount of FTRs available in another Balancing Authority Area applies to all market participants. The fact that some of these FTRs may be Option B FTRs does not represent a meaningful difference between IMPA and WPPI and other market participants. We do not find the current tariff to be unduly discriminatory toward IMPA and WPPI versus other market participants, and therefore, we do not see a basis for allowing IMPA and WPPI to exceed the 35 percent tier I threshold. For this reason, we disagree with WPPI and IMPA that the treatment of Option B in tier I results in unduly discriminatory treatment.

The Commission orders:

(A) The Midwest ISO's compliance filing is hereby accepted, subject to the revisions described in the body of this order.

³³ The Commission accepted the tariff sheets pertaining to FTRs before GFA parties were required to elect an option for how their GFAs would be treated in the energy markets. See *Midwest Independent Transmission System Operator, Inc.*, 107 FERC ¶ 61,191 (2004), *order on reh'g*, 111 FERC ¶ 61,042 (2005).

(B) The Midwest ISO is hereby required to make the compliance filings described in the body of this order.

By the Commission.

Linda Mitry,
Deputy Secretary.