

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Otter Tail Power Company

Docket No. ER05-408-000

ORDER ACCEPTING AND SUSPENDING PROPOSED AMENDMENTS TO
GRANDFATHERED AGREEMENTS AND ESTABLISHING
HEARING AND SETTLEMENT JUDGE PROCEDURES

(Issued March 3, 2005)

1. On January 3, 2005, Otter Tail Power Company (Otter Tail) filed to amend 12 grandfathered agreements (GFAs) that the Commission has required Otter Tail to integrate into the Midwest Independent Transmission System Operator, Inc.'s (Midwest ISO) nascent energy markets. The proposed amendments will pass through to the 12 GFA customers Otter Tail's share of the costs associated with: (1) planning and operation of the Midwest ISO's transmission grid; and (2) establishing and operating the Midwest ISO's energy markets.

2. In this order, we will accept and suspend the proposed amendments and establish hearing and settlement judge procedures. Our order benefits customers because it provides for procedures to: (1) establish what costs the parties to these 12 GFAs should pay when the Midwest ISO's energy markets become operational, (2) explore appropriate mechanisms for recovery of other costs, and (3) evaluate the reasonableness of the proposed rates.

I. Background

3. The Midwest ISO proposed to implement a new Transmission and Energy Markets Tariff (TEMT) in a filing dated March 31, 2004. When implemented, the TEMT will allow the Midwest ISO to initiate so-called Day 2 operations in its 15-state region, including day-ahead and real-time energy markets and a Financial Transmission Rights (FTR) market.

4. As a threshold issue, the Midwest ISO stated in its filing that it would be unable to operate its proposed energy markets without integrating an estimated 300 pre-Open Access Transmission Tariff (OATT) agreements, *i.e.*, GFAs, that were effective in the Midwest ISO region. It estimated that up to 40,000 megawatts of transmission service – about 40 percent of total load in the region¹ – was likely to be associated with the GFAs.² The Midwest ISO argued that allowing holders of GFAs scheduling rights similar to their current practice would require a physical reservation, or carve-out, of transmission capacity in the day-ahead energy market and until the scheduling deadline prior to real-time dispatch. It stated that this “cannot be accomplished without negatively impacting the Midwest ISO’s ability to reliably operate the Energy Markets and without placing excessive financial burden on other Market Participants.”³

5. In response, the Commission identified a need for further information about the GFAs and a desire to better understand how the GFAs and the proposed energy markets would affect one another.⁴ The Commission initiated a three-step investigation of the GFAs under section 206 of the Federal Power Act (FPA)⁵ “to decide whether GFA operations can be coordinated with energy market operations, whether and to what extent the [transmission owners] should bear the costs of taking service to fulfill the existing contracts and whether and to what extent the GFAs should be modified.”⁶

¹ The Midwest ISO stated that, after reviewing all of the contracts listed in Attachment P of the OATT, the specific details of the contracts, such as usage, scheduling requirements and megawatt quantity or capacity, were not readily apparent on the face of some of the contracts. The Midwest ISO added, however, that about half the contracts had a specific megawatt value associated with them, and that in the aggregate those contracts accounted for approximately 20,000 megawatts of capacity. The Midwest ISO projected that the remaining half of the GFAs were likely to be associated with a similar number of megawatts.

² The Midwest ISO’s analysis assumed a peak capacity of 97,000 megawatts.

³ Midwest ISO Transmittal Letter at 9 (Mar. 31, 2004).

⁴ See *Midwest Independent Transmission System Operator, Inc.*, 107 FERC ¶ 61,191 (2004) (Procedural Order), *reh’g pending*.

⁵ 16 U.S.C. § 824e (2000).

⁶ Procedural Order at P 67.

6. The Commission ordered GFA parties to file interpretations of their contracts in Step 1 of the investigation, and established trial-type hearing procedures before administrative law judges – Step 2 of the investigation – to elicit the GFA information from those parties who were not able to agree in Step 1. The Commission also offered GFA holders an opportunity to settle their GFAs by voluntarily accepting the GFA treatment that the Midwest ISO proposed in the TEMT. Step 2 of the investigation concluded on July 28, 2004, with the presiding judges' oral presentation to the Commission of the results of the hearing and the issuance of their written Findings of Fact.⁷

7. Following the GFA investigation, the Commission approved the TEMT in two orders. On August 6, 2004, the Commission accepted and suspended the proposed TEMT and permitted the bulk of it to become effective March 1, 2005, subject to further orders on subjects including the GFAs.⁸ On September 16, 2004, the Commission issued an order to address how GFAs will be treated in the Midwest ISO energy and FTR markets.⁹ The GFA Order found that the GFAs' impact on the energy markets would be much less than the Midwest ISO had estimated,¹⁰ and that the Midwest ISO could reliably operate its energy markets with some capacity carved out.¹¹

8. The GFA Order grouped GFAs that would remain in effect beyond March 1, 2005 into several categories, with differing consequences for their treatment in the Midwest ISO's energy and FTR markets based on the parties' election to settle, the presiding

⁷ *Midwest Independent Transmission System Operator, Inc.*, 108 FERC ¶ 63,013 (2004).

⁸ *Midwest Independent Transmission System Operator, Inc.*, 108 FERC ¶ 61,163 (2004), *order on reh'g*, 109 FERC ¶ 61,157 (2004), *reh'g pending*. The March 1, 2005 effective date was subsequently extended to April 1, 2005. *See Midwest Independent Transmission System Operator, Inc.*, 110 FERC ¶ 61,169 (2005).

⁹ *Midwest Independent Transmission System Operator, Inc.*, 108 FERC ¶ 61,236 (2004) (GFA Order), *reh'g pending*.

¹⁰ *Id.* at P 130 (“Consequently, the proper treatment of GFAs representing only 15,378 MW, or only 14.3 percent of the Midwest ISO's peak capacity, remains in dispute. The Midwest ISO's March 31 Filing, in contrast, originally sought modification of contracts representing more than 2½ times that much capacity.”).

¹¹ *Id.* at P 100.

judges' actions in the hearing held in Step 2, or the Commission's own determinations. As relevant here, the Commission found that it was just and reasonable to integrate into the energy markets approximately 50 GFAs that did not settle, and for which unilateral modification is subject to the "just and reasonable" standard of review.¹² The Commission noted that this treatment "may affect the bargain between parties to individual GFAs" and that, to the extent costs shift between the parties, the parties may propose appropriate modifications to the GFAs to reflect the new costs.¹³ The contracts at issue in this proceeding are part of this group.¹⁴

II. Otter Tail's Filing

9. Otter Tail proposes to amend 12 GFAs for which the Commission found in the GFA Order that unilateral modification is subject to the "just and reasonable" standard of review.¹⁵ Otter Tail states that it is responding to the Commission's directive in the GFA Order that GFA parties may submit proposals to recover costs associated with transactions under these contracts. The proposed amendments consist of a new rider entitled "2005 Supplement." Otter Tail states that the new rider is designed to recover costs Otter Tail incurs under the TEMT to meet its GFA obligations, including the ISO

¹² *See Id.* at P 137.

¹³ *Id.* at P 138.

¹⁴ *See* Appendix B to GFA Order, 108 FERC ¶ 61,236 at 62,325-6, 62,325-10 (stating the results of the Commission's three-step investigation with respect to the 12 contracts at issue here).

¹⁵ Otter Tail's proposal includes the following 12 contracts: GFA No. 300 with the City of Newfolden, Minnesota; GFA No. 302 with the City of Nielsville, Minnesota; GFA No. 304 with the City of Shelly, Minnesota; GFA No. 432 with the State of Minnesota on behalf of State Hospital (State Hospital Agreement); GFA No. 433 with the State of North Dakota on behalf of Grafton State School (Grafton Agreement); GFA No. 434 with the State of North Dakota on behalf of School of Forestry (School of Forestry Agreement); GFA No. 435 with the State of North Dakota on behalf of School of Science (School of Science Agreement); GFA No. 436 with the State of North Dakota on behalf of School for the Deaf (School for the Deaf Agreement); GFA No. 437 with the Fort Totten Indian Agency (Fort Totten Agreement), GFA No. 438 with the Turtle Mountain Indian Agency (Turtle Mountain Agreement); GFA No. 439 with the Oakes O&M Center (Oakes O&M Center Agreement); and GFA No. 440 with the Town of Badger, South Dakota.

Cost Recovery Adder (Schedule 10),¹⁶ the Financial Transmission Rights Administrative Service Cost Recovery Adder (Schedule 16),¹⁷ the Energy Market Support Administrative Service Cost Recovery Adder (Schedule 17),¹⁸ and other charges under the TEMT.

10. Otter Tail states that the Commission has approved similar provisions to pass through new costs associated with regional transmission organizations (RTOs) and independent system operators (ISOs) to customers under GFAs. Otter Tail argues that the new costs to be passed through under the amendments are for new services that were not previously provided under the agreements, all of which were entered into prior to the formation of the Midwest ISO. Otter Tail states that a large portion of the costs involve the Midwest ISO energy markets, and such costs are new costs as no regional entity prior to the Midwest ISO administered centralized energy markets like the Midwest ISO will pursuant to the TEMT. Otter Tail argues that the Commission has previously found that similar ISO administrative charges involved new services.¹⁹

11. Otter Tail requests that the Commission accept the proposal for filing, without modification or hearing, to become effective March 1, 2005.

III. Notice, Interventions and Protests

12. Notice of Otter Tail's filing was published in the *Federal Register*, 70 Fed. Reg. 3,013 (2005), with interventions and protests due on or before January 24, 2005. The Midwest ISO filed a motion to intervene. The Western Area Power Administration (WAPA) filed a motion to intervene and conditional protest.

¹⁶ Pursuant to Schedule 10, the Midwest ISO recovers its non-market related costs associated with administration of transmission service under the TEMT, including costs associated with planning and operating the transmission facilities under its control, and costs associated with its functioning as North American Electric Reliability Council security coordinator for its region.

¹⁷ Pursuant to Schedule 16, the Midwest ISO recovers its costs associated with implementing and administering FTRs.

¹⁸ Pursuant to Schedule 17, the Midwest ISO recovers its costs associated with development, implementation, and operation of its energy markets.

¹⁹ Otter Tail Transmittal Letter at 4 (Jan. 3, 2005) (citing *Pacific Gas and Electric Company*, Opinion No. 477, 109 FERC ¶ 61,093 (2004), *reh'g pending*).

13. WAPA indicates that it is responsible for delivering power to the Oakes O&M Center. It states that it has concerns regarding the proposed amendment to this contract, but that it is working with Otter Tail to resolve those concerns. Depending on the outcome of those discussions, WAPA states that it reserves the right to protest the proposed amendment to the Oakes O&M Center Agreement.

IV. Discussion

A. Procedural Matters

14. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2004), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

B. Commission Decision

15. Our preliminary analysis of Otter Tail's filing indicates that it has not been shown to be just and reasonable, and may be unjust, unreasonable, unduly discriminatory or preferential or otherwise unlawful. Accordingly, we will accept Otter Tail's filing, suspend it for a nominal period, to become effective March 5, 2005, after sixty days from the date of filing, subject to refund, and set it for hearing and settlement judge procedures as ordered below. While Otter Tail requests an effective date of March 1, 2005, it does not request waiver of the Commission's prior notice requirement or demonstrate good cause, as required for such a waiver.²⁰ Accordingly, we will not grant waiver of prior notice.

16. In the hearing and settlement judge procedures ordered below, participants should address, among other things, what modifications to the proposed new rider are necessary to better define what charges are properly passed through to GFA customers. Specifically, they should: (1) evaluate the extent to which the existing rates in the GFAs already provide Otter Tail an opportunity to recover the costs it proposes to pass through the proposed rider that are not associated with new services; (2) address what adjustments to the proposed rider are necessary to ensure that the 12 GFA customers will not be

²⁰ See, e.g., *Central Hudson Gas & Electric Corp.*, 60 FERC ¶ 61,106, order on reh'g, 61 FERC ¶ 61,089 (1992).

double-charged for services already included in their contracts; and (3) propose clarifications to the rider to clearly specify the Midwest ISO charges that will be passed through the rider and to preclude the automatic pass-through of unidentified future costs.²¹

17. While we are setting the filing for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their disputes before hearing procedures are commenced. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.²² If the parties desire, they may, by mutual agreement, request a specific judge as a settlement judge in the proceeding; otherwise the Chief Judge will select a judge for this purpose.²³ The settlement judge shall report to the Chief Judge and the Commission within 60 days of the date of this order concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for the commencement of a trial-type evidentiary hearing by assigning the case to a presiding judge.

The Commission orders:

(A) Otter Tail's proposed GFA amendments are hereby accepted for filing and suspended for a nominal period, to become effective on March 5, 2005, subject to refund, as discussed in the body of this order.

(B) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, particularly section 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure

²¹ See *Michigan Electric Transmission Company, LLC*, 103 FERC ¶ 61,195 at P 13 (2003) (rejecting language that would have automatically permitted pass-through of unidentified future charges).

²² 18 C.F.R. § 385.603 (2004).

²³ If the parties decide to request a specific judge, they must make their request to the Chief Judge by telephone at (202) 502-8500 within five days of the date of this order. The Commission's website contains a list of Commission judges and a summary of their background and experience, available at: <http://www.ferc.gov/about/offices/oalj/oalj-dj.asp>.

and the regulations under the Federal Power Act (18 C.F.R. Chapter I), a public hearing shall be held concerning the proposed amendments, as discussed in the body of this order. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Paragraphs (C) and (D) below.

(C) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2004), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in these proceedings within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge by telephone within five (5) days of the date of this order.

(D) Within sixty (60) days of the date of this order, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(E) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within fifteen (15) days of the date of the presiding judge's designation, convene a prehearing conference in this proceeding in a hearing room of the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, DC 20426. Such conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates, and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.