126 FERC ¶ 61,143
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Acting Chairman;
Suedeen G. Kelly, Marc Spitzer,
and Philip D. Moeller.

Midwest Independent Transmission System Operator, Inc. — Docket Nos. ER08-394-004, ER08-394-005

ORDER ON REHEARING AND COMPLIANCE

(Issued February 19, 2009)

1. This order addresses requests for clarification and rehearing of an order issued on October 20, 2008,[1] in which the Commission granted in part and denied in part requests for rehearing of a March 26, 2008 order.[2] This order also addresses a compliance filing required by the October 20 Rehearing Order. As set forth below, we will grant clarification, deny requests for rehearing, and conditionally accept the Midwest Independent Transmission System Operator, Inc.'s (Midwest ISO) compliance filing subject to a future compliance filing.

I. Background

2. As part of a two-phased approach, the Midwest ISO filed Phase II of its proposed long-term resource adequacy plan,[3] as set forth in Module E of its Open Access Transmission and Energy Markets Tariff (Tariff),[4] on December 28, 2007. This phase

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[1] *Midwest Indep. Transmission Sys. Operator, Inc.*, 125 FERC ¶ 61,061 (2008) (October 20 Rehearing Order).

[2] *Midwest Indep. Transmission Sys. Operator, Inc.*, 122 FERC ¶ 61,283 (2008) (March 26 Order).

[3] The Midwest ISO filed Phase I of its resource adequacy plan, its proposed ancillary services market, on February 15, 2007, and it was conditionally accepted on February 25, 2008. *Midwest Indep. Transmission Sys. Operator, Inc.*, 122 FERC ¶ 61,172, *order on reh'g*, 123 FERC ¶ 61,297 (2008).

[4] Midwest Independent Transmission System Operator, Inc., FERC Electric Tariff, Third Revised Vol. No. 1.

contained mandatory requirements for any market participant serving load in the Midwest ISO (load serving entities or LSEs) to have and maintain access to sufficient planning resources. In the March 26 Order, the Commission conditionally accepted the Midwest ISO's proposal, subject to its completion of financial settlement provisions, and ordered several compliance filings.[5]

3. Several parties filed requests for clarification or rehearing of the March 26 Order. The October 20 Rehearing Order granted in part and denied in part these requests for rehearing and/or clarification, subject to the Midwest ISO filing a compliance filing on several issues. The Midwest ISO submitted its compliance filing on November 19, 2008, in Docket No. ER08-394-005 (November Compliance Filing).

II. Requests for Rehearing of the October 20 Rehearing Order

4. Several parties filed requests for clarification or rehearing of the October 20 Rehearing Order. These parties include: Alliant Energy Corporate Services, Inc. (Alliant); the Detroit Edison Company (Detroit Edison); Duke Energy Corporation (Duke); Hoosier Energy Rural Electric Cooperative, Inc. and Southern Illinois Power Cooperative (Hoosier and Southern Illinois); the Illinois Commerce Commission (Illinois Commission); Industrial Customers;[6] the Midwest ISO; Midwest Transmission-Dependent Utilities (Midwest TDUs); Michigan Public Power Agency (Michigan Public Power); Michigan Public Service Commission (Michigan Commission); the Public Utilities Commission of Ohio (Ohio Commission);[7] the Organization of Midwest ISO States (OMS); Public Service Commission of Wisconsin (Wisconsin Commission); Wisconsin Electric Power Company (Wisconsin Electric); Wisconsin Public Service Corporation and Upper Peninsula Power Company (WPSC/UPPCO); and Xcel Energy Services Inc. (Xcel).

[5] The Midwest ISO submitted its proposed financial settlement provisions in June 2008, and the Commission conditionally accepted these provisions in another order issued on October 20, 2008. *Midwest Indep. Transmission Sys. Operator, Inc.*, 125 FERC ¶ 61,060 (2008).

[6] Industrial Customers consist of the Coalition of Midwest Transmission Customers (CMTC), the Illinois Industrial Energy Customers, and the Midwest Industrial Customers.

[7] The Ohio Commission filed an amendment to its request for rehearing on November 18, 2008.

III. Notice of the November Compliance Filing and Responsive Pleadings

5. Notice of the Midwest ISO's November Compliance Filing was published in the *Federal Register*, 73 Fed. Reg. 73,320 (2008), with interventions and protests due on or before December 10, 2008.

6. Several parties filed timely protests or comments to the November Compliance Filing, including: the OMS; the Illinois Commission; Midwest TDUs; Constellation Energy Commodities Group, Inc. and Constellation NewEnergy, Inc. (Constellation); CMTC; Consumers Energy Company (Consumers Energy); and FirstEnergy Service Company (FirstEnergy). The Midwest ISO filed an answer to the protests and comments.

IV. 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) (2008), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept the Midwest ISO's answer because it has provided information that assisted us in our decision-making process.

B. Substantive Matters

1. Rehearing

a. Netting of Load Modifying Resources

i. October 20 Rehearing Order

8. In the October 20 Rehearing Order, the Commission granted a request for rehearing challenging the Commission's decision to allow netting of behind-the-meter generation from an LSE's load forecast.[8] The Commission noted that by allowing LSEs to subtract load modifying resources, which include behind-the-meter generation and demand resources from their load forecast, LSEs would have fewer resources available during an emergency to the detriment of reliability.[9] The Commission therefore found the Midwest ISO's proposal to net behind-the-meter resources to be unjust and unreasonable and directed the Midwest ISO to revise its Tariff accordingly.[10]

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[8] October 20 Rehearing Order, 125 FERC ¶ 61,061 at P 64.

[9] *Id.*

[10] *Id.*

ii. Requests for Clarification and/or Rehearing

9. Numerous parties,[11] including the Midwest ISO, request clarification or, in the alternative, rehearing of the October 20 Rehearing Order. The parties generally do not challenge (except as noted below) the Commission's decision to include behind-the-meter generation as part of an LSE's load forecast. In fact, several parties acknowledge that behind-the-meter generation is, at least for reliability purposes, similar to other generation resources on the system and comparable treatment under the Midwest ISO's resource adequacy plan may be appropriate.[12]

10. These parties, however, are concerned that the October 20 Rehearing Order could be interpreted as applying to behind-the-meter generation *and* demand resources. They point to a single sentence in the October 20 Rehearing Order stating that allowing "LSEs to subtract LMRs [load modifying resources] from load, would result in these LSEs having fewer resources available during emergencies to the detriment of reliability."[13] The parties argue that the use of load modifying resources appears to be inadvertent given other language in the order. They further note that the parties requesting rehearing of the March 26 Order only challenged the netting of behind-the-meter generation and, thus, did not raise the issue of netting demand resources. Thus, they argue that the issue of netting demand resources was not before the Commission on rehearing. These parties request clarification to ensure that demand resources can be netted from an LSE's load forecast.

11. The Industrial Customers, Hoosier and Southern Illinois, Michigan Public Power, and the Michigan Commission likewise agree that demand resources should be netted from an LSE's load forecast. Additionally, they argue that the Commission erred by prohibiting netting of behind-the-meter generation. These parties claim that the Commission failed to engage in reasoned decision-making by prohibiting the netting of behind-the-meter generation from an LSE's load forecast. They assert that similar netting provisions are permitted in PJM and other regional transmission organizations.[14] They also note that Module E was the product of extensive stakeholder involvement. Finally, they argue that netting of behind-the-meter generation would encourage

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[11] These parties include: the OMS, Ohio Commission, Duke, Xcel, and Detroit Edison, Wisconsin Commission, WPSC/UPPCO, and Alliant.

[12] Ohio Commission November 18, 2008 Amended Request for Rehearing at 4; Duke Energy Corporation November 18, 2008 Request for Clarification at 2; Midwest ISO November 19 Request for Rehearing at 4.

[13] October 20 Rehearing Order, 125 FERC ¶ 61,061 at P 64.

[14] *PJM Interconnection, LLC,* 107 FERC ¶ 61,113 (2004).

customers to participate in other demand response programs and provide incentives for demand response.

12. The Industrial Customers further disagree with the Commission's determination that netting of behind-the-meter generation could impact reliability. They claim that neither ISO New England, Inc. (ISO New England) nor the California Independent System Operator Corp. (California ISO) has faced reliability issues and they permit netting for behind-the-meter generation. Nor do they agree with the Commission's assessment that behind-the-meter generation is similar to capacity resources (*e.g.*, other generation resources on the system) and, thus, should be treated similarly in the resource adequacy plan. For example, they claim that behind-the-meter generation, unlike capacity resources, is not subject to a must-offer obligation. The Industrial Customers also assert that the Commission lacks any evidence to show that netting of behind-the-meter generation will negatively impact the Midwest ISO's resource adequacy plan.

13. Michigan Public Power raises similar questions regarding the Commission's decision to prohibit the netting of behind-the-meter generation. In addition, it requests that the Commission provide additional time for stakeholders to secure the necessary planning reserves. Michigan Public Power believes that it may not have sufficient planning resources in summer 2009 and may be 14 MW short during certain months. It argues that it was unjust and unreasonable for the Commission to change the netting provisions at this late stage.

iii. <u>Commission Determination</u>

14. We clarify that the Commission's ruling in the October 20 Rehearing Order applies only to behind-the-meter generation. No party requested rehearing of our decision in the March 26 Order that allowed demand resources to be netted from an LSE's load forecast and we did not intend to hold otherwise in the October 20 Rehearing Order. As recognized by the Midwest ISO and numerous parties, the use of the term load modifying resources, rather than behind-the-meter generation, when discussing the potential reliability impact of the Midwest ISO's netting proposal in the October 20 Rehearing Order was inadvertent. Accordingly, we hereby clarify that demand resources can be netted from an LSE's load forecast under Module E.

15. However, we will deny the requests for rehearing that challenge the Commission's decision to prohibit the netting of behind-the-meter generation. We disagree with the assessment that behind-the-meter generation is different from other generation resources on the transmission system as it relates to reliability and resource planning purposes. As recognized by the Midwest ISO, the Ohio Commission and a number of market participants, behind-the-meter generation has similar operating characteristics as other generation resources (e.g., both are involved in the physical production of energy and subject to outages), and therefore comparable treatment, in terms of a planning reserve margin to ensure resource adequacy in the event of generation resource outages, is

appropriate. These parties agree that a planning reserve margin is appropriate for both types of generation. As the WPSC/UPPCO notes and as corroborated in the Tariff, behind-the-meter generation is not necessarily available when needed[15] and the load it serves may impose a demand on system resources during a critical period. In contrast, demand resources will be under the direct control of the LSE and available during emergencies. Accordingly, the lack of a planning reserve margin for behind-the-meter generation may result in inadequate planning reserves and a consequent increase in the likelihood of failure to meet the one in ten year loss-of-load reliability requirement. These reliability concerns support the October 20 Rehearing Order and further support our decision to deny rehearing here.

16. We also disagree with the Industrial Customers' assertion that behind-the-meter generation should be netted because it lacks a must-offer requirement. Behind-the-meter generation, as a load modifying resource, has an obligation to perform during emergencies, and therefore is expected to be available during these periods. If a behind-the-meter generation resource is counted as if it is available during these peak periods, and the resource is not available (as the Tariff indicates it may not be), the load associated with this generation imposes a demand on system resources that can only be met by the planning reserve margin. This fact further supports the decision to prohibit the netting of behind-the-meter generation.

17. Nor do we believe that the Commission's precedent requires the Midwest ISO to net behind-the-meter generation for resource adequacy requirements. While the Industrial Customers and other parties cite cases that purportedly support the netting of behind-the-meter generation, we find these cases to be inapposite. While the parties argue that we have permitted netting of behind-the-meter generation in ISO New England, citing ISO New England Market Rule 1, Section III, 12, 8, (a) and (b), we note the cited provisions only apply to those resources *not* participating in ISO New England's capacity markets (i.e., where resources compete to provide capacity to the ISO New England market). If the resource participates in the capacity market (i.e., it provides capacity for the ISO New England market), the resource is not netted from a market participant's load forecast and the market participant must provide capacity for that resource.[16] In this context, we find that behind-the-meter generation has similar operating characteristics as resources participating in ISO New England's capacity

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[15] For example, the Midwest ISO tariff specifies that behind-the-meter generation will dispatch only when available during emergencies.

[16] *See* ISO New England Market Rule 1 § III.12.8.c and d.

market. As noted above, these similarities include the fact that behind-the-meter generation is involved in the physical production of energy and subject to outages.

18. As for the Commission orders cited by Industrial Customers, *California Independent System Operator Corp.*[17] and *PJM Interconnection, LLC*[18], these cases are factually distinguishable. Unlike the reliability issue raised in this proceeding, these cases deal with the allocation of certain transmission access charges for behind-the-meter generation. The California ISO precedent cited by Industrial Customers[19] concerned the allocation of the transmission access charge to reflect behind-the-meter generation. The Commission found that certain customers with behind-the-meter generation should be allocated a share of the transmission access charge on a net load basis[20] to reflect their use of the grid to access alternative resources. Because the transmission access charge is assessed on a volumetric (per MWH) basis, such customers with behind-the-meter generation will pay a share of the costs of the transmission system that must be available to access alternate resources when their behind-the-meter generation is unavailable. With regard to the PJM proposal cited by Industrial Customers,[21] the Commission was approving netting of behind-the-meter generation with respect to the allocation of transmission charges.[22] In those cases, the Commission found that the allocation of

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[17] *See Calif. Indep. Sys. Operator Corp.*, 104 FERC ¶ 61,062 (2003).

[18] *See PJM Interconnection, LLC,* 107 FERC ¶ 61,113 (2004).

[19] *See Calif. Indep. Sys. Operator Corp.*, 104 FERC ¶ 61,062 at P 55, cited in Industrial Customers' Rehearing Request at 9 n.36.

[20] The net load basis is defined as the actual cumulative kWh load that utilized the grid in any given month.

[21] *See PJM Interconnection, LLC,* 107 FERC ¶ 61,113 (2004).

[22] Industrial Customers at 9, citing *Occidental Chemical Corp. v. PJM Interconnection LLC,* 102 FERC ¶ 61,275 (2003). The Commission also notes that the situation addressed in the underlying *Occidental v. PJM* decision, as cited by Industrial Customers, is different from the Midwest ISO resource adequacy proceeding, where the Midwest ISO's proposed netting approach assumes 100 percent availability of the behind-the-meter generation resource. The issue in the orders cited by Industrial Customers was in fact just the opposite, in that PJM was adding back certain curtailed load to allocate transmission costs, essentially treating the curtailed load as if it were never available to reduce load on the transmission system during peak periods.

transmission-related costs could be done on a net load basis.[23] In other words, the key issue is how likely it is that a resource will use the transmission system.

19. Here, in contrast, our objective is to ensure that the Midwest ISO has adequate planning reserves to meet the one in ten year loss-of-load reliability requirement. As noted above, we conclude that these reliability concerns justify the Commission's decision to prohibit the netting of behind-the-meter generation and will deny the request for rehearing. However, Midwest ISO will receive information about the behind-the-meter generation as part of the resource plans that will be filed on March 1. Based on that information, Midwest ISO will be better able to assess the effect of behind-the-meter generation on the calculation of the planning reserve margin. Given existing system conditions, that effect may be de minimis. Midwest ISO is directed to use the information to be filed on March 1 to study how the overall generation mix (central station generation and distributed behind-the-meter generation, including the locational dispersion of that generation) affects the planning reserve margin calculated for the planning zones. Midwest ISO is directed to submit the report no later than December 1, 2009.

20. Finally, we do not see a need to provide Michigan Public Power with additional time to meet its resource adequacy requirements for the summer of 2009. While LSEs must submit their annual resource plans by March 1, 2009, they may submit changes to their plans by the first day of the month preceding the month in which the resource adequacy obligation is in effect.[24] We find that this schedule should provide LSEs sufficient time to address any remaining resource adequacy needs.

b. <u>Slice-of-System Contracts</u>

i. <u>October 20 Rehearing Order</u>

21. The Commission clarified that "slice-of-system" contracts could be used to meet resource adequacy requirements.[25] However, consistent with its treatment of power purchase agreements in the March 26 Order, the Commission required the Midwest ISO to verify the availability of the resources under these agreements.[26]

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[23] *Calif. Indep. Sys. Operator Corp.*, 104 FERC ¶ 61,062 at P 55; *PJM Interconnection, LLC*, 107 FERC ¶ 61,113 at P 28.

[24] Midwest ISO Tariff §§ 69.1.4.1 and 69.1.4.2.

[25] October 20 Rehearing Order, 125 FERC ¶ 61,061 at P 22.

[26] *Id*.

ii. Request for Clarification and/or Rehearing

22. Hoosier and Southern Illinois are concerned about the verification process and how that may impact small utilities. Hoosier and Southern Illinois state that one implication might be that if a smaller utility contracts to purchase a slice of another entity's fleet of generation resources as a capacity resource, but the Midwest ISO determines that the seller does not have sufficient capacity to meet its commitment to the smaller utility as well as its other commitments, the purchasing utility must suffer the consequences, and will be credited only with the capacity in excess of the seller's own resource adequacy obligations.

23. Hoosier and Southern Illinois seek clarification that the Commission did not intend to make a purchasing utility responsible if the Midwest ISO determines that a seller does not have sufficient capacity. They argue that the buyer should be held harmless. Hoosier and Southern Illinois assert that to the extent that the Commission denies this clarification, the result is unjust and unreasonable, and Hoosier and Southern Illinois seek rehearing.

c. Commission Determination

24. We deny Hoosier and Southern Illinois' request for clarification and rehearing. The Midwest ISO's resource adequacy program requires LSEs to be the entities responsible for ensuring their resource adequacy. We will not alter that assignment of responsibility by holding LSEs harmless for not obtaining sufficient resources. Accordingly, we affirm that a buyer of capacity in the form of slice-of-system contracts is responsible for ensuring that the seller it is purchasing from has sufficient resources to meet its capacity obligation under the contract. Buyers can protect themselves by ensuring that their slice-of-system purchases are verified through the Midwest ISO's verification process, and/or by conditioning the effectiveness of the contracts upon a positive verification by the Midwest ISO.

d. Penalties for Behind-the-Meter Generation

i. October 20 Rehearing Order

25. As noted above, the October 20 Rehearing Order determined that an LSE could not net behind-the-meter generation from its load forecast, but instead had to treat these resources similar to other capacity resources on the system.

ii. Request for Clarification

26. The Midwest TDUs note that the Commission's decision in the October 20 Rehearing Order, which found that a planning reserve margin should apply to behind-the-meter generation, should cause the Midwest ISO to revisit the penalty provisions for load

modifying resources in Module E when these resources fail to respond in an emergency. The Midwest TDUs assert that the more stringent penalty provisions for load modifying resources (which include behind-the-meter generation and demand resources), as originally accepted in March 26 Order, were based, in part, on the assumption that a planning reserve margin would not apply to behind-the-meter generation. The Midwest TDUs argue that because the Commission has now determined that a planning reserve should apply to behind-the-meter generation, the Midwest ISO should revisit the penalty provisions applicable to load modifying resources to ensure that they are still justified. The Midwest TDUs also request clarification that the Commission's directives do not preclude the possibility of adjusting those penalties in a future proceeding.

iii. Commission Determination

27. We are not persuaded to revisit our determination regarding penalties for load modifying resources, including penalties for behind-the-meter generation. As the Commission noted in the March 26 Order, load modifying resources, which include both behind-the-meter generation and demand resources, "perform a critical function in emergencies and therefore the penalty for failure to perform at these times should be commensurate with the costs incurred."[27] Thus, the Commission found it reasonable that the Midwest ISO will calculate the penalty for non-performing load modifying resources based on the costs to replace the energy during the hour in which the load modifying resource did not achieve the load reduction it was called upon to provide. Furthermore, the Midwest ISO will disqualify a load modifying resource that repeatedly is unavailable during emergencies.[28] We continue to find these penalties to be appropriate for behind-the-meter generation given their critical role in emergencies and to ensure that they are available when called upon. The Commission's determination that a planning reserve margin should apply to behind-the-meter generation in the October 20 Rehearing Order does not diminish this critical function and the need for stringent penalties if these resources are not available. With regard to Midwest TDUs' request for clarification, this order does not preclude the Midwest ISO and market participants from reviewing the penalties for behind-the-meter generation and proposing any Tariff revisions.

e. Deliverability

i. October 20 Rehearing Order

28. In the October 20 Rehearing Order, the Commission found it reasonable for the Midwest ISO to verify the deliverability of a capacity resource. Such a deliverability

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[27] March 26 Order, 122 FERC ¶ 61,283 at P 355.

[28] Midwest ISO Tariff §§ 69.2.2.3.a and 69.2.2.3.b

analysis is important because it shows that a specific resource can reliably deliver energy to loads in a peak load event. However, the Commission disagreed with several parties who argued that the Midwest ISO should be responsible for ensuring the deliverability of a capacity resource. The Commission noted that Order Nos. 890 and 890-A made clear that network resource designations had no bearing on whether resources would qualify as capacity resources. The Commission concluded that while the Midwest ISO has an obligation to facilitate generation interconnections and expansion planning, it cannot force utilities to build capacity and, thus, cannot be required to build sufficient transmission capacity to ensure deliverability of all resources.[29]

ii. Request for Rehearing

29. The Wisconsin Commission asserts that the October 20 Rehearing Order did not clarify the confusion regarding the deliverability of designated network resources versus the deliverability of capacity resources under Module E. It argues that once a resource is tested and approved as a designated network resource, transmission owners and LSEs should ensure that these designated network resources remain deliverable as capacity resources for resource adequacy purposes. The Wisconsin Commission argues that transmission owners already have agreed, in principle, to construct necessary transmission facilities in accordance with Order No. 2000. The Wisconsin Commission requests that the Commission require that designated network resources remain deliverable for capacity resource requirements

iii. Commission Determination

30. As the Commission found in the October 20 Rehearing Order, the Midwest ISO does not have an obligation to guarantee the deliverability of a capacity resource.[30] Contrary to the Wisconsin Commission's arguments, section 28.2 of the Midwest ISO Tariff, as noted in the October 20 Rehearing Order,[31] and the Commission's Order No. 2000 requirements[32] refer to the planning, operating and maintenance obligations of the Midwest ISO, but do not encompass expansion building requirements to ensure the deliverability of capacity resources. While the Midwest ISO Transmission Owner's

[29] October 20 Rehearing Order, 125 FERC ¶ 61,061 at P 34.

[30] *Id*.

[31] *Id*.

[32] 18 C.F.R § 35.34(k)(7) (2008) ("The Regional Transmission Organization must be responsible for planning, and for directing or arranging, necessary transmission expansions, additions, and upgrades that will enable it to provide efficient, reliable and non-discriminatory transmission service.").

agreement specifies that transmission owners within the Midwest ISO have a good-faith contractual obligation, as coordinated by the Midwest ISO, to build facilities "to fulfill the approved Midwest ISO Plan,"[33] this good faith obligation does not translate to an obligation to *guarantee* the availability of capacity resources, as the Commission decided in the October 20 Rehearing Order. The Wisconsin Commission has not provided a basis for reversing that decision. Accordingly, we will deny rehearing.[34]

2. Compliance Filing

a. Netting of Load Modifying Resources

i. Compliance Filing

31. The Midwest ISO submitted several modifications to Module E to prohibit the netting of both behind-the-meter generation and demand resources from an LSE's load forecast. These revisions include a modification to section 69.2.2 of Module E, which initially permitted the netting of such resources, and several other changes to prevent netting of behind-the-meter generation and demand resources.

ii. Protests

32. First Energy, the CMTC, and OMS protest the November Compliance Filing to the extent that it prohibits the netting of demand resources. First Energy, the CMTC, and OMS argue that the Midwest ISO should modify Module E so that it permits the netting of demand resources.

iii. Commission Determination

33. Given our finding above on rehearing, we direct the Midwest ISO to modify Module E to clarify that demand resources can be netted from an LSE's load forecast. We direct the Midwest ISO to file corresponding tariff revisions in a compliance filing to be submitted within 30 days of the date of this order.

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[33] Midwest ISO Transmission Owners Agreement, Midwest ISO FERC Electric Tariff, First Revised Rate Schedule No.1, Appendix B, Sheet No. 113.

[34] The deliverability issue also is being addressed in a rehearing order of our October 20, 2008 order on compliance in Docket No. ER08-394-006. That rehearing order will be issued concurrently with this order.

b. Reporting to State Commissions

i. Compliance Filing

34. In the November Compliance Filing, the Midwest ISO made several modifications to ensure that certain state regulatory jurisdictions receive information regarding a market participant's resource adequacy plan, but only if the market participant is subject to state jurisdiction.[35] To that end, the Midwest ISO modified section 69 (additions are underlined):

> The Transmission Provider shall validate that LSEs have arranged for sufficient Planning Resources to meet its RAR under Section 68 of this Module E for the Planning Year. The Transmission Provider shall, upon request, submit RAR information to the applicable RE, Electric Reliability Organization, state <u>(in the case of an LSE subject to rate regulation by such state regulatory authority)</u> or FERC, subject to the provisions of Section 38.9 of this Tariff. The Transmission Provider will coordinate with LSEs and Market Participants to monitor shifts in Load for retail switching to ensure reserve requirements are met.

The Midwest ISO also modified section 69.3.2 to reflect that the Midwest ISO would report resource adequacy information only for state jurisdictional entities. Finally, the Midwest ISO modified section 68.3.1 to indicate that Module E did not infringe upon "applicable" state safety standards or resource adequacy requirements.[36]

ii. Protests and Answer

35. OMS and the Illinois Commission raise questions regarding the Midwest ISO's use of "rate regulation" in section 69. They assert that this proposed change may have substantially more widespread effect than intended by the Commission. They note that phrase could be interpreted to exclude alternative retail electric suppliers in retail open access states, even though such suppliers are subject to state jurisdiction. OMS and the Illinois Commission recommend that the Commission direct the Midwest ISO to submit a further compliance filing to delete the word "rate" and insert the words "or using delivery services rates, terms or conditions established" between the words "regulation" and "by such state" in section 69. The parenthetical phrase in section 69 would then read: "in the

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[35] October 20 Rehearing Order, 125 FERC ¶ 61,061 at P 121.

[36] In the October 20 Rehearing Order, we inadvertently identified this section as section 69.2.1.

case of an LSE subject to regulation or using delivery services rates, terms or conditions established by such state regulatory authority."

36. Consumers Energy filed comments supporting OMS and the Illinois Commission. The Midwest ISO filed an answer saying that it would modify section 69 as suggested by these stakeholders if the Commission directed it to do so.

iii. Commission Determination

37. To the extent alternative electric suppliers in retail choice states are subject to state jurisdiction, we did not intend for our determination to exclude these entities from the reporting requirements in section 69. To ensure that there is no ambiguity in the Tariff, we direct the Midwest ISO to submit revisions to its tariff deleting the word "rate" and inserting the words "or using delivery services rates, terms or conditions established" between the words "regulation" and "by such state" in section 69. We direct the Midwest ISO to submit these revisions in a compliance filing to be submitted within 30 days of the date of this order.

c. Other Issues

38. The Midwest ISO's November Compliance Filing contains other minor tariff revisions and clarifications concerning pseudo-tied load and the must-offer requirement. We find these proposed tariff revisions to be reasonable and accept them.

The Commission orders:

(A) The requests for rehearing of the October 20 Rehearing Order are hereby denied, as discussed in the body of this order.

(B) The request for clarification regarding the netting of demand resources is hereby granted, as discussed in the body of this order.

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

By the Commission. Commissioner Kelliher is not participating.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.