



System Operator, Inc.'s (Midwest ISO) proposed revisions to its Open Access Transmission, Energy, and Operating Reserve Markets Tariff (Tariff), which limit the eligibility of certain grandfathered agreements (GFAs) to be carved out of Midwest ISO's Energy and Operating Reserve Markets.<sup>4</sup> The Initial Order also rejected Midwest ISO's proposal to remove existing GFAs from the list of GFAs in Attachment P of its Tariff, and denied relief that Dairyland requested in its complaint against Midwest ISO – namely, specific findings concerning whether Dairyland's GFAs should receive carved-out status once Dairyland integrates its transmission facilities into Midwest ISO. The Commission ordered Midwest ISO to submit revised tariff sheets in compliance with the Initial Order correcting inconsistencies in tariff language regarding GFAs and reinstating certain GFAs previously listed on Attachment P.

2. In this order, we deny requests for clarification or rehearing of the Initial Order. We accept Midwest ISO's compliance filing in Docket No. ER10-73-002, effective December 16, 2009. We also accept Midwest ISO's compliance filing in Docket No. ER10-74-002, effective June 1, 2010.

## **I. Background**

### **A. GFAs**

3. As part of its application to implement energy markets under its Open Access Transmission and Energy Markets Tariff (TEMT), the precursor to the Tariff, Midwest ISO proposed tariff provisions to address transmission service provided under certain existing long-term contracts that were executed before September 16, 1998<sup>5</sup> (generally classified as GFAs). The Commission issued several orders addressing the treatment of GFAs under the TEMT.<sup>6</sup> Subsequently, the Commission accepted Midwest ISO's

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<sup>4</sup> The phrase “carved out” refers to a specific type of treatment of GFAs that does not require them to participate in Midwest ISO's energy and operating reserve markets. Carved-out GFAs are not subject to the Tariff's scheduling and settlement requirements, and are financially exempt from many energy and operating reserve market charges. The treatment of GFAs is outlined in section 38.8 of the Tariff (Tariff Sheet Nos. 656-74).

<sup>5</sup> September 16, 1998, is the date upon which the Commission granted Midwest ISO status as an independent system operator.

<sup>6</sup> *Midwest Indep. Transmission Sys. Operator, Inc.*, 108 FERC ¶ 61,236 (2004) (September 2004 GFA Order), *order on reh'g*, 111 FERC ¶ 61,042 (GFA Rehearing Order), *order on reh'g*, 112 FERC ¶ 61,311 (2005) (collectively, GFA Orders), *aff'd sub nom. Wisconsin Public Power, Inc. v. FERC*, 493 F.3d 239 (D.C. Cir. 2007) (WPPI). See also *Midwest Indep. Transmission Sys. Operator, Inc.*, 121 FERC ¶ 61,166 (2007)

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proposal to replace the TEMT with the Tariff,<sup>7</sup> which continues to include the GFA provisions that the Commission accepted in the GFA Orders. Midwest ISO lists the GFAs in Attachment P to the Tariff.

4. Section 38.8.3(A) of the Tariff delineates the treatment of GFAs that are added to Attachment P after September 16, 2004.<sup>8</sup> Pursuant to this section, parties may choose to have a GFA carved out of the Energy and Operating Reserve Markets if that GFA: (1) is subject to the *Mobile-Sierra* public interest standard of review;<sup>9</sup> (2) is silent on the applicable standard of review; or (3) is providing for transmission service by an entity that is not a public utility. Carved-out GFAs are not subject to the Tariff's scheduling and settlement requirements and are financially exempt from many energy market charges (e.g., congestion charges and loss charges).

### **B. Dairyland**

5. Dairyland is a not-for-profit generation and transmission electric cooperative that is owned by, and provides the wholesale power requirements for, 25 separate distribution cooperatives in southern Minnesota, western Wisconsin, northern Iowa, and northern Illinois. Dairyland also provides wholesale power requirements for 16 municipal utilities in Wisconsin, Minnesota, and Iowa. Dairyland does not provide retail electric service directly to any customers, but its member cooperatives provide service to more than 251,000 retail electric customers in a 9,000 square mile area. Dairyland owns or has under contract generating units totaling approximately 1,192 MW, and it owns approximately 3,144 miles of transmission lines.

6. Relevant to these proceedings, Dairyland announced its intent to join Midwest ISO as a transmission owner, with the goal of integrating its facilities into Midwest ISO on June 1, 2010. On September 3, 2009, Dairyland submitted a conditional application to become a transmission owner and communicated with Midwest ISO concerning the GFA status of certain contracts. Specifically, Dairyland, which is not a public utility,

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(November 2007 GFA Order) (allowing Midwest ISO to continue the same GFA treatment after the initial six-year transition period ended).

<sup>7</sup> *Midwest Indep. Transmission Sys. Operator, Inc.*, 122 FERC ¶ 61,172 (2008).

<sup>8</sup> September 16, 2004, is the date of the September 2004 GFA Order, in which the Commission first approved Midwest ISO's treatment of GFAs under the TEMT.

<sup>9</sup> *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956); *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956).

requested that Midwest ISO grant carved-out status to 30 of Dairyland's existing agreements, which comprise approximately 700 MW (about 79 percent of Dairyland's peak load), and add those GFAs to Attachment P of the Tariff. On October 5, 2009, Dairyland withdrew all conditions to its membership in Midwest ISO and executed the Midwest ISO Transmission Owners Agreement. On that same day, Midwest ISO communicated via letter to Dairyland that it would grant carved-out GFA status for only one of Dairyland's existing agreements.<sup>10</sup>

**C. Midwest ISO's Proposal to Limit Carved-Out GFAs – Docket No. ER10-73-000**

7. On October 16, 2009, in Docket No. ER10-73-000, Midwest ISO proposed changes to its Tariff that would eliminate, going forward, the availability of the carved-out GFA option for new transmission owners whose GFA is with an affiliate, owner-member company, and/or other transmission owner. Under the Midwest ISO proposal, carved-out GFA treatment would not be available for such GFAs added to Attachment P on or after November 1, 2009.<sup>11</sup> Instead, pursuant to the proposed tariff language, the agreements must be fully converted to service under section 38.8.3(A) of the Tariff:

Notwithstanding the foregoing, carved-out treatment under this paragraph b shall not be available to Grandfathered Agreements added to Attachment P of the Tariff effective on or after November 1, 2009, that involve service to an Affiliate or an owner-member of the Transmission Owner or to an entity that itself is a Transmission Owner. Any such agreements between Transmission Owners shall be fully converted to service under the Tariff for the internal loads of the affected Transmission Owners.

8. Midwest ISO noted that the option of carving out GFAs from the energy markets was intended to be a transitory mechanism, and that after five years of market operations, new members can weigh the benefits of membership against the discomfiture of not

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<sup>10</sup> See Initial Order, 129 FERC ¶ 61,221 at P 7.

<sup>11</sup> The revised tariff language would exclude carved-out treatment only for GFAs between the new transmission owner and another transmission owner that are added to Attachment P on or after November 1, 2009. Midwest ISO's proposal in Docket No. ER10-74-000 to de-list certain of Dairyland's existing GFAs indicated its intention that the proposal also applies to GFAs between the new transmission owner and other transmission owners that were added to Attachment P prior to November 1, 2009. See Initial Order, 129 FERC ¶ 61,221 at P 8, n.9.

being permitted to carve out GFAs that involve service to the new transmission owner's load or to other transmission owners. Midwest ISO stated that it saw a trend among newer transmission owners to claim carved-out GFA status for contracts between the applicant transmission owner and its own affiliate or member customers. Midwest ISO noted that Dairyland requested carved-out GFA status for over 70 percent of its load, primarily because carved-out status was requested for contracts with Dairyland's retail cooperative members. It argued that this placed an unfair burden on existing members to subsidize the congestion costs of utilities that have chosen to avail themselves of the benefit of Midwest ISO's markets. According to Midwest ISO, the proposed Tariff changes are necessary because the Tariff is not explicit about Midwest ISO's ability to limit the addition of carved-out GFAs. Midwest ISO requested waiver of the 60-day prior notice requirement to permit an effective date of October 17, 2009, one day after filing, for its proposed tariff revisions.

**D. Classification of Dairyland's GFAs – Docket No. ER10-74-000**

9. On the same day Midwest ISO filed the proposed Tariff changes, it also filed, in Docket No. ER10-74-000, amendments to Attachment P to reflect its proposed classifications of Dairyland's agreements, effective June 1, 2010. Midwest ISO proposed to add one Dairyland agreement to Attachment P as a carved-out GFA, and to delete five others from Attachment P.<sup>12</sup> According to Midwest ISO, since it proposed that its new GFA provisions take effect before Dairyland's integration into Midwest ISO, it determined which of Dairyland's existing agreements qualified for GFA status based on its proposed standards.

**E. Dairyland's Complaint – Docket No. EL10-9-000**

10. In response to Midwest ISO's proposed tariff changes and its proposed amendment to Attachment P, Dairyland filed a complaint in Docket No. EL10-9-000. Dairyland argued that it should be subject to the Tariff as it existed when Dairyland made

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<sup>12</sup> Specifically, Midwest ISO proposed to add GFA No. 484 (a shared transmission agreement between Dairyland and Western Wisconsin Municipal Power Group, dated April 8, 1985), and to remove GFA Nos. 20 and 41 (an August 19, 1966 interconnection and interchange agreement and a November 15, 1978 general transmission facilities installation agreement with Interstate Power Company); GFA No. 290 (a May 30, 1985 phase angle regulating transformer cost sharing agreement with Minnesota Power Inc.); 293 (a September 16, 1983 interconnection and facility use agreement with Northwestern Wisconsin Electric Company); and GFA No. 467 (a June 16, 1982 Shared Transmission Agreement with Southern Minnesota Municipal Power Agency). *See* Initial Order, 129 FERC ¶ 61,221 at P 11.

its commitment to join Midwest ISO, and that it should therefore receive carved-out GFA status for all 30 of its GFAs that meet the requirements of the currently-approved Tariff. Dairyland asserted that, throughout integration discussions with Midwest ISO, it understood that its GFAs would be subject to the terms of the Tariff on file at the time of the discussions, in accordance with the filed rate doctrine. Accordingly, Dairyland asked the Commission to require Midwest ISO to include in Attachment P, effective October 31, 2009, the GFAs that Midwest ISO proposed to delete (namely, GFA Nos. 20, 41, 290, 293 and 467), along with 25 member all-requirements contracts under which Dairyland sells and delivers energy to member entities.

11. Dairyland alleged that Midwest ISO informed it that a GFA that was previously carved out because a counterparty was not a Midwest ISO transmission owner could no longer be carved out once the counterparty became a transmission owner. However, Dairyland pointed out that the new Tariff language does not prohibit carved-out GFAs involving two Midwest ISO transmission owners; nor does the definition of a GFA mention any exception where both entities are transmission owners. Dairyland provided examples of GFAs presently listed on Attachment P that are between two transmission owners. Furthermore, Dairyland claimed that its member all-requirements contracts qualify as GFAs even though they were extended after September 16, 1998, i.e., the cut-off date for receiving grandfathered status. According to Dairyland, the Tariff's definition of GFA does not state that an extension of the term of the GFA renders it ineligible for GFA treatment, nor has Midwest ISO previously pointed to any case law to support such an assertion.

#### **F. Initial Order**

12. In the Initial Order, the Commission accepted, subject to modification, Midwest ISO's proposed revisions to Tariff section 38.8.3(A) in Docket No. ER10-73-000, eliminating the availability of carved-out GFA status for existing agreements between a new transmission owner and its affiliates and/or owner-members that are not already included in Attachment P. The Commission noted that these changes are prospective in nature and do not implicate the Commission's prior findings regarding GFAs or the *Mobile-Sierra* doctrine.<sup>13</sup> According to the Commission, Dairyland is a prospective transmission owner and, unlike the transmission-owning members who were already part of Midwest ISO at the time of energy market start-up, Dairyland can analyze the costs of

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<sup>13</sup> See Initial Order, 129 FERC ¶ 61,221 at P 39-40.

converting its GFAs to tariff service prior to integration, and weigh those costs against the benefits of Midwest ISO membership.<sup>14</sup>

13. The Commission observed that the GFAs at issue in this proceeding are, in essence, contracts between the prospective member and itself, and that the decision to modify any of its existing contracts is entirely at the discretion of the prospective member. The Commission noted that it was “not directing or coercing any potential Midwest ISO member to modify its existing contracts.”<sup>15</sup> The Commission concluded that Midwest ISO’s proposed revisions were consistent with the Commission’s prior findings regarding GFAs, and with the Commission’s expectation that the amount of load attributable to carved-out GFAs would decrease over time.<sup>16</sup>

14. However, the Commission rejected Midwest ISO’s proposal to eliminate the availability of carved-out GFA status for existing agreements between a prospective new member and another transmission owner. According to the Commission, unlike existing agreements between a prospective member and its affiliates and owner-members, which are not currently listed in Attachment P, many existing agreements between prospective members and existing transmission owners are already listed in Attachment P. (As mentioned above, in this proceeding Midwest ISO proposed deleting five of Dairyland’s GFAs that are currently listed in Attachment P.) Midwest ISO’s proposed tariff language, as written, would not allow it to make such deletions, because it addressed only agreements added to Attachment P effective on or after November 1, 2009. In addition, the Commission found that the prospective member cannot unilaterally modify existing agreements with unaffiliated transmission owners, in which case these agreements are similar to agreements between the prospective member and unaffiliated non-members, which raise the same potential for trapped costs, and which would still qualify for carved-out treatment. The Commission also directed Midwest ISO to revise its proposed tariff sheets to make Option A and Option C GFA treatment available for existing agreements with affiliates and member-owners.<sup>17</sup>

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<sup>14</sup> *See id.* P 40.

<sup>15</sup> *See id.*

<sup>16</sup> *See id.* P 41 (citing November 2007 GFA Order, 121 FERC ¶ 61,166 at P 70). The Commission noted that if Dairyland were permitted to elect carved-out status for all of its existing contracts with its owner-members, this trend would reverse.

<sup>17</sup> Under Option A, the GFA Responsible Entity – a designated contract party financially responsible for energy market activities associated with the GFA – nominates and holds financial transmission rights in order to transact under the GFA. Midwest ISO

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15. Regarding the classification of Dairyland's GFAs, the Commission noted that Midwest ISO's proposed tariff changes will become effective on December 16, 2009, but Dairyland's membership in Midwest ISO will not take effect until June 1, 2010. The Commission stated that the proposed tariff provisions would apply to all GFAs that have not been accepted by the Commission for inclusion in Attachment P as carved-out agreements by December 16, 2009. Therefore, the Initial Order concluded that Midwest ISO's new tariff provisions in effect on December 16, 2009 will apply to Dairyland's GFAs.<sup>18</sup> The Commission therefore denied the relief (in the form of specific findings regarding GFA eligibility) requested in Dairyland's complaint in Docket No. EL10-9-000, and found no error in Midwest ISO's decision to file the Attachment P it hoped to make effective at the time of Dairyland's integration.<sup>19</sup>

## **II. Requests for Rehearing and Clarification**

16. On January 14, 2010, Dairyland filed a request for rehearing, and Great River filed a request for clarification or rehearing, of the Initial Order. Midwest ISO filed an answer to Dairyland's request for rehearing and Great River's request for clarification or rehearing. Dairyland filed an answer to Midwest ISO's answer.

### **A. Procedural Matters**

17. Rule 713(d)(1) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d)(1) (2009), prohibits an answer to a request for rehearing. We will therefore reject the answers of Midwest ISO and Dairyland.

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assesses congestion charges and the cost of losses for all transactions under the GFA. Under Option C, the GFA Responsible Entity does not nominate or hold financial transmission rights for the GFA transactions but must pay the costs of congestion for all GFA transactions. *See* Initial Order, 129 FERC ¶ 61,221 at n.24.

<sup>18</sup> *Id.* P 48.

<sup>19</sup> The Commission noted, however, that Midwest ISO is required to reinstate those GFAs that were previously included in the Attachment P, but which Midwest ISO proposed to remove in its filing in Docket No. ER10-73-000. *See* December 15 Order, 129 FERC ¶ 61,221 at P 52.



**B. Substantive Matters****1. Undue Discrimination**

18. Dairyland argues that the Commission erred in approving Midwest ISO's Tariff amendment, because it unduly discriminates between existing and prospective transmission owners and forbids transmission owners that joined Midwest ISO on or after November 1, 2009 from designating certain of their existing contracts as GFAs in the same manner as did transmission owners that were Midwest ISO members on that date. It contends that the Commission and the courts have found that discrimination is undue under the Federal Power Act (FPA) when there is a difference in rates that is not justified by some legitimate factor. In order to establish a *prima facie* case of undue discrimination, Dairyland states that one must ““demonstrate not only differential rates between two classes of customers but also that the two classes of customers are similarly situated for purposes of the rate.””<sup>20</sup> Unlike in prior cases, Dairyland says, here the Commission undertook no meaningful analysis of Dairyland's agreements to determine whether there was a sufficient factual basis to distinguish them from other GFAs. The only distinction that the Commission made between Dairyland's contracts and the GFAs of similarly situated transmission owners was the timing of Dairyland's upcoming Midwest ISO membership.

**a. Dairyland's Ability to Analyze Market Impacts**

19. Dairyland argues that its ability to analyze the impact of Midwest ISO's energy markets should have no bearing on its GFAs' eligibility for carved-out status. Dairyland adds that if this were a determining factor for carved-out GFA status, then Midwest ISO might have justified an amendment that foreclosed GFA eligibility for any entity proposing to become a Midwest ISO transmission owner after a date corresponding with the announcement of Midwest ISO's Day 2 energy market proposal,<sup>21</sup> or an amendment that foreclosed GFA eligibility after the six-year transition period provided for under the original Midwest ISO Transmission Owners Agreement, which, Dairyland states, was a

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<sup>20</sup> Dairyland Rehearing Request at 4 (quoting *Washington Water Power Co. v. FERC*, 201 F.3d 497, 504 (D.C. Cir. 2000)).

<sup>21</sup> According to Dairyland, on or after the date corresponding with the announcement of Midwest ISO's Day 2 energy market proposal, no prospective Midwest ISO transmission owner could argue that it could not assess the impact of new market rules on the cost of performing under its then-existing contracts. *Id.* at 6.

“‘formation bargain’ that promised ‘special treatment’ to the original GFA parties.”<sup>22</sup> Dairyland contends that November 1, 2009 is an arbitrary date.

20. Dairyland further argues that if its ability to weigh the costs of converting GFAs against the benefits of Midwest ISO membership at the time that it joined justifies Midwest ISO’s GFA amendment, then Dairyland is similarly situated to any transmission owner that joined Midwest ISO at a time when it could have conducted such an analysis. Dairyland contends, however, that the only analysis it could have performed had to be based on the existing Midwest ISO Tariff and recent Commission orders, adding that it had no reasonable basis for analyzing tariff language that had not yet been proposed at the time Midwest ISO approved Dairyland’s application.

### **Commission Determination**

21. We deny rehearing. Dairyland’s arguments on rehearing are predicated on the misguided belief that Dairyland, as a prospective transmission owner, is similarly situated to existing transmission owners in Midwest ISO, and that the Initial Order unduly discriminates against prospective transmission owners. This inaccurate reading of the Initial Order betrays a fundamental misunderstanding of the critical distinctions between current and prospective Midwest ISO transmission owners, and of the GFA proceedings to date.

22. As the Commission explained in the Initial Order, the Commission’s prior findings related to GFAs were premised on the fact that the start-up of Midwest ISO’s energy markets would have a considerable impact on Midwest ISO’s existing transmission owner members by, among other things, imposing scheduling and settlement requirements to which GFAs had never been subject.<sup>23</sup> Original transmission owners and their GFA counterparties who transitioned from a Day 1 to a Day 2 environment in 2005 did not have control over this change; by virtue of their membership in Midwest ISO, they were forced to either endure market changes or face substantial withdrawal costs. By contrast, prospective applicants for transmission owner status, such as Dairyland, are not subject to forced market transitions. Dairyland and other prospective members retain the choice of whether or not to subject themselves to Midwest ISO’s market rules, and they maintain full control over how to preserve their arrangements with their cooperative members. Dairyland can analyze the costs of converting its GFAs to Tariff service prior to fully integrating into Midwest ISO, and weigh those costs against the benefits of

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<sup>22</sup> *Id.* at 7 (citing *WPPI*, 493 F.3d at 275).

<sup>23</sup> *Id.*

Midwest ISO membership.<sup>24</sup> Therefore, Dairyland is not similarly situated to the transmission-owning members who were already a part of Midwest ISO at the time of energy market start-up.

23. We disagree with Dairyland's contention that it is similarly situated to "any [transmission owner] that joined the Midwest ISO at a time when it could have made the very same cost-benefit analysis" of converting GFAs against Midwest ISO membership,<sup>25</sup> and therefore the Commission's decision to approve the "arbitrary cut-off date" of November 1, 2009, was unduly discriminatory. Whether or not Dairyland is similarly situated to other transmission-owning members that joined Midwest ISO after energy market start-up, discrimination is not undue if it is premised upon a legitimate factor. Dairyland itself notes this distinction.<sup>26</sup>

24. The carve-out option for GFAs was approved with the understanding that carved-out GFAs represented a relatively minor and declining segment of the Midwest ISO market.<sup>27</sup> Further, the Commission made clear that the carve-outs were only possible due to the small number of megawatts involved, and stated that "larger carve-outs [ ] would require us to reevaluate this treatment."<sup>28</sup> When the Commission accepted Midwest ISO's proposal to continue the carved-out GFA treatment after the expiration of the initial six-year transition period, it again noted the small number of carve-outs as well as its expectation that this number would continue to decrease.<sup>29</sup> Moreover, the focus of the November 2007 GFA Order was on the disadvantages of abrogating *existing* carved-out GFAs, and it stated that "the end of the transition period [ ] is not significant enough to

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<sup>24</sup> *Id.* P 40.

<sup>25</sup> Dairyland Rehearing Request at 7. Presumably, Dairyland refers to those transmission owners who were not Midwest ISO members (and original GFA parties) at the time of Midwest ISO's market transition, but who elected to join Midwest ISO after expiration of the transition period.

<sup>26</sup> *Id.* at 3 (citing cases).

<sup>27</sup> See September 2004 GFA Order, 108 FERC ¶ 61,236 at P 143; see also November 2007 GFA Order, 121 FERC ¶ 61,166 at P 48.

<sup>28</sup> September 2004 GFA Order, 108 FERC ¶ 61,236 at P 143.

<sup>29</sup> November 2007 GFA Order, 121 FERC ¶ 61,166 at P 48.

justify modification of the existing GFAs or a change in their treatment.”<sup>30</sup> Nothing suggests that carved-out treatment was an option that all future potential transmission owners could have reasonably believed would remain available indefinitely.<sup>31</sup>

25. As the Initial Order noted, Dairyland proposed to carve out of the Midwest ISO markets nearly 700 MW, which would have increased by more than ten percent the then-current size of the carve-out. Dairyland’s proposed carve-out is much larger than any carve-out for a transmission owner that became a member after the start-up of the Midwest ISO energy markets.<sup>32</sup> Given the intention underlying the carve-out, we do not find that Midwest ISO’s proposal to limit its availability going forward, or the Commission’s approval of it, amounted to undue discrimination.

26. Dairyland contends that the only cost-benefit analysis it could have performed had to be based on the existing Midwest ISO Tariff and recent Commission orders; it had no reasonable basis for attempting to analyze proposed tariff language which had not yet been proposed to the Commission. This argument does not consider the regulatory context of Dairyland’s integration proposal. Dairyland proposed to substantially increase the size of the GFA carve-out, even though the September 2004 GFA Order and the November 2007 GFA Order indicated that carved-out treatment would not continue indefinitely, and that carve-outs were only possible to the extent they were limited in scope.<sup>33</sup> Moreover, Dairyland opted for a phased integration into Midwest ISO, with nearly nine months between the time it signed the Transmission Owners’ Agreement and the date of full integration.<sup>34</sup> So while Dairyland could not have evaluated tariff

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<sup>30</sup> *Id.* P 49.

<sup>31</sup> *See* September 2004 GFA Order, 108 FERC ¶ 61,236 at P 143; *see also* November 2007 GFA Order, 121 FERC ¶ 61,166 at P 48.

<sup>32</sup> *See* Midwest ISO April 30, 2010 GFA Quarterly Report in Docket No. ER04-691-000 (showing that the carved-out GFAs for Midwest ISO members that were added after the initial GFA orders – i.e., those GFAs above number 461 – represent transmission amounts substantially less than Dairyland asked to carve out).

<sup>33</sup> *See* September 2004 GFA Order, 108 FERC ¶ 61,236 at P 143; *see also* November 2007 GFA Order, 121 FERC ¶ 61,166 at P 48.

<sup>34</sup> We note that it was Dairyland’s election to defer its full integration into Midwest ISO until June 1, 2010. *See* Dairyland Protest, Docket No. EL10-9-000, *et al.*, at 8, 20 n.16 (filed Oct. 30, 2009).

language that had not yet been proposed, we do not excuse it from understanding that its proposal afforded Midwest ISO both a reasonable basis and sufficient time to amend its Tariff to limit the size of the GFA carve-out Dairyland proposed, prior to Dairyland's full integration.

**b. Dairyland's "Reasonable Assurance"**

27. According to Dairyland, the Initial Order incorrectly attempts to justify the distinction between existing and prospective customers on the basis that nothing precludes Midwest ISO from proposing changes to its GFA tariff provisions, and Dairyland had no assurance that such changes would not be proposed prior to the effective date of Dairyland's membership. Dairyland argues on rehearing that no current or prospective customer has assurance that the tariff provisions would not change, and that Dairyland cannot be distinguished on this ground. Dairyland further argues that the Commission can make no meaningful distinction between the expectations of current and prospective transmission owners based on the original six-year transition period under the "formation bargain," because the November 2007 GFA Order provided that the Commission's GFA policy instead turns on the application of *Mobile-Sierra*.<sup>35</sup> Once the Commission eliminated the transition notion as the basis for carved-out GFA treatment, then there can no longer be any meaningful distinction between the expectations of existing and prospective transmission owners based on the original formation bargain. Instead, Dairyland says, carved-out GFA protection was extended indefinitely because of the "coercive" effect of the Midwest ISO market rules on the contracts subject to *Mobile-Sierra* and non-jurisdictional contracts, and the Commission lacked a basis to distinguish the "coercive" impact of the Midwest ISO market rules on Dairyland's existing contracts from the impact on those contracts that were permitted to retain indefinite carved-out status. Therefore, Dairyland argues that it had no reason to believe that it would be treated differently than existing Midwest ISO transmission owners. While Midwest ISO staff took a contrary position during negotiations with Dairyland, Dairyland states that it had no reason to rely on that position because it was inconsistent with the Commission's GFA policy. Further, Dairyland argues that the Commission cannot justify disparate treatment under the Tariff based on Dairyland's decision to waive conditions to Midwest ISO membership.

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<sup>35</sup> Dairyland Rehearing Request at 9 (citing November 2007 GFA Order, 121 FERC ¶ 61,166 at P 43-44). According to Dairyland, the underlying basis for the GFA carve-out policy was that the Commission could not order changes that would adversely impact contracts subject to *Mobile-Sierra* and non-jurisdictional contracts by trapping costs without making the requisite public interest finding.

28. According to Dairyland, the Commission has, up until consideration of Dairyland's GFAs, acted in accordance with the core principles of the *Mobile-Sierra* doctrine. It contends that the Supreme Court's rulings in *Mobile-Sierra*, *Morgan Stanley*,<sup>36</sup> and *NRG*,<sup>37</sup> along with the Commission's earlier GFA orders, make clear that Dairyland's reasonable expectation was that the benefit of its bargain would be preserved unless the Commission found a strong public interest reason not to do so.

### **Commission Determination**

29. Dairyland avers that, if it had no assurance that Midwest ISO would not propose changes to its GFA tariff provisions prior to the effective date of Dairyland's membership, it cannot be distinguished from current or prospective Midwest ISO transmission members who also had no such assurance. The more apt consideration, however, is not whether Dairyland or any other prospective member had any assurance that the Midwest ISO Tariff would remain unchanged for a period of time (which they did not), but rather what the actual tariff provisions governing the carve-out of GFAs were at the time a prospective member was fully integrated into Midwest ISO. Contrary to Dairyland's assertions, Midwest ISO's proposed GFA Tariff revisions were not unduly discriminatory towards prospective transmission owners, because Midwest ISO presented a valid basis for changing the treatment of GFAs going forward. Dairyland admits that Midwest ISO staff had earlier cautioned it that Midwest ISO did not support the full extent of the proposed carve-out. While Dairyland disregarded Midwest ISO staff's representations, Dairyland should have reasonably foreseen that Midwest ISO might proffer Tariff revisions to prevent Dairyland's proposed carve-out. In addition, as discussed above, Dairyland had no reasonable expectation that carved-out GFA treatment would remain available indefinitely. The Commission has previously indicated that carved-out GFA treatment was possible only because of the small number of megawatts involved,<sup>38</sup> and because the size of the carve-out would decrease over time.<sup>39</sup>

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<sup>36</sup> *Morgan Stanley Capital Group, Inc. v. Public Util. Dist. No. 1 of Snohomish County*, 128 S. Ct. 2733 (2008).

<sup>37</sup> *NRG Power Marketing, LLC v. Maine Public Utilities Commission*, 130 S. Ct. 693 (2010).

<sup>38</sup> See September 2004 GFA Order, 108 FERC ¶ 61,236 at P 143; see also November 2007 GFA Order, 121 FERC ¶ 61,166 at P 48.

<sup>39</sup> November 2007 GFA Order, 121 FERC ¶ 61,166 at P 48.

30. We further reject Dairyland's *Mobile-Sierra*-related claims. In the Initial Order, we rejected Dairyland's argument that the *Mobile-Sierra* doctrine required Dairyland's contracts be carved out.<sup>40</sup> Our reasoning hinged on the fact that the decision of a prospective transmission owner to modify its existing contracts is entirely at the discretion of that prospective member, and that the Commission was not directing or coercing any potential Midwest ISO member to modify its existing contracts.<sup>41</sup> We affirm here that Midwest ISO's GFA-related Tariff provisions, as approved in the Initial Order, implicated no involuntary modification or abrogation of Dairyland's contracts with its cooperative members. Dairyland made a *voluntary* decision to join Midwest ISO. While the GFA proceedings associated with Midwest ISO's transition from Day 1 to Day 2 environments in 2004 and 2005 involved the issue of "how to treat approximately 300 existing GFAs currently in force in the Midwest ISO region," the GFA revisions approved in the Initial Order involve no such similar modifications to existing contracts.<sup>42</sup> Instead, the decision to transfer facilities to the Midwest ISO's functional control, and to submit to the Midwest ISO Tariff and market practices as a transmission owner, rests with the applicant. Dairyland, as a prospective member, can fairly assess whether it will be better off remaining outside the Midwest ISO or whether the membership benefits outweigh any potential costs of converting existing transmission service to service under the Tariff.

31. Dairyland's contention that *Mobile Sierra* and *NRG* provide it with "reasonable assurance" as to the status of its contracts, similar to the reasonable expectations of existing Midwest ISO transmission owners, is mistaken. Contrary to Dairyland's numerous assertions, Dairyland cannot fairly compare itself to Midwest ISO transmission owners who, at the time the Day 2 markets began, could not maintain full control over how to preserve their arrangements with their cooperative members. Existing Midwest ISO transmission owners had pre-existing agreements that had been designated as GFAs and listed on Midwest ISO's Attachment P for a number of years, and therefore had certain reasonable expectations with respect to the continuation of those agreements. Prospective members such as Dairyland, however, have no similar legitimate

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<sup>40</sup> Initial Order, 129 FERC ¶ 61,221 at P 40.

<sup>41</sup> *Id.* The Initial Order pointed out that, in contrast, in the GFA proceedings, the Commission was faced with the decision of whether to abrogate *existing* GFAs of existing transmission-owning members to accommodate the start-up of Midwest ISO's energy markets.

<sup>42</sup> See Initial Order, 129 FERC ¶ 61,221 at P 40; see also *Midwest Indep. Transmission Sys. Operator Corp.*, 107 FERC ¶ 61,191, at P 1 (2004).

expectations.<sup>43</sup> Dairyland's "reasonable assurance" argument relies on the proposition that the Midwest ISO Tariff provisions governing admission of new members are not subject to modification which, as discussed above, is erroneous. For these reasons, neither *Mobile Sierra* nor *NRG* supports Dairyland's arguments on rehearing.

**c. Dairyland's All-Requirements Contracts**

32. According to Dairyland, the Initial Order incorrectly suggests that generation and transmission cooperatives such as Dairyland can amend their member contracts at will. Dairyland states that each of its member distribution cooperatives are separate entities and the all-requirements contracts between Dairyland and its members cannot be unilaterally modified. Dairyland further argues that if it could amend its member contracts at will, current Midwest ISO cooperative members would have similar rights, and Dairyland could not be distinguished on this ground.<sup>44</sup>

33. Dairyland contends that the Initial Order attempts to justify a distinction between existing and prospective customers on the basis that the wholesale sales Dairyland seeks to carve out are intended to provide for its cooperative members' sales to its bundled retail load. Dairyland argues, however, that the Initial Order does not distinguish Dairyland's members' sales to bundled retail load from identical sales made by existing Midwest ISO cooperatives to their members.<sup>45</sup> Dairyland goes on to argue that the Initial Order does not explain how Dairyland's ability to revise its member contracts avoids the potential cost shifts between parties to individual GFAs, as identified by the *WPPI* court.<sup>46</sup> According to Dairyland, if two entities are viewed as the same, amending their

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<sup>43</sup> We note, however, that Dairyland does have pre-existing agreements that have been designated as GFAs and listed on Midwest ISO's Attachment P. Dairyland does have certain reasonable expectations with respect to the continuation of those agreements, which will remain grandfathered.

<sup>44</sup> Dairyland Rehearing Request at 13. Dairyland states that this also holds true for the requirements contracts of Midwest ISO transmission owners that are joint municipal agencies.

<sup>45</sup> *Id.* at 14-15 (quoting Initial Order, 129 FERC ¶ 61,221 at P 50).

<sup>46</sup> According to Dairyland, the *WPPI* court recognized that the alleged coercive effect of Midwest ISO's new market rules was the potential cost shifts between the parties to the individual GFAs. Dairyland Rehearing Request at 15 (citing *WPPI*, 493 F.3d at 273).



contracts to pass through costs has no significant impact, and suggesting that Dairyland adopt this approach is arbitrary and capricious given that existing Midwest ISO cooperatives were not made to do so.

34. Dairyland contends that, while the *WPPI* court identified potential cost shifts associated with Midwest ISO's new market rules, pursuant to the Initial Order no cost shifts between cooperatives and their members could justify granting carved-out GFA status because the member agreements are contracts between the cooperative and itself.<sup>47</sup> Dairyland argues that this rationale should be applied to "every other Midwest ISO [generation and transmission] cooperative and [joint municipal agency] with [c]arved-[o]ut GFAs listed on Attachment P," and adds that the Initial Order does not sufficiently justify a distinction between existing and prospective Midwest ISO cooperative members on this basis.

### **Commission Determination**

35. We reject as immaterial Dairyland's claim that its member contracts do not permit unilateral modification. The Initial Order did not permit or require unilateral modification of any of the contracts between Dairyland's distribution cooperatives.<sup>48</sup> Dairyland has voluntarily elected to pursue Midwest ISO membership and must secure the consent of its cooperative members prior to its decision to enter Midwest ISO and to fully integrate as a Midwest ISO transmission owner. As part of this process, Dairyland's member agreements must be consistent with the terms and requirements of the Midwest ISO Tariff as it exists at the time of Dairyland's full integration.

36. Dairyland claims its ability to amend its member agreements does not distinguish Dairyland from existing Midwest ISO cooperative members who would have similar rights to contract modification. This argument is incorrectly premised on the assumption that Dairyland is otherwise similarly situated to existing transmission-owning members of Midwest ISO. Dairyland, however, is not similarly situated to transmission-owning members who were already a part of Midwest ISO at the time of energy market start-up. Moreover, whether or not Dairyland is similarly situated to other transmission-owning

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<sup>47</sup> Dairyland Rehearing Request at 16 (citing Initial Order, 129 FERC ¶ 61,221 at P 40).

<sup>48</sup> *See* Initial Order, 129 FERC ¶ 61,221 at P 40 ("The decision to modify any of its existing contracts is entirely at the discretion of the prospective member; the Commission is not directing or coercing any potential Midwest ISO member to modify its contracts.").

members that joined Midwest ISO after energy market start-up, as Dairyland contends it is, any resulting discrimination purportedly experienced by Dairyland is not undue where it is premised on a legitimate factor.<sup>49</sup> Midwest ISO's GFA revisions were not unduly discriminatory towards prospective transmission owners because, as discussed above, Midwest ISO presented a valid basis for changing the treatment of GFAs going forward.<sup>50</sup> Further, nothing suggests that carved-out treatment was an option that all future potential transmission owners could have reasonably believed would remain available indefinitely.<sup>51</sup>

37. Similarly, we reject Dairyland's argument that its members' sales to bundled retail load cannot be distinguished from similar sales made by existing Midwest ISO cooperatives to their owner-members. Dairyland again relies on the erroneous premises that it is otherwise similarly situated to existing Midwest ISO cooperative members, and that carved-out treatment would remain available indefinitely. The Commission made clear that carve-outs were only possible due to the small number of megawatts involved, and that larger carve-outs would require reevaluation of carved-out treatment.<sup>52</sup> Here, Dairyland's proposed carve-out would have increased by more than ten percent the then-current size of Midwest ISO's carve-out, and Dairyland should have understood that its proposal afforded Midwest ISO a reasonable basis to amend its Tariff to limit the size of Dairyland's requested carve-out. Given the intention underlying the carve-out, we do not find that Midwest ISO's proposal to limit its availability going forward, or the Commission's approval, amounted to undue discrimination.

38. Dairyland cites to *WPPI* and argues that the Initial Order does not explain how Dairyland's ability to modify its member contracts avoids the potential cost shifts between the parties to the individual GFAs.<sup>53</sup> Dairyland's reliance on *WPPI* is

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<sup>49</sup> *See supra* P 22-23.

<sup>50</sup> *See supra* P 25.

<sup>51</sup> *See* September 2004 GFA Order, 108 FERC ¶ 61,236 at P 143; *see also* November 2007 GFA Order, 121 FERC ¶ 61,166 at P 48.

<sup>52</sup> September 2004 GFA Order, 108 FERC ¶ 61,236 at P 143.

<sup>53</sup> According to Dairyland, the *WPPI* court recognized that the alleged coercive effect of Midwest ISO's new market rules was the potential cost shifts between the parties to the individual GFAs. Dairyland Rehearing Request at 15 (citing *WPPI*, 493 F.3d at 273).

misplaced. The central premise recognized by the Commission in the GFA proceedings, and the *WPPI* court, was that the contracts at issue in those proceedings had already been designated as GFAs under the terms of the Midwest ISO's then-effective tariff. At issue in the GFA proceedings and *WPPI*, then, was not the creation of a permanent carve-out, but how to address existing GFAs in the new Day 2 environment.<sup>54</sup> No existing Midwest ISO member had any control over how the new Midwest ISO market would impact its GFAs, and this necessitated certain protections or transition options for these existing agreements. As a result, the carve-out option was created.

39. By contrast, Dairyland and other prospective Midwest ISO members can choose whether or not to subject themselves to Midwest ISO's market rules, and they maintain complete control over how to preserve their arrangements with their cooperative members. Dairyland, then, does not suffer from the "coercive effect" of the Day 2 market rules recognized by the *WPPI* court. Further, the GFA revisions approved in the Initial Order neither coerce the modification of any GFA, nor implicate any of the GFAs subject to the "original bargain." Instead, the revisions apply to new transmission owners joining Midwest ISO on or after December 16, 2009, and include certain exceptions to the carved-out GFA option on a prospective basis.

40. According to Dairyland, the Commission suggested that Dairyland revise its member agreements to pass through costs; this, Dairyland argues, is arbitrary and capricious given that existing Midwest ISO cooperatives were not "made to do the same." We disagree. The Initial Order did not require Dairyland or any prospective Midwest ISO cooperative member to modify its member agreements, but instead concluded that a prospective member's decision to modify any of its existing contracts is entirely at the discretion of that member.<sup>55</sup> The Initial Order went on to conclude that Dairyland, as a prospective member, can analyze the costs of converting its GFAs to tariff service and weigh those costs against the benefits of Midwest ISO membership.<sup>56</sup> Further, Dairyland's argument incorrectly suggests that it should be treated similarly to existing Midwest ISO cooperative members. Dairyland is not similarly situated to transmission-owning members who were already a part of Midwest ISO at the time of energy market start-up. Moreover, whether or not Dairyland is similarly situated to other transmission-owning members that joined Midwest ISO after energy market start-up, any resulting

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<sup>54</sup> See, e.g., *Midwest Indep. Transmission Sys. Operator Corp.*, 107 FERC ¶ 61,191, at P 1 (2004).

<sup>55</sup> See Initial Order, 129 FERC ¶ 61,221 at P 40.

<sup>56</sup> *Id.*

discrimination purportedly experienced by Dairyland is not undue where it is premised on a legitimate factor. Given the extent of Dairyland's proposed carve-out, Midwest ISO reasonably adopted a proposal to reasonably limit the availability of the carve-out option going forward.

41. We reject Dairyland's contention that if cooperative member agreements are contracts between a cooperative and itself, there can be no cost shifts between generation and transmission cooperatives and their members that could justify granting carved-out GFA status. Dairyland once again misinterprets *WPPI* and overlooks a fundamental distinction between the GFAs at issue in the GFA proceedings and those at issue here. The *WPPI* court recognized that Midwest ISO's tariff would impose significant changes that could result in cost shifts between parties to the individual GFAs, and pointed out that such cost shifts could in turn "affect the bargain between the parties to the individual GFAs."<sup>57</sup> Cost shifting, then, was an issue identified by the Commission and the *WPPI* court as uniquely affecting the GFAs of existing Midwest ISO transmission owner members who were unable to preserve their originally-bargained-for arrangements.

42. In contrast, prospective transmission owning members such as Dairyland are not subject to similar forced market transitions, and have the option of either modifying their cooperative agreements or not pursuing Midwest ISO membership. Original transmission owners and their GFA counterparties transitioning to the Day 2 environment in 2004 did not have a similar level of control, and were forced to either endure market changes or face substantial withdrawal costs. Cost shifting between prospective Midwest ISO cooperatives and their members is immaterial here and would not justify a carve-out since new members can weigh the benefits of membership against the discomfiture of not being permitted to carve out certain GFAs.

43. Further, we disagree with Dairyland's assertion that the rationale in the Initial Order should be applied to "every other Midwest ISO [generation and transmission] cooperative and [joint municipal agency] with [c]arved-[o]ut GFAs listed on Attachment P." Dairyland is not similarly situated to transmission-owning members who were already a part of Midwest ISO at the time of energy market start-up. In addition, whether or not Dairyland is similarly situated to other transmission-owning members that joined

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<sup>57</sup> *WPPI*, 493 F.3d at 273 (quoting GFA Rehearing Order, 111 FERC ¶ 61,042 at P 87). The *WPPI* court went on to note that the Commission's conclusion here was "tantamount to a finding that *not* carving out this narrow class of GFAs would modify them, thereby triggering application of *Mobile-Sierra's* public interest standard."

Midwest ISO after energy market start-up, any resulting discrimination purportedly experienced by Dairyland is not undue where it is premised on a legitimate factor.<sup>58</sup>

**d. Decrease In Carved-Out GFA Load**

44. Dairyland argues that the Commission's desire to decrease carved-out GFA load does not justify discriminatory treatment under Midwest ISO's GFA amendment, which, Dairyland argues, creates two classes of transmission owners without distinguishing between them. Dairyland contends that it was never the Commission's position that no future transmission owner could obtain carved-out status for its GFAs, and adds that the Commission previously approved a tariff provision permitting GFA carve-outs from new transmission owners.<sup>59</sup> According to Dairyland, if the Commission's policy was to reduce the amount of carved-out GFA load, it would not have eliminated the transition period in the November 2007 GFA Order. Dairyland asserts that current Midwest ISO members with carved-out GFAs will continue to experience load growth, adding that the Midwest ISO Tariff does not prevent additional carved-out GFA load.

45. According to Dairyland, the Initial Order did not consider "any offsetting decreases in 'expiring' [c]arved-[o]ut GFAs of other Midwest ISO [transmission owners]." <sup>60</sup> Dairyland disagrees with the Commission's comparison of Dairyland's 700 MW of proposed carved-out GFAs with Midwest ISO's current 6,786 MW of total carved-out GFAs, and adds that if the Commission compared Dairyland's 620 MW all-requirements contracts to Midwest ISO's total load, Dairyland's GFAs would increase the percentage of Midwest ISO's carved-out load by less than one percent.<sup>61</sup> Dairyland also argues that the Initial Order does not compare the total load under Dairyland's proposed GFAs with the load of other Midwest ISO member cooperatives' GFAs, and adds that the Initial Order does not support the position that accepting "one new

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<sup>58</sup> *See supra* P 22-23.

<sup>59</sup> Dairyland Rehearing Request at 16. Dairyland cites to the version of Midwest ISO Tariff section 38.8.3(A) that was previously in effect prior to the revisions approved in the Initial Order.

<sup>60</sup> *Id.* at 17.

<sup>61</sup> *Id.* (citing Initial Order, 129 FERC ¶ 61,221 at P 41).

[transmission owner] with a modest amount of load” served under carved-out GFAs would “reverse the trend” with respect to the total amount of carved-out GFA load.<sup>62</sup>

46. Dairyland contends that the uplift costs associated with carving out its GFAs would not be significant, and adds that the Initial Order did not demonstrate how the impact of these costs would be more severe than the impacts associated with the September 2004 GFA Order designating carved-out GFAs, or the November 2007 GFA Order extending carve-outs at the end of the transition period. Specifically, Dairyland states that, according to the November 2007 GFA Order, extending carved-out GFA coverage indefinitely would not impose costs “so severe as to threaten the ‘financial ability’ of any [Midwest ISO] utility ‘to continue its service,’ or that the cost shift amount[s] to an ‘excessive’ burden on any other market participant.”<sup>63</sup>

47. According to Dairyland, the Midwest ISO Board’s unconditional approval of Dairyland’s membership prior to the issuance of the Initial Order suggests that Midwest ISO did not believe there would be severe impacts associated with carving out Dairyland’s GFAs. Dairyland also states that the November 2007 GFA Order indicated that carved-out GFAs accounted for approximately seven percent of Midwest ISO’s total load, and claims that the addition of Dairyland’s proposed GFAs does not materially change that number.<sup>64</sup> Finally, Dairyland argues that, according to the record, Dairyland would absorb \$0.62/MWh in increased costs without its requested carve-outs. Therefore, Dairyland contends that the Initial Order disproportionately harms Dairyland by exposing it to increased costs in the absence of carved-out status, adding that the Initial Order did not consider the potential impacts of Tariff disparities on Dairyland.<sup>65</sup>

### **Commission Determination**

48. We reject Dairyland’s arguments that it was never the Commission’s position that no future transmission owner could obtain carved-out status for its GFAs, and that the Commission previously approved a tariff provision permitting GFA carve-outs from new

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<sup>62</sup> *Id.* at 18.

<sup>63</sup> *Id.* (quoting November 2007 GFA Order, 121 FERC ¶ 61,166 at P 39 (quoting *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348, 355 (1956))).

<sup>64</sup> *Id.* at 19 (citing November 2007 GFA Order, 121 FERC ¶ 61,166 at P 28-29).

<sup>65</sup> *Id.* at 20 (citing *City of Bethany v. FERC*, 72 F.2d 1131, 1139-40 (D.C. Cir. 1984); *Public Service Co. of Indiana v. FERC*, 575 F.2d 1204, 1212 (7<sup>th</sup> Cir. 1978)).

transmission owners. The Commission has made abundantly clear that the carve-out option was initially approved with the understanding that carved-out GFAs represented a relatively minor and declining segment of the Midwest ISO market.<sup>66</sup> In addition, carve-outs were only permitted to the extent that the Commission perceived them to be limited in scope and in number of megawatts involved. According to the Commission, “larger carve-outs [ ] would require us to reevaluate this [carve-out] treatment.”<sup>67</sup>

49. While the November 2007 GFA Order accepted Midwest ISO’s proposal to continue carved-out treatment after expiration of the transition period, the Commission noted the small number of carve-outs as well as its expectation that this number would continue to decrease over time, which would result in a more reliable Midwest ISO system.<sup>68</sup> The Midwest ISO Tariff provisions governing GFA carve-outs, then, are subject to the size limitations and overall reductions contemplated in the GFA orders.<sup>69</sup> Further, the November 2007 GFA Order required Midwest ISO’s quarterly reports on GFA carve-outs to include termination dates for the remaining carved-out GFAs and to monitor their expiration.<sup>70</sup> The Commission has placed significant emphasis on the overall reduction of GFA carve-outs as the Midwest ISO markets matured, and made clear that prospective transmission owners could not rely on carved-out treatment being available indefinitely.<sup>71</sup>

50. We reject Dairyland’s argument that the Commission did not consider “any offsetting decreases” from expiring GFAs. The Commission, through Midwest ISO’s quarterly reports on GFA carve-outs, is aware of future expiring GFA carve-outs, and that the overall size of the carve-out has dwindled since energy market start-up. Nevertheless, that a certain number of existing carve-outs may be expiring provides no

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<sup>66</sup> See September 2004 GFA Order, 108 FERC ¶ 61,236 at P 143; *see also* November 2007 GFA Order, 121 FERC ¶ 61,166 at P 48.

<sup>67</sup> September 2004 GFA Order, 108 FERC ¶ 61,236 at P 143.

<sup>68</sup> November 2007 GFA Order, 121 FERC ¶ 61,166 at P 45, 48.

<sup>69</sup> See September 2004 GFA Order, 108 FERC ¶ 61,236 at P 143, 146; November 2007 GFA Order, 121 FERC ¶ 61,166 at P 45, 48.

<sup>70</sup> See November 2007 GFA Order, 121 FERC ¶ 61,166 at P 70, 45, 48.

<sup>71</sup> See September 2004 GFA Order, 108 FERC ¶ 61,236 at P 143; *see also* November 2007 GFA Order, 121 FERC ¶ 61,166 at P 48.

compelling reason for the Commission to vacillate from its position that the number of carve-outs would *continue* to decrease over time.

51. Dairyland argues that the Initial Order should have compared Dairyland's all-requirements contracts to Midwest ISO's total load, and further states that its total GFA load should have been compared to the GFA load of other Midwest ISO cooperative members. We disagree. Dairyland proposed to carve out of the Midwest ISO markets nearly 700 MW, which would have substantially increased in the size of Midwest ISO's GFA carve-out. As stated earlier, the Commission previously indicated that carved-out GFA treatment was possible only because of the small number of megawatts involved and the expectation that carve-outs would decrease over time.<sup>72</sup> Therefore, an analysis of the impact of Dairyland's proposed carve-outs requires a comparison of the number of megawatts implicated in the requested carve-out with the size of Midwest ISO's then-existing carve-out.

52. Further, looking at Dairyland's total GFA load and the GFA load of other Midwest ISO cooperative members is not a relevant comparison. Dairyland is not similarly situated to transmission-owning members who were already a part of Midwest ISO at the time of energy market start-up. Whether or not Dairyland is similarly situated to other transmission-owning members that joined Midwest ISO after energy market start-up, any discrimination between Midwest ISO members and Dairyland is not undue if it is premised upon a legitimate factor. Here, Dairyland proposed to carve out of the Midwest ISO markets nearly 700 MW, which would have increased by more than ten percent the then-current size of the carve-out despite the fact that the September 2004 GFA Order and the November 2007 GFA Order indicated that carved-out treatment would not continue indefinitely, and that carve-outs were only possible to the extent they were limited in scope.<sup>73</sup> Midwest ISO's proposed GFA revisions were not unduly discriminatory towards prospective transmission owners, because Midwest ISO presented a valid basis for changing the treatment of GFAs going forward. In addition, as discussed above, Dairyland had no reasonable expectation that carved-out GFA treatment would remain available indefinitely.

53. While Dairyland argues that granting carved-out status to its GFAs would not constitute a reversal in the trend towards a decrease in carved-out load over time, we note

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<sup>72</sup> See September 2004 GFA Order, 108 FERC ¶ 61,236 at P 143; *see also* November 2007 GFA Order, 121 FERC ¶ 61,166 at P 48.

<sup>73</sup> See September 2004 GFA Order, 108 FERC ¶ 61,236 at P 143; *see also* November 2007 GFA Order, 121 FERC ¶ 61,166 at P 48.



that the Commission has previously indicated that carved-out GFA treatment was possible only because of the small number of megawatts involved,<sup>74</sup> and because the size of the carve-out would decrease over time.<sup>75</sup> Therefore, we find that allowing an increase such as that requested by Dairyland would contravene the Commission's stated policy regarding GFA carve-outs and would undermine the Commission's long-held expectation that the number of carve-outs would continue to decrease.

54. We further reject Dairyland's argument that the Initial Order did not sufficiently distinguish between the severity of the impact of Dairyland's costs associated with its GFAs and the impacts associated with the September 2004 GFA Order and the November 2007 GFA Order. Dairyland's argument suggests that it is similarly situated to the existing Midwest ISO members at issue in those GFA orders. As stated above, however, Dairyland is not similarly situated to transmission-owning members who were part of Midwest ISO at the time of energy market start-up, and whether or not Dairyland is similarly situated to other transmission-owning members that joined Midwest ISO after energy market start-up, any discrimination between Midwest ISO members and Dairyland is not undue if it is premised upon a legitimate factor.

55. Further, Dairyland's reliance on the November 2007 Order is inapposite. The primary focus of the November 2007 GFA Order was whether modifying or abrogating existing carved-out GFAs protected under *Mobile-Sierra* was justifiable under the public interest standard of review given the costs shifts associated with those carved-out GFAs. As we have noted before, this is not the same issue presented here, which is whether an increase in the carve-out can be justified to accommodate the terms on which Dairyland proposes to integrate into Midwest ISO. The November 2007 Order concluded that "the end of the transition period [ ] is not significant enough to justify modification of the existing GFAs or a change in their treatment,"<sup>76</sup> and determined that there would be relatively small advantages to integrating the existing carved-out GFAs into the markets compared to the disadvantages that would result from requiring them to conform to the Midwest ISO tariff.<sup>77</sup> We do not employ the same analysis here, where Dairyland proposes to integrate new GFAs to the Midwest ISO energy markets for the first time.

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<sup>74</sup> See September 2004 GFA Order, 108 FERC ¶ 61,236 at P 143; *see also* November 2007 GFA Order, 121 FERC ¶ 61,166 at P 48.

<sup>75</sup> November 2007 GFA Order, 121 FERC ¶ 61,166 at P 48.

<sup>76</sup> *Id.* P 49.

<sup>77</sup> November 2007 GFA Order, 121 FERC ¶ 61,166 at P 48.

56. We further reject Dairyland's claim that Midwest ISO's unconditional approval of Dairyland's membership prior to issuance of Initial Order suggests that Midwest ISO did not believe there would be severe impacts associated with extending carved-out GFA eligibility to Dairyland's agreements. Nothing in the record supports this conclusion, or suggests that Midwest ISO's unconditional approval indicates that the impacts of extending carved-out treatment to Dairyland's GFAs would or would not be severe. Instead, Dairyland admits that Midwest ISO staff had earlier cautioned it that Midwest ISO did not support the full extent of the proposed carve-out, and that Dairyland had disregarded Midwest ISO staff's representations. Following Dairyland's rationale, the fact that Dairyland withdrew and waived any condition relating to GFA carve-outs in connection with its application for Midwest ISO membership suggests that Dairyland did not regard a potential denial of its requested carve-outs by Midwest ISO as fatal to its efforts to integrate into Midwest ISO. Further, as discussed above, Dairyland had no reasonable expectation that carved-out GFA treatment would remain available indefinitely.

57. Finally, we reject Dairyland's argument that the Initial Order disproportionately harms Dairyland by exposing it to increased costs in the absence of carved-out status. As stated above,<sup>78</sup> Dairyland, as a prospective Midwest ISO transmission owner, can weigh the benefits of membership against the discomfiture of not being permitted to carve out GFA.<sup>79</sup>

## 2. Genoa 3 Agreement

58. Dairyland and Great River raise issues pertaining to an agreement between the two parties relating to Dairyland's Genoa Station No. 3 (Genoa 3 Agreement).<sup>80</sup> According to Dairyland, while the Genoa 3 Agreement satisfied the requirements for carved-out GFA status under the previous version of Midwest ISO Tariff section 38.8.3(A), Midwest ISO relied on the GFA Tariff amendment and did not amend Attachment P to include the Genoa 3 Agreement.

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<sup>78</sup> *See supra* P 22-23.

<sup>79</sup> Initial Order, 129 FERC ¶ 61,221 at P 40.

<sup>80</sup> Under the Genoa 3 Agreement, a contractually defined portion of Dairyland's transmission system is utilized to deliver Great River's capacity entitlement, and Great River in turn reimburses Dairyland for all costs of Great River's use of the Dairyland transmission system to deliver the Great River entitlement.

59. Dairyland argues that while the Initial Order did not address treatment of the Genoa 3 Agreement, the Commission rejected Midwest ISO's proposed language eliminating the availability of carved-out GFA status for existing agreements between prospective new members and other transmission owners, and directed Midwest ISO to revise its Tariff accordingly. Therefore, Dairyland contends, the Genoa 3 Agreement between Dairyland (as a prospective transmission owner) and Great River (as an existing transmission owner) qualifies for carved-out status. According to Dairyland, however, Midwest ISO advised Dairyland that the Initial Order denied Dairyland's proposal to carve out the Genoa 3 Agreement. Dairyland argues that the Initial Order provides that agreements between prospective Midwest ISO members and other transmission owners are eligible for carved-out status and, therefore, the Genoa 3 Agreement is eligible for carved-out treatment.

60. Dairyland states that if the Initial Order was intended to preclude carved-out GFA treatment for the Genoa 3 Agreement, Dairyland seeks rehearing. Dairyland raises two discrete issues: (1) the Initial Order provides no authority under which utilities can disregard filed rates in anticipation of Commission action on a proposal to amend the filed rate;<sup>81</sup> and (2) contrary to the Initial Order, Midwest ISO could not have waited to file its Tariff amendment until 60 days prior to Dairyland's planned integration in Midwest ISO on June 1, 2010.<sup>82</sup> Dairyland maintains that Midwest ISO's filing in Docket No. ER10-74-000 explicitly instructed the Commission that "Commission action on Dairyland's proposed GFAs was required by December 15, 2009, to enable Dairyland to integrate in the Midwest ISO by June 1, 2010."<sup>83</sup> Therefore, Dairyland contends that consideration of its complaint could not wait until 60 days prior to the June 1, 2010 integration date because, absent Commission action by December 15, 2009, "a June 1, 2010 integration could not be met."

61. According to Great River, the Initial Order does not directly address the Genoa 3 Agreement beyond stating that "Dairyland's thirty GFA contracts will be classified as described in this order."<sup>84</sup> Great River states that it is unclear exactly what agreements

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<sup>81</sup> Dairyland Rehearing Request at 23.

<sup>82</sup> *Id.* at 22-23 (quoting Initial Order, 129 FERC ¶ 61,221 at P 52).

<sup>83</sup> *Id.* at 23.

<sup>84</sup> Great River Rehearing Request at 6 (quoting Initial Order, 129 FERC ¶ 61,221 at Ordering Paragraph (C)). Great River states that the Initial Order did not rule on whether any of the GFAs are eligible for carved-out treatment under the Midwest ISO Tariff, as amended, but instead ruled that the eligibility of the GFAs must be evaluated

these comprise, and adds that the Genoa 3 Agreement was never contained in Attachment P and not listed among the thirty GFAs identified by the Commission. Therefore, Great River requests Commission clarification that the Genoa 3 Agreement is not eligible for carved-out GFA treatment, or confirm that the Commission has not made a determination regarding whether the Genoa 3 Agreement meets the eligibility criteria for carved-out GFA treatment. According to Great River, clarification is necessary to ensure that only those agreements that satisfy the approved criteria under the Tariff are eligible to be carved out.<sup>85</sup>

62. In the event that the Commission denies the requested clarification, and thereby concludes that the Genoa 3 Agreement is eligible for carved-out treatment, Great River requests rehearing. Great River argues that the Initial Order did not adequately address arguments raised by Great River demonstrating that the Genoa 3 Agreement is not eligible for carved-out GFA status, and proceeds to summarize those arguments.<sup>86</sup> Great River contends that upon Dairyland's integration in Midwest ISO, the transmission systems of both Great River and Dairyland will be under a common network, both will recover costs pursuant to the Midwest ISO Tariff, and transmission charges under the Genoa 3 Agreement will no longer be applicable.<sup>87</sup> Therefore, Great River argues that since Dairyland will not be providing transmission service under the Genoa 3 Agreement upon its integration into Midwest ISO, the agreement is not eligible for carved-out status.

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based upon the approved criteria, and that Midwest ISO must make the appropriate Section 205 filing to amend its Attachment P.

<sup>85</sup> *Id.* at 4-7. Great River contends that the Genoa 3 Agreement is not eligible for carved-out GFA treatment because, under the terms of the agreement, Dairyland will not be providing transmission service to Great River upon its integration into Midwest ISO. Great River cites to Midwest ISO Tariff section 38.8.3(A)b which specifies that a GFA may only be carved-out if it provides for "transmission service by an entity that is not a public utility."

<sup>86</sup> *Id.* at 8-9 (citing Great River November 19 Protest, Docket No. EL10-9-000, at 9-13 (filed November 19, 2009)).

<sup>87</sup> Great River explains that, pursuant to a May 1, 1999 Memorandum of Understanding between Dairyland and Great River regarding the Genoa 3 Agreement (Genoa 3 Memorandum of Understanding), transmission services and charges do not apply when the facilities of Great River and Dairyland are aggregated within a common transmission network. *Id.* at 9 (quoting Great River November 19 Protest, Docket No. EL10-9-000, at 9-13 (filed November 19, 2009)).

63. Great River goes on to argue that parties to carved-out GFAs added after September 16, 2004 can choose to convert to service under the Tariff, rather than to have their agreements carved out from the Midwest ISO Tariff.<sup>88</sup> Therefore, Great River argues that to the extent the Genoa 3 Agreement would be eligible for carved-out status, the Commission should confirm that: (1) Great River has the option of converting the transmission service under the Genoa 3 Agreement to service provided pursuant to the Midwest ISO Tariff upon Dairyland's integration; and (2) Great River's election not to continue taking transmission service currently provided under the Genoa 3 Agreement precludes the inclusion of that agreement as a carved-out GFA under Attachment P.

64. Great River contends that allowing Dairyland to impose transmission charges under the Genoa 3 Agreement upon integration into Midwest ISO would subject Great River to pancaked transmission charges for load service, contrary to Commission policy.<sup>89</sup> Great River goes on to state that carving out the Genoa 3 Agreement would force Great River to convert approximately 150 MW of existing network service to GFA status. Finally, Great River argues that there is no risk that Dairyland would incur trapped costs related to the Genoa 3 Agreement since, under the terms of the Genoa 3 Memorandum of Understanding, Dairyland will not be providing Great River with transmission service under the Genoa 3 Agreement upon its integration into Midwest ISO. Instead, Great River contends that carving out the Genoa 3 Agreement would force Great River to take and pay for service from both Dairyland and Midwest ISO for the same load, thereby resulting in trapped costs for Great River through pancaked rates.

#### **Commission Determination**

65. We deny requests for clarification and rehearing. In the Initial Order, the Commission found that Dairyland did not show that Midwest ISO's alleged failure to file the Attachment P tariff sheets provided by Dairyland (including the Genoa 3 Agreement) constituted a violation of the Midwest ISO Tariff.<sup>90</sup> The Commission also directed Midwest ISO to reinstate those GFAs previously listed on Attachment P that Midwest

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<sup>88</sup> *Id.* at 10-11.

<sup>89</sup> Great River states that, as a Midwest ISO network customer, 100 percent of its load is subject to network service charges in the pricing zones in which it resides, and adds that a separate charge for delivery over Dairyland's transmission facilities that will be part of the Midwest ISO network would result in Great River load paying twice for transmission service under the Midwest ISO Tariff. *Id.* at 12, n.33.

<sup>90</sup> *See* Initial Order, 129 FERC ¶ 61,221 at P 52.

ISO proposed to remove.<sup>91</sup> The Commission did not address or otherwise prejudge the issue of whether the Genoa 3 Agreement, which was not previously included in Attachment P, is eligible for inclusion in Attachment P as a GFA and, if so, whether it is eligible for carved-out status under the terms of Tariff governing carved-out GFA treatment, as approved in the Initial Order.

66. We note that the Genoa 3 Agreement is between two entities, Dairyland and Great River, that are not public utilities as defined in FPA section 201.<sup>92</sup> The Commission lacks jurisdiction over contracts for services provided by non-jurisdictional entities and, therefore, has no authority to make any modification to the Genoa 3 Agreement. We further note that the Commission cannot directly regulate non-jurisdictional entities even after they join a Commission-jurisdictional regional transmission organization or independent system operator. To the extent there continues to be any disagreement between Dairyland and Great River regarding the terms of the Genoa 3 Agreement, this is a contractual dispute between these two parties, and is more appropriately addressed in the relevant court.

### **III. Midwest ISO's Compliance Filings**

67. On January 14, 2010, Midwest ISO submitted compliance filings revising tariff language on eligibility of carved-out GFA treatment,<sup>93</sup> and reinstating previously-listed GFAs on Attachment P of its Tariff.<sup>94</sup> Specifically, in its GFA Compliance filing, Midwest ISO filed revised tariff sheets permitting the availability of carved-out GFA status for existing agreements between a new member and another transmission owner, as well as making Option A and Option C GFA treatment available for existing agreements with affiliates and member-owners.

68. In its Attachment P Compliance filing, Midwest ISO filed revisions to Attachment P reinstating several of Dairyland's GFAs in which the other party to the GFA is a

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<sup>91</sup> *See id.*

<sup>92</sup> 16 U.S.C. § 824e (2006).

<sup>93</sup> Midwest ISO January 14, 2010 GFA Compliance Filing, Docket No. ER10-73-002 (Midwest ISO GFA Compliance).

<sup>94</sup> Midwest ISO January 14, 2010 Attachment P Compliance Filing, Docket No. ER10-74-002 (Midwest ISO Attachment P Compliance).

transmission owner.<sup>95</sup> In addition, Midwest ISO proposed adding the following footnote: “Dairyland is also a party to GFA Nos. 20, 41, 290, 293 and 467.”<sup>96</sup> Midwest ISO explains that it adopted a similar footnote in association with the recent integration of MidAmerican Energy Company to avoid the duplicative second listing, under a new transmission owner, of GFAs already listed in Attachment P under counterparties that are existing transmission owners.

**A. Notice of Filing and Responsive Pleadings**

69. Notice of Midwest ISO’s compliance filings in Docket Nos. ER10-73-002 and ER10-74-002 were published in the *Federal Register*, 75 Fed. Reg. 4370 (2010), with interventions or comments due on or before February 4, 2010. A conditional protest was filed by Dairyland in both compliance dockets. Midwest ISO filed an answer to Dairyland’s protest on February 17, 2010.

**B. Discussion**

**1. Procedural Matters**

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

**2. Substantive Matters**

**a. Dairyland’s Protest**

71. Dairyland argues that Midwest ISO’s Attachment P Compliance filing did not revise Attachment P to specify those existing agreements with affiliates and member-owners for which Dairyland is entitled to select either Option A or Option C GFA treatment. According to Dairyland, it was informed by Midwest ISO staff that Midwest

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<sup>95</sup> Midwest ISO notes that one of these GFAs, No. 290, has been relisted as “excluded” (i.e., out of market). Midwest ISO states that it reserves the right to separately seek a change to this “excluded” classification in light of Dairyland’s integration which would render inapplicable the premise that it was previously excluded on the ground that it did not involve any use of, and did not otherwise affect, Midwest ISO’s transmission system. Midwest ISO Attachment P Compliance at 3.

<sup>96</sup> See Footnote No. 1 on Midwest ISO Substitute Original Sheet No. 2890H.

ISO envisioned an additional two steps to accomplish this revision whereby Dairyland would complete separate GFA templates for each distinct legal entity,<sup>97</sup> after which Midwest ISO would make an additional filing to add the twenty-five member contracts to Attachment P. Dairyland states that it should be notified immediately in the event that Midwest ISO does not intend for each of the twenty-five all-requirements contracts to fully qualify for Option A or Option C GFA treatment. Dairyland further states that, in the event these additional steps are only needed for purposes of additional time for Midwest ISO to make the additional Attachment P revisions, then Dairyland does not protest the compliance filings, but reserves the right to comment on the subsequent filing.

72. Dairyland next cites to the footnote in Midwest ISO's Attachment P Compliance filing, which states that Dairyland is also a party to GFA Nos. 20, 41, 290, 293 and 467. According to Dairyland, while Midwest ISO states the purpose of the footnote is to avoid the duplicative second listing, under a new transmission owner, of GFAs already listed in Attachment P under counterparties that are existing transmission owners, Dairyland believes that the footnote is intended to indicate that transmission service provided by Dairyland under those five GFAs is pursuant to the terms of those GFAs and is carved-out of (or in the case of GFA No. 290, is excluded from) Midwest ISO's energy and operating reserves markets. Dairyland is concerned, however, that the footnote does not adequately explain that Dairyland provides transmission service pursuant to the specified GFAs. Dairyland therefore requests the footnote be revised to state "Dairyland is also a Transmission Owner providing transmission service pursuant to GFA Nos. 20, 41, 290, 293, and 467."<sup>98</sup>

73. Dairyland adds that if, on the other hand, Midwest ISO's footnote was not intended to mean that transmission service under those GFAs is provided by Dairyland pursuant to the terms of those GFAs, and thus the GFAs are carved-out of (or in the case of GFA No. 290, is excluded from) Midwest ISO's energy and operating reserves markets, then Midwest ISO should indicate this immediately to permit the Commission to address the matter with its consideration of the Midwest ISO's GFA and Attachment P Compliance filings.<sup>99</sup>

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<sup>97</sup> According to Dairyland, this refers to each member cooperative that has entered into an all-requirements agreement with Dairyland. Dairyland February 4, 2010 Protest at 2.

<sup>98</sup> Dairyland February 4, 2010 Protest at 3-4. Dairyland states that if Midwest ISO is amenable to this revision, Dairyland does not protest the matter.

<sup>99</sup> Dairyland adds that its acquiescence in the two matters raised in its February 4,



**b. Midwest ISO's Answer**

74. Midwest ISO states that it does not have the authority under its Tariff to make the Option A or Option C election for parties to a GFA, and adds that parties must inform Midwest ISO of their election, which Midwest ISO will incorporate into its Tariff sheets prior to Dairyland's integration, and file the revised Attachment P with the Commission.

75. In response to Dairyland's issues with the footnote in Midwest ISO's Attachment P Compliance filing, Midwest ISO explains that the footnote is a standard cross-reference adopted by Midwest ISO for all multi-party GFAs, as a convenience to the reader, which has no effect on the rights and obligations of the parties, or the classification of any GFA. Further, Midwest ISO states that Dairyland's proposed change is unnecessary and would be inaccurate because, until Dairyland integrates its system, it is providing service under its current contracts, and not as a transmission owner as defined by the Tariff.

**c. Commission Determination**

76. We find that Midwest ISO, in its GFA Compliance filing, has complied with the requirements of the Initial Order by revising its Tariff sheets to permit the availability of carved-out GFA status for existing agreements between a new member and another transmission owner, and to make Option A and Option C GFA treatment available for existing agreements with affiliates and member-owners. We also find that Midwest ISO, in its Attachment P Compliance filing, has properly reinstated specified agreements between Dairyland and other transmission owners which the Initial Order concluded had been inappropriately deleted from Attachment P.

77. While Dairyland expressed concerns about adding the twenty-five existing agreements to Attachment P and electing Option A or Option C treatment, we note that, on March 12, 2010, in Docket No. ER10-866-000, Midwest ISO filed to add all twenty-five existing agreements to Attachment P with Option A status.<sup>100</sup> Therefore, Dairyland's concerns are now moot.

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2010 Protest should not be construed as a waiver of Dairyland's ability to seek rehearing or judicial review of the Initial Order, including the issue of whether the Genoa 3 Agreement should have been denied carved-out status and left off of Attachment P. Dairyland February 4, 2010 Protest at 4-5.

<sup>100</sup> We note that Midwest ISO's filing in Docket No. ER10-866-000 is unprotested.

78. In addition, we accept Midwest ISO's proposed footnote which it includes as part of its Attachment P Compliance filing, and reject Dairyland's proposed modification to this footnote. We find that, based on Midwest ISO's clarification that the footnote is a standard cross-reference adopted by Midwest ISO for all multi-party GFAs which has no effect on the rights and obligations of the parties, or the classification of any GFA, that the footnote is properly included as part of Attachment P.

The Commission orders:

(A) The requests for rehearing and clarification of the Initial Order are hereby denied, as discussed above.

(B) Midwest ISO's compliance filing in Docket No. ER10-73-002 is hereby accepted effective December 16, 2009, as discussed above.

(C) Midwest ISO's compliance filing in Docket No. ER10-74-002 is hereby accepted effective June 1, 2010, as discussed above.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.