

138 FERC ¶ 61,039  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Philip D. Moeller, John R. Norris,  
and Cheryl A. LaFleur.

Ameren Services Company  
Northern Indiana Public Service Company

Docket Nos. EL07-86-018

v.

Midwest Independent Transmission System  
Operator, Inc.

Great Lakes Utilities  
Indiana Municipal Power Agency  
Missouri Joint Municipal Electric Utility Commission  
Missouri River Energy Services  
Prairie Power, Inc.  
Southern Minnesota Municipal Power Agency  
Wisconsin Public Power Inc.

EL07-88-018

v.

Midwest Independent Transmission System  
Operator, Inc.

Wabash Valley Power Association, Inc.

EL07-92-018

v.

Midwest Independent Transmission System  
Operator, Inc.

ORDER DISMISSING NOTICE OF NON-COMPLIANCE  
AND DENYING REQUEST FOR REHEARING

(Issued January 19, 2012)

1. On May 9, 2011, SESCO Enterprises LLC, Energy Endeavors LP, and JPTC, LLC (collectively, the Financial Marketers) submitted a filing entitled “Notice of Non-Compliance and Request for Immediate Commission Action or, in the Alternative, Request for Rehearing.” In their filing, the Financial Marketers allege that Midwest Independent Transmission System Operator, Inc. (Midwest ISO) has been improperly imposing real-time Revenue Sufficiency Guarantee charges on virtual demand bids in its markets since April 1, 2011. They ask the Commission to direct Midwest ISO to stop imposing such charges on virtual demand bids and to pay refunds. In the alternative, the Financial Marketers ask the Commission to grant rehearing of an order issued in this proceeding on April 7, 2011.<sup>1</sup>

2. In this order, the Commission denies the Financial Marketers’ request for rehearing and dismisses their notice of non-compliance and request for immediate Commission action.

### **I. Background**

3. On April 25, 2006, the Commission issued an order in Docket No. ER04-691-065 rejecting Midwest ISO’s proposal to, among other things, remove references to virtual supply offers from the provisions of its Transmission and Energy Markets Tariff (tariff) related to calculating real-time Revenue Sufficiency Guarantee charges.<sup>2</sup> The Commission found that, because Midwest ISO had not been including virtual supply offers in its Revenue Sufficiency Guarantee calculations, it had violated its tariff and must provide appropriate refunds.<sup>3</sup> The Commission subsequently exercised its discretion on rehearing and held that these refunds were not required.<sup>4</sup>

4. In August 2007, three groups of utilities filed complaints under section 206 of the Federal Power Act (FPA)<sup>5</sup> alleging that the real-time Revenue Sufficiency Guarantee

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<sup>1</sup> *Ameren Servs. Co. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 135 FERC ¶ 61,007 (2011) (Clarification Order).

<sup>2</sup> *Midwest Indep. Transmission Sys. Operator, Inc.*, 115 FERC ¶ 61,108, at P 48-49 (Revenue Sufficiency Guarantee Order), *order on reh’g*, 117 FERC ¶ 61,113 (2006) (First Rehearing Order), *order on reh’g*, 118 FERC ¶ 61,212 (Second Rehearing Order), *order on reh’g*, 121 FERC ¶ 61,131 (2007) (Third Rehearing Order).

<sup>3</sup> Revenue Sufficiency Guarantee Order, 115 FERC ¶ 61,108 at P 26.

<sup>4</sup> First Rehearing Order, 117 FERC ¶ 61,113 at P 92-96.

<sup>5</sup> 16 U.S.C. § 824e (2006). The Complainants are Ameren Services Company and Northern Indiana Public Service Company (Ameren/Northern Indiana); Great Lakes Utilities, Indiana Municipal Power Agency, Missouri Joint Municipal Electric Utility Commission, Missouri River Energy Services, Prairie Power, Inc., Southern Minnesota

charge contained in Midwest ISO's tariff unduly discriminated among classes of market participants. The Commission found that the Complainants had shown that the rate in question may be unjust, unreasonable, or unduly discriminatory, but that they had not shown that their proposed alternative rate was just and reasonable.<sup>6</sup> In order to develop a more complete record, the Commission established a refund effective date of August 10, 2007, and set the complaints for paper hearing and investigation to review evidence and to establish a just and reasonable Revenue Sufficiency Guarantee cost allocation methodology.<sup>7</sup> The Commission held the paper hearing in abeyance until the earlier of the conclusion of a then-ongoing stakeholder proceeding that was seeking to identify possible improvements to the Revenue Sufficiency Guarantee cost allocation methodology or February 1, 2008.

5. On February 1, 2008, Midwest ISO made an informational filing stating that it was not able to meet the February 1, 2008 deadline because the Revenue Sufficiency Guarantee Task Force was still engaged in negotiations. Midwest ISO proposed to file specific tariff provisions and supporting documentation on or about March 3, 2008.

6. On March 3, 2008, Midwest ISO filed what it referred to as "indicative" tariff revisions. Midwest ISO explained that the revised tariff provisions set out a new real-time Revenue Sufficiency Guarantee cost allocation methodology (Indicative Rate). Midwest ISO stated that it would agree to file Ancillary Services Markets-specific tariff provisions under section 205 of the FPA<sup>8</sup> reflecting the Indicative Rate if the Commission determined that the proposed tariff language was a just and reasonable basis for adapting the new real-time Revenue Sufficiency Guarantee cost allocation methodology to the Ancillary Services Markets context.

7. On August 21, 2008, the Commission issued an order commencing a paper hearing.<sup>9</sup> The Commission noted that, under section 206(b) of the FPA, Complainants, not Midwest ISO, carried the burden of proof and therefore were required to demonstrate

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Municipal Power Agency, and Wisconsin Public Power Inc.; and Wabash Valley Power Association, Inc.

<sup>6</sup> *Ameren Servs. Co. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 121 FERC ¶ 61,205 (2007) (Order on Revenue Sufficiency Guarantee Complaints), *order on reh'g*, 125 FERC ¶ 61,162 (2008) (Rehearing Order on Revenue Sufficiency Guarantee Complaints).

<sup>7</sup> *Id.* P 94.

<sup>8</sup> 16 U.S.C. § 824d (2006).

<sup>9</sup> *Ameren Servs. Co. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 124 FERC ¶ 61,173 (2008), *reh'g denied*, 131 FERC ¶ 61,214 (2010).

that the rate in effect was unjust and unreasonable and that their proposed alternative rate was just and reasonable.<sup>10</sup>

8. On November 10, 2008, the Commission issued an order finding that Midwest ISO's indicative tariff revisions provided a just and reasonable basis for future Revenue Sufficiency Guarantee cost allocations.<sup>11</sup> As relevant here, the Indicative Rate allocated Revenue Sufficiency Guarantee costs based on cleared virtual supply offers and the negative of cleared virtual demand bids. The Commission found that the Indicative Rate was just and reasonable because it allocated costs to the factors that had been determined to "contribute to unit commitment and the incurrence of Revenue Sufficiency Guarantee costs . . . including virtual supply offers."<sup>12</sup> The Commission recognized that Midwest ISO could not implement the Indicative Rate before the start of the Ancillary Services Markets and that further adjustments would be necessary to conform the indicative tariff revisions to the Ancillary Services Markets. Therefore, the Commission stated that it would allow Midwest ISO to file the Indicative Rate after it made adjustments necessary to conform the proposal to the Ancillary Services Markets tariff.<sup>13</sup> In response, Midwest ISO submitted a compliance filing on February 23, 2009 (Redesign Proposal).

9. On August 30, 2010, the Commission issued an order conditionally accepting in part and rejecting in part the Redesign Proposal, which included tariff sheets to implement the indicative tariff revisions.<sup>14</sup> In relevant part, the Commission stated that it agreed with protesters that Midwest ISO's proposed revisions to section 40.3.3.a.ii.4 allocated costs based on virtual demand bids and was inconsistent with the Indicative Rate. The Commission explained that, as proposed by Midwest ISO, the proposed formulation of virtual offers and virtual bids in the constraint management charge incorrectly treated virtual bids as positive factors and virtual offers as negative factors in

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<sup>10</sup> *Id.* P 9.

<sup>11</sup> *Ameren Servs. Co. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 125 FERC ¶ 61,161 (2008) (Order on Paper Hearing), *order on reh'g*, 127 FERC ¶ 61,121 (2009).

<sup>12</sup> *Id.* P 109.

<sup>13</sup> *Id.* P 118.

<sup>14</sup> *Ameren Servs. Co. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 132 FERC ¶ 61,186, at P 3 (2010) (Compliance Order). The Compliance Order required Midwest ISO to propose a specific effective date for the tariff revisions once appropriate software was ready for implementation. *Id.* P 140. The tariff revisions went into effect on April 1, 2011. *Ameren Servs. Co. v. Midwest Indep. Transmission Sys. Operator, Inc.*, Docket Nos. EL07-86-015, EL07-88-015, and EL07-92-015 (Aug. 4, 2011) (delegated letter order).

the calculation of the constraint management charge. The Commission required Midwest ISO to revise this provision to treat virtual offers as a positive factor and virtual bids as a negative factor so that it would be consistent with the indicative tariff revisions and with cost causation.<sup>15</sup>

10. On October 29, 2010, Midwest ISO submitted the compliance filing required by the Compliance Order. Among other things, Midwest ISO revised section 40.3.3.a.ii(4) to treat virtual offers as constituting a positive factor, and virtual bids as a negative factor, in the calculation of the constraint management charge.

11. On April 7, 2011, the Commission issued both the Clarification Order, addressing requests for rehearing of the Compliance Order, and an order addressing Midwest ISO's compliance filing.<sup>16</sup> In the Clarification Order, the Commission granted in part and denied in part requests for rehearing of the Compliance Order, including Midwest ISO's request for rehearing of the Commission's decision to require Midwest ISO to modify its proposed formulation of virtual offers and bids to be consistent with the indicative tariff revisions and with cost causation.<sup>17</sup> The Commission reiterated that Midwest ISO's proposal was inconsistent with the Indicative Rate, which based the constraint management charge on positive virtual offers and negative virtual bids.<sup>18</sup> In the April 7 Compliance Order, the Commission, among other things, accepted Midwest ISO's proposed revisions to section 40.3.3.a.ii(4).<sup>19</sup>

## **II. Notice of Non-Compliance and Request for Rehearing**

12. The Financial Marketers allege that Midwest ISO has been imposing real-time Revenue Sufficiency Guarantee charges on virtual demand bids since April 1, 2011.<sup>20</sup> They state that the history of the proceedings concerning Revenue Sufficiency Guarantee charges demonstrates that the Commission has never authorized Midwest ISO to impose these charges on virtual demand bids, and that the Commission has actually rejected

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<sup>15</sup> Compliance Order, 132 FERC ¶ 61,186 at P 50, 66.

<sup>16</sup> *Ameren Servs. Co. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 135 FERC ¶ 61,008 (2011) (April 7 Compliance Order).

<sup>17</sup> Clarification Order, 135 FERC ¶ 61,007 at P 14, 18.

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

<sup>19</sup> April 7 Compliance Order, 135 FERC ¶ 61,008 at P 45.

<sup>20</sup> Financial Marketers Notice of Non-Compliance at 2-3, 20.

language that might have given Midwest ISO authority to do so.<sup>21</sup> They claim that Midwest ISO's tariff excludes virtual demand bids from these charges because Revenue Sufficiency Guarantee costs associated with constraint management are only assigned to positive deviations under the tariff (i.e., deviations that increase Revenue Sufficiency Guarantee costs), while section 40.3.3.a.ii(4) of the tariff assigns a negative value to virtual demand bids (i.e., they reduce Revenue Sufficiency Guarantee costs).<sup>22</sup> The Financial Marketers state that Midwest ISO has not demonstrated that imposing Revenue Sufficiency Guarantee charges on virtual demand bids is just and reasonable and that the Commission has explicitly held that allocating Revenue Sufficiency Guarantee charges to virtual demand bids is contrary to cost causation principles.<sup>23</sup> Therefore, the Financial Marketers request that the Commission direct Midwest ISO to cease its practice immediately and to pay refunds, with interest, on all virtual demand bids charged.

13. In the alternative, the Financial Marketers request rehearing of the Clarification Order on the grounds that the Commission erred in: (1) approving a charge on virtual demand bids that has not been published in a tariff and approved; (2) approving the allocation of Revenue Sufficiency Guarantee charges to virtual demand bids without record evidence showing that the imposition of such charges on virtual demand bids is just and reasonable; (3) approving, as part of a complaint proceeding, a change to a tariff that has not been shown to be unjust and unreasonable; and (4) approving tariff language that is impermissibly vague.<sup>24</sup>

### **III. Answers**

14. Midwest ISO and Northern Indiana Public Service Company (NIPSCO) filed answers.

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<sup>21</sup> *Id.* at 6-14 (citing Order on Revenue Sufficiency Guarantee Complaints, 121 FERC ¶ 61,205 at P 34, Rehearing Order on Revenue Sufficiency Guarantee Complaints, 125 FERC ¶ 61,162 at P 24; Order on Paper Hearing, 125 FERC ¶ 61,161 at P 109).

<sup>22</sup> *Id.* at 14. Section 40.3.3.a.ii(4) requires that for deviations occurring prior to the Notification Deadline, the Real-Time Revenue Sufficiency Guarantee Constraint Management Charge shall be based on any virtual transaction resulting from a cleared virtual supply offer or the negative of any virtual transaction resulting from a cleared virtual bid. *See* Midwest ISO FERC Electric Tariff, Fourth Revised Volume No. 1, Substitute Third Revised Sheet No. 1096.

<sup>23</sup> Financial Marketers Notice of Non-Compliance at 20.

<sup>24</sup> *Id.* at 4-6.

15. Midwest ISO and NIPSCO maintain that section 40.3.3.a.ii(4) of Midwest ISO's tariff imposes Revenue Sufficiency Guarantee charges on virtual demand bids.<sup>25</sup> According to Midwest ISO, the tariff revisions accepted in the April 7 Compliance Order and affirmed in the Clarification Order result in a Revenue Sufficiency Guarantee calculation that imposes charges on virtual demand bids. Midwest ISO states, however, that the current version of section 40.3.3.a.ii(4) is inconsistent with cost causation and should be revised in order to avoid imposing Revenue Sufficiency Guarantee charges on virtual demand bids.<sup>26</sup>

16. Midwest ISO asserts that the currently effective language of section 40.3.3.a.ii(4) results in an Revenue Sufficiency Guarantee calculation that imposes real-time Revenue Sufficiency Charges on virtual demand bids when the bids are at price nodes with negative Constraint Contribution Factors, indicating that virtual demand bids would reduce flows over the constraint and, therefore, should not be allocated Revenue Sufficiency Guarantee charges.<sup>27</sup> Midwest ISO explains, for example, that a 10 MW virtual demand bid at a price node with a Constraint Contribution Factor of -0.5 would result in a positive volume of 5 MW as the basis for an allocation of Revenue Sufficiency Guarantee charges to virtual bids.<sup>28</sup>

#### **IV. Discussion**

##### **A. Procedural Matters**

17. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2011), prohibits answers to rehearing requests. Thus, we will dismiss the answers of Midwest ISO and NIPSCO to the extent that they address the Financial Marketers' request for rehearing.

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<sup>25</sup> NIPSCO Answer at 1-3; Midwest ISO Answer at 5-7.

<sup>26</sup> Midwest ISO Answer at 5-7. We note that if Midwest ISO believes that the currently effective tariff language requires the imposition of Revenue Sufficiency Guarantee charges in a manner that is inconsistent with cost causation, Midwest ISO may make a filing under section 205 of the FPA to revise its tariff accordingly.

<sup>27</sup> *Id.* at 6-7.

<sup>28</sup> *Id.* at 7.

## B. Substantive Matters

18. We will deny the Financial Marketers' request for rehearing of the Clarification Order. The Commission does not allow rehearing of an order denying rehearing.<sup>29</sup> Any other result would lead to never-ending litigation as every response by the Commission to a party's arguments would allow yet another opportunity for rehearing (unless, presumably, that response were word-for-word identical to what the Commission earlier said).<sup>30</sup> Litigation before the Commission cannot be allowed to drag on indefinitely – at some point it must end – and so the Commission does not allow parties to seek rehearing of an order denying rehearing. And, as the U.S. Court of Appeals for the District of Columbia Circuit has put it, even “an improved rationale” would not justify a further request for rehearing.<sup>31</sup>

19. Rehearing of an order on rehearing lies only when the order on rehearing modifies the result reached in the original order in a manner that gives rise to a wholly new objection.<sup>32</sup> In fact, a second rehearing request is required to preserve appellate review rights in instances when the later order modifies the results of the earlier order in a significant way.<sup>33</sup>

20. In the Clarification Order, the Commission denied rehearing and affirmed its findings respecting virtual transactions in the Compliance Order. In these circumstances, no opportunity to seek rehearing remains. Accordingly, we will deny the Financial Marketers' rehearing request.

21. Additionally, we will dismiss the Financial Marketers' “Notice of Non-Compliance and Request for Immediate Commission Action.” In this case, the Financial

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<sup>29</sup> See, e.g., *Southern Company Services, Inc.*, 111 FERC ¶ 61,329 (2005); *AES Warrior Run, Inc. v. Potomac Edison Company d/b/a Allegheny Power*, 106 FERC ¶ 61,181 (2004); *Southwestern Public Service Co.*, 65 FERC ¶ 61,088, at 61,533 (1993).

<sup>30</sup> See, e.g., *Canadian Association of Petroleum Producers v. FERC*, 254 F.3d 289, 296 (D.C. Cir. 2001).

<sup>31</sup> *Southern Natural Gas Co. v. FERC*, 877 F.2d 1066, 1073 (D.C. Cir. 1999) (*Southern*) (citing *Tennessee Gas Pipeline Co. v. FERC*, 871 F.2d 1099, 1109-10 (D.C. Cir. 1988)). See also *Londonderry Neighborhood Coalition v. FERC*, 273 F.3d 416, 423-24 (1st Cir. 2001).

<sup>32</sup> *Southern*, 877 F.2d at 1073.

<sup>33</sup> *California Department of Water Resources v. FERC*, 306 F.3d 1121, 1125 (D.C. Cir. 2002); *Town of Norwood, Massachusetts v. FERC*, 906 F.2d 772, 775 (D.C. Cir. 1990).



Marketers have filed a so-called “Notice of Non-Compliance” pursuant to Rule 212 of the Commission’s Rules of Practice and Procedure,<sup>34</sup> which governs motions, alleging that Midwest ISO is administering its tariff incorrectly and asking the Commission to order Midwest ISO to stop its practice and pay refunds. In so doing, the Financial Marketers are raising a fresh claim against Midwest ISO after the Commission has issued a final order addressing the issues raised and after the opportunity for rehearing has passed. The Commission has discretion to determine the best procedures to address the issues before it, and, in these circumstances, we find that it would be inappropriate to consider the merits of the Financial Marketers’ claim.<sup>35</sup> While we understand that the Financial Marketers have concerns about the current allocation of Revenue Sufficiency Guarantee charges to virtual transactions, the appropriate vehicle for raising such claims is through the submission of a properly supported complaint under section 206 of the FPA.

The Commission orders:

(A) The Financial Marketers’ request for rehearing of the Clarification Order is hereby denied, as discussed in the body of this order.

(B) The Financial Marketers’ notice of non-compliance and request for Commission action is hereby dismissed, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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<sup>34</sup> 18 C.F.R. § 385.212 (2011).

<sup>35</sup> *See, e.g., Mobil Oil Exploration & Producing Se., Inc. v. United Distribution Cos.*, 498 U.S. 211, 230 (1991) (“An agency enjoys broad discretion in determining how best to handle related, yet discrete, issues in terms of procedures, . . . .”); *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 544-46 (1978) (stating that agencies have broad discretion over the formulation of their procedures); *Mich. Pub. Power Agency v. FERC*, 963 F.2d 1574, 1778-79 (1992) (noting the substantial deference afforded to agencies in ordering their proceedings).