

ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 06-1084

**CARGILL POWER MARKETS, LLC, *ET AL.*,
PETITIONERS,**

v.

**FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.**

**ON PETITION FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION**

**BRIEF FOR RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION**

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APRIL 25, 2007

FINAL BRIEF: JUNE 14, 2007

CIRCUIT RULE 28(A)(1) CERTIFICATE

A. Parties and Amici

To counsel's knowledge, all parties are presented in Petitioners' brief.

B. Rulings Under Review

1. Order Denying Complaint, *Cargill Power Markets LLC, et al. v. Midwest Independent Transmission System Operator, Inc.*, Docket No. EL05-66, 112 FERC ¶ 61,025 (2005), R. 12, JA 1;
2. Order Denying Rehearing, *Cargill Power Markets LLC, et al. v. Midwest Independent Transmission System Operator, Inc.*, Docket No. EL05-66, 113 FERC ¶ 61,233 (2005), R. 16, JA 15; and
3. Order Rejecting Request For Rehearing, *Cargill Power Markets LLC, et al. v. Midwest Independent Transmission System Operator, Inc.*, Docket No. EL05-66, 114 FERC ¶ 61,093 (2006), R. 18, JA 24.

C. Related Cases

This case has not previously been before any other court. A related petition for review of the first and second orders listed above, filed by the same Petitioners, *Cargill Power Markets LLC, et al. v. FERC*, Case No. 06-1041, was dismissed by this Court as incurably premature in an Order issued September 13, 2006. Counsel is not aware of any related cases pending before this or any other court.

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GLOSSARY

Br.	Petitioners' Brief
Commission or FERC	Federal Energy Regulatory Commission
Complaint Order	Order Denying Complaint, <i>Cargill Power Markets LLC, et al. v. Midwest Independent Transmission System Operator, Inc.</i> , Docket No. EL05-66, 112 FERC ¶ 61,025 (2005), R. 12, JA 1
FERC Orders	Collectively, Complaint Order, Rehearing Order, and Second Rehearing Order
First Rehearing Request	Request for Rehearing of Coalition Members [Marketers] (filed Aug. 4, 2005), R. 13, JA 260, requesting rehearing of Complaint Order
FPA	Federal Power Act
Marketers	Petitioners Cargill Power Markets, LLC, PSEG Energy Resources & Trade LLC, Transalta Energy Marketing (US) Inc., Tenaska Power Services Co., and Ontario Power Generation Inc.; and, in reference to the underlying FERC proceeding, the aforementioned Petitioners plus Conectiv Energy Supply, Inc. and DTE Energy Trading Inc. (also referred to, in FERC Orders, as “Coalition Members”)
Michigan-Ontario Interface	Michigan-Ontario Independent Electricity Market Operator Interface
Midwest ISO	Intervenor Midwest Independent Transmission System Operator, Inc.
Midwest ISO Answer	Answer of the Midwest ISO to the Complaint

GLOSSARY

Midwest ISO Tariff or Tariff	Midwest ISO's open access transmission tariff
OASIS	Open Access, Same-Time Information System
Order No. 888	<i>Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities</i> , Order No. 888, FERC Stats. & Regs., Regs. Preambles ¶ 31,036 (1996)
Order No. 888-A	<i>Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities</i> , Order No. 888-A, FERC Stats. & Regs., Regs. Preambles ¶ 31,048 (1997)
Rehearing Order	Order Denying Rehearing, <i>Cargill Power Markets LLC, et al. v. Midwest Independent Transmission System Operator, Inc.</i> , Docket No. EL05-66, 113 FERC ¶ 61,233 (2005), R. 16, JA 15
Second Rehearing Order	Order Rejecting Request For Rehearing, <i>Cargill Power Markets LLC, et al. v. Midwest Independent Transmission System Operator, Inc.</i> , Docket No. EL05-66, 114 FERC ¶ 61,093 (2006), R. 18, JA 24
Service Agreements	Service Agreements For Long-Term Firm Point-to-Point Service; specifically, the Service Agreements between the Midwest ISO and each of the Marketers

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**BRIEF OF RESPONDENT
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STATEMENT OF THE ISSUE

Whether the Federal Energy Regulatory Commission (“Commission” or “FERC”) reasonably determined that the revocation of certain discounted transmission rates by Midwest Independent System Operator, Inc. (“Midwest ISO”) was consistent with the terms of the Midwest ISO’s open access transmission tariff and applicable filed service agreements, with Commission policy, and with the Federal Power Act.

STATUTORY AND REGULATORY PROVISIONS

The pertinent statutes and regulations are contained in the Addendum to this brief.

INTRODUCTION

This appeal concerns claims by a group of power marketers who are transmission customers on the Midwest ISO's system (the "Marketers"). They filed a complaint asserting that the Midwest ISO, by revoking a discounted rate and subsequently charging the higher filed rate under its open access transmission tariff, breached fixed-price contracts that the Marketers had entered while the discount was in effect. They sought to bind the Midwest ISO to charge the discounted rate through the full terms of their transmission service reservations.

In response, the Commission interpreted the service agreements between the Marketers and the Midwest ISO, the Midwest ISO's tariff, and the discounting procedures established by earlier Commission orders and adopted in the tariff. Based on all relevant documents, the Commission determined that the Midwest ISO had complied with the rates, terms, and conditions of its tariff and had not breached its contracts, which did not fix an unchangeable price. *Cargill Power Markets LLC, et al. v. Midwest Independent Transmission System Operator, Inc.*, 112 FERC ¶ 61,025 ("Complaint Order"), R. 12, JA 1, *reh'g denied*, 113 FERC ¶ 61,233 (2005) ("Rehearing Order"), R. 16, JA 15, *reh'g rejected*, 114 FERC

¶ 61,093 (2006), R. 18, JA 24.¹ The Commission further concluded that the limited discount offered by the Midwest ISO had served its purpose of encouraging increased throughput on the Midwest ISO’s system and had appropriately been revoked when the system later became fully-subscribed and constrained. *See* Complaint Order at PP 34-35, JA 13; Rehearing Order at P 14, JA 21-22.

The long-term reservations of capacity requested by the Marketers ensured them continued access to a certain delivery point after that system became fully subscribed. They also benefited from discounted rates that continued in effect a full 13 months longer than the Midwest ISO had originally committed to offer the discount. In this case, however, the Marketers demand still more; arguing that the discounted rates were locked in for the entire period of each multi-year reservation, the Marketers seek a price advantage over competing power marketers on a constrained transmission system.

STATEMENT OF FACTS

I. Statutory And Regulatory Background

Section 201 of the Federal Power Act (“FPA”), 16 U.S.C. § 824, affords the Commission jurisdiction over the rates, terms, and conditions of service for the transmission and sale at wholesale of electric energy in interstate commerce. *See*

¹ “R.” refers to a record item. “JA” refers to the Joint Appendix page number. “P” refers to the internal paragraph number within a FERC order.

16 U.S.C. § 824(a)-(b). This grant of jurisdiction is comprehensive and exclusive. *See New York v. FERC*, 535 U.S. 1 (2002) (discussing statutory framework, and division between federal and state regulatory authority under the FPA). All rates for or in connection with jurisdictional sales and transmission services are subject to FERC review to assure they are just and reasonable, and not unduly discriminatory or preferential. FPA § 205(a), (b), (e), 16 U.S.C. § 824d(a), (b), (e).

In 1996, the Commission issued Order No. 888,² which required all jurisdictional utilities to offer network services on a nondiscriminatory basis under an open access tariff. The Commission promulgated a *pro forma* tariff as a model for transmission providers to implement the requirements of that policy. In order to allow pricing flexibility while ensuring comparability of service and nondiscriminatory pricing, the Commission allowed transmission providers to offer discounted rates below their filed, maximum firm transmission rates, but required providers to offer the same discounted rates to non-affiliated customers that they gave to themselves or their affiliates, at the same time and on the same

² *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs., Regs. Preambles ¶ 31,036 (1996), *clarified*, 76 FERC ¶ 61,009 and 76 FERC ¶ 61,347 (1997), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs., Regs. Preambles ¶ 31,048, *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part*, *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000) (“TAPS”), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

transmission path and on all unconstrained transmission paths. Order No. 888 at 31,743-44. Order No. 888 emphasized transparency, requiring the provider to post on its Open Access Same-Time Information System (described below) price and other information for all discounted transactions with both affiliates and non-affiliates. *Id.* at 31,744 & n.454.

On rehearing, the Commission reaffirmed its basic determinations in Order No. 888, but clarified certain terms and modified the *pro forma* tariff accordingly. *See* Order No. 888-A at 30,172, 30,180. With respect to rate discounts, the Commission required that a transmission provider, if it offers a discount on a particular path, must offer the same discount for the same period on all unconstrained paths that go to the same point of delivery on its system. *Id.* at 30,180, 30,275. The Commission also clarified that “[a] transmission provider should discount only if necessary to increase throughput on its system[]” and that offers of discounts may be limited to particular time periods. *Id.* at 30,274, 30,275.

To facilitate transparency and open access, the Commission contemporaneously issued Order No. 889,³ which required transmission providers to provide certain information and communicate with customers using an Open

³ *Open Access Same-Time Information System and Standards of Conduct*, Order No. 889, FERC Stats. & Regs., Reg. Preambles ¶ 31,035 (1996), *clarified*, 77 FERC ¶ 61,335 (1996), *on reh’g*, Order No. 889-A, FERC Stats. & Regs., Regs. Preambles ¶ 31,049 (1997), *on reh’g*, Order No. 889-B, 81 FERC ¶ 61,253 (1997), *aff’d in relevant part*, TAPS, 225 F.3d 667.

Access Same-Time Information System (“OASIS”). As the Commission explained in the instant proceeding, “OASIS is an accessible electronic, real time way for a transmission provider to post transmission service and ancillary service [i]nformation.” Complaint Order at P 2 n.2, JA 2; *see generally* 18 C.F.R. § 37.6 (2006).

II. The Commission Proceeding And Orders

A. Background

The Midwest ISO is an independent transmission provider that operates a transmission system in several midwestern states. *See generally Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1365 (D.C. Cir. 2004) (explaining development of Midwest ISO). Among the transmission services it offers under its open access transmission tariff (the “Midwest ISO Tariff”) is long-term firm, point-to-point “Through-and-Out Service” that is delivered to (or “sinks at”) the Michigan-Ontario Independent Electricity Market Operator Interface (the “Michigan-Ontario Interface”). *See* Complaint Order at P 2, JA 2.

1. The Midwest ISO Tariff And The Marketers’ Service Agreements

Schedule 7 of the Midwest ISO Tariff provides for the calculation and posting of rates:

All effective rates under this schedule shall be posted on the Midwest ISO OASIS. The rates are calculated using the formula included in Attachment O The rates will be recalculated each June 1 based on the prior full calendar or fiscal year. . . . However, if the initial

rates are to take effect between January 1 and June 1 of a year, then the calendar year used in deriving the rates shall be the calendar or fiscal year preceding the last calendar or fiscal year. These initial rates then would be recalculated effective on June 1 based on the prior full calendar or fiscal year.

Midwest ISO Tariff, Schedule 7, JA 306, *quoted in* Answer of the Midwest Independent Transmission System Operator, Inc. (“Midwest ISO Answer”) at 9 n.23, R. 4, JA 170; *see also* Complaint Order at P 28 & n.22, JA 11. Pursuant to this Schedule, a transmission customer “shall pay the zonal rate (per [kilowatt] of reserved capacity) based upon the zone where the load is located” Schedule 7(1), JA 307, *quoted in* Complaint Order at P 28, JA 11. Schedule 14 of the Tariff includes a Regional Through and Out Rate adder that also applies to customers taking firm point-to-point transmission either through or out of the Midwest ISO. *See* Complaint Order at P 28, JA 11.

Schedules 7 and 14 of the Tariff also set forth requirements for discounts, consistent with Order No. 888-A:

Three principal requirements apply to discounts for transmission service as follows: (1) any offer of a discount made by the Transmission Provider must be announced to all Eligible Customers solely by posting on the OASIS, (2) any customer-initiated requests for discounts (including requests for use by one’s wholesale merchant or an affiliate’s use) must occur solely by posting on the OASIS, and (3) once a discount is negotiated, details must be immediately posted on the OASIS. For any discount agreed upon for service on a path, from point(s) of receipt to point(s) of delivery, the Transmission Provider must offer the same discounted transmission service rate for the same time period to all Eligible Customers on all unconstrained transmission paths that go to the same point(s) of delivery on the

Transmission System.

Midwest ISO Tariff, Schedules 7 & 14, JA 311, 314, *quoted in* Midwest ISO Answer at 10 & n.24, JA 174.

Each of the Marketers obtained transmission service from the Midwest ISO under its Tariff pursuant to a Service Agreement For Long-Term Firm Point-to-Point Service (“Service Agreement”), modeled on a service agreement included in the *pro forma* Tariff in Order No. 888 at 31,962, Att. A. The Service Agreements for each of the Marketers were attached to the Midwest ISO’s Answer filed before the Commission. R. 4, Att. A, JA 187-200. All but one of the Service Agreements had been filed with the Commission. *See* Complaint Order at P 2 n.4, JA 2; *see also* Midwest ISO Tariff § 13.4 (“Executed Service Agreements that contain the information required under the Tariff shall be filed with the Commission in compliance with applicable Commission regulations.”), *quoted in* Midwest ISO Answer at 9 & n.22), JA 173. The fifth, between the Midwest ISO and Petitioner Ontario Power Generation Inc., was executed after the Commission issued revised filing requirements in 2002⁴ and accordingly was not filed with the Commission.

⁴ *See Revised Public Utility Filing Requirements*, Order No. 2001, FERC Stats. & Regs. ¶ 31,127, *reh’g denied*, Order No. 2001-A, 100 FERC ¶ 61,074, *reconsideration and clarification denied*, Order No. 2001-B, 100 FERC ¶ 61,342, *enforcing*, Order No. 2001-C, 101 FERC ¶ 61,314 (2002), *enforcing*, Order No. 2001-D, 102 FERC ¶ 61,334, *order on clarification*, Order No. 2001-E, 105 FERC ¶ 61,352 (2003).

See Complaint Order at P 2 n.4, JA 2.

The Service Agreements established the contractual relationship between the Midwest ISO, as the transmission provider, and the Marketers, as transmission customers. Each Service Agreement stated that the customer had completed an application to be a transmission customer under the Midwest ISO Tariff and that the Midwest ISO “agree[d] to provide service upon the request . . . of the Transmission Customer.” Service Agreements § 2.0, JA 188, 194, 196, 198, 200. It also set forth the customer’s commitment “to take and pay for the requested service in accordance with the provisions of the Tariff and this Service Agreement.” Service Agreements § 3.0, JA 188, 194, 196, 198, 200. Each Service Agreement described how the dates on which “[s]ervice under this Service Agreement for a transaction” would commence and terminate would be determined. Service Agreements § 4.0, JA 188, 194, 196, 198, 200. Finally, each Service Agreement further stated that “[t]he Tariff . . . [is] incorporated herein and made a part hereof.” *Id.* § 6.0, JA 188, 194, 198, 200, 196 (§ 7.0⁵). *See generally* Order No. 888 at 31,962, Attachment A (Form of Service Agreement for Firm

⁵ The Service Agreements between the Marketers and the Midwest ISO are substantially identical. Four of the Service Agreements are identical in all material respects; the Service Agreement for Tenaska Power Services Co. is the same except for an additional provision, not relevant here, which is designated § 5.0. Because of that additional provision in Tenaska’s Service Agreement, the language incorporating the Tariff appears in § 7.0, rather than § 6.0. *See* JA 196.

Point-to-Point Transmission Service).

2. The Posting And Revocation Of A Discounted Rate For Service At The Michigan-Ontario Interface

On July 1, 2002, the Midwest ISO posted on its OASIS a notice that it had “discounted the firm rates for through and out service to the rates indicated in [an accompanying] spreadsheet. The Midwest ISO commits to post rates no higher than these rates for a period of 18 months.” Complaint, Attachment C at 5, JA 153. The Midwest ISO in fact retained the discount an additional 13 months beyond that commitment, finally posting on its OASIS, on January 28, 2005, a notice that, effective February 1, 2005, “the discounted rate for the [Michigan-Ontario Interface] sink has been removed.” Complaint, Attachment C at 1, JA 152. The discounted rate of \$13,814 per megawatt-year for that service represented a 49 percent discount from the filed rate of \$27,268 per megawatt-year (a figure that, as explained herein, remained subject to future change). Complaint at 11, JA 37.

During the period while the discount was available, the Marketers submitted, through OASIS, transmission reservation requests for service sinking at the Michigan-Ontario Interface, which the Midwest ISO accepted and confirmed on OASIS in accordance with the Midwest ISO Tariff and the Service Agreements. Petitioner Cargill Power Markets, LLC submitted two such reservation requests for service over a period ending in 2011 and three for service until 2012. *See* Complaint, Attachment A, Table No. 1, JA 72. The remaining Marketers who are

Petitioners in this appeal submitted reservation requests for service over periods ending in 2005, 2006, 2007, and 2008. *See id.* The OASIS printouts confirming the requested reservations noted, *inter alia*, the type of service requested (*e.g.*, firm point-to-point); the path, “source” (point of receipt), and “sink” (point of delivery); the amount of reserved capacity; start and stop dates; and the then-current price. *See* Complaint, Attachment A, JA 73-146.

Upon rescission of the discount, the Midwest ISO began to charge, going forward for service taken and billed on or after February 1, 2005, the filed rate for service over the Michigan-Ontario Interface, for all customers including the Marketers.

B. The Marketers’ Complaint And The Challenged FERC Orders

On February 22, 2005, the Marketers filed their Complaint before the Commission, pursuant to FPA § 206, 16 U.S.C. § 824e. R. 1, JA 27.⁶ The Marketers claimed that the OASIS confirmation sheets constituted binding contracts that “locked-down” the discounted rate for the full term of the reservations, such that the Midwest ISO could not rescind the discount without

⁶ In the FERC proceeding, the complainants included, in addition to the five Marketers who are Petitioners in this case, two other marketers that are not parties to this appeal. For purposes of this brief, “Marketers” indicates the five Petitioners in this case, as well as, in reference to the underlying FERC proceeding, the group of seven marketers that jointly filed the Complaint and the Requests for Rehearing.

satisfying the high “public interest” standard under the *Mobile-Sierra* doctrine.⁷ Complaint at 3, JA 29. Therefore, the Marketers asserted that the Midwest ISO had breached its contracts. *Id.* at 3, 14-23, JA 29, 40-49. The Marketers also claimed that the Midwest ISO should be estopped from revoking the discount based on the Marketers’ detrimental reliance, that rescission of the discount was unduly discriminatory, and, in the alternative, that the Marketers were entitled to equitable relief. *See id.* at 4, 23-42, JA 30, 49-68.

The Midwest ISO filed an answer, R. 4, JA 162, and a number of parties intervened and filed comments opposing the Complaint. R. 7, JA 240 (Midwest ISO Transmission Owners), R. 6, JA 224 (Midwest Stand-Alone Transmission Companies), and R. 5, JA 216 (International Transmission Company).

1. Order Denying Complaint

On July 5, 2005, the Commission issued its Order Denying Complaint, *Cargill Power Markets LLC, et al. v. Midwest Independent Transmission System Operator, Inc.*, 112 FERC ¶ 61,025 (2005) (“Complaint Order”), R. 12, JA 1. The Commission found that the confirmed transmission requests providing transactional details do not create fixed price contracts; rather, the rates, terms, and

⁷ That doctrine, designed to protect settled expectations under contracts, imposes a high “public interest” standard to attempts to modify contract terms. *See FPC v. Sierra Pac. Power Co.*, 350 U.S. 348, 353 (1956); *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 342-44 (1956).

conditions applicable to the Marketers' service reservations are the filed Service Agreements and the Midwest ISO Tariff. *Id.* at P 27, JA 11. The Commission further found that the Tariff expressly provides for rate changes and discounting procedures; therefore, the Service Agreements are not fixed-price contracts and the Marketers were on notice that the discounted rate could be adjusted and that the Midwest ISO could unilaterally change its rates. *Id.* at PP 28-30, JA 11-12.

The Commission further determined that the Marketers had no justified expectation that the discount would continue for the life of the service reservations, so the Marketers were not entitled to equitable relief. *Id.* at P 33, JA 12-13. The Commission also found that the Midwest ISO's revocation of the discount was consistent with the Commission's discounting policy and was not unduly discriminatory. *Id.* at PP 34-37, JA 13-14.

2. Rehearing Order

On August 4, 2005, the Marketers filed a timely Request for Rehearing ("First Rehearing Request"), R. 13, JA 260. (One party to the Complaint, DTE Energy Trading, Inc., joined in that request but also filed a separate rehearing request, R. 14, JA 289. DTE is not a party to this appeal.)

On December 2, 2005, the Commission issued its Order Denying Rehearing, *Cargill Power Markets LLC, et al. v. Midwest Independent Transmission System Operator, Inc.*, 113 FERC ¶ 61,233 (2005) ("Rehearing Order"), R. 16, JA 15.

The Commission rejected the Marketers' contention that the Midwest ISO was required to submit a filing to the Commission under FPA § 205 in order to remove the discount; the Commission explained that Order Nos. 888 and 888-A permit transmission providers to post and to discontinue discounts on OASIS, without making § 205 filings. *Id.* at PP 7-8, JA 17-19. The Commission also reaffirmed its interpretation of the Midwest ISO Tariff and the Service Agreements, again rebuffing the Marketers' claim that the OASIS confirmation sheets and the Midwest ISO's July 2002 posting constituted binding contracts, and reiterated that the revocation of the discount was consistent with the Commission's discounting policy. *Id.* at PP 9-10, 13-14, JA 19-20, 21-22. The Commission also addressed additional arguments raised separately by DTE regarding the claim for equitable relief. *Id.* at PP 11-12, JA 20-21.

3. Second Rehearing Order

The Marketers filed a second request for rehearing on January 3, 2006, contesting the Commission's determination that allowing the Marketers to retain the discounted rate would be unduly discriminatory. R 17, JA 295.⁸

On February 1, 2006, the Commission issued an Order Rejecting Request

⁸ On January 25, 2006, while the Marketers' second rehearing request remained pending before the Commission, the Marketers also filed a petition for review in this Court, in Case No. 06-1041. In an Order issued September 13, 2006, this Court dismissed that petition as incurably premature, noting that "Petitioners may raise all of their claims in [this later-filed appeal,] 06-1084."

For Rehearing, *Cargill Power Markets LLC, et al. v. Midwest Independent Transmission System Operator, Inc.*, 114 FERC ¶ 61,093 (2006) (“Second Rehearing Order,” and collectively with Complaint Order and Rehearing Order, the “FERC Orders”), R. 18, JA 24. The Commission rejected the Marketers’ second rehearing request because, unless a rehearing order significantly modifies the result of the original order, “[t]he Commission does not allow rehearing of an order denying rehearing.” *Id.* at PP 5-6, JA 25-26. Here, the Rehearing Order “pointed out additional weaknesses in [the Marketers’] arguments” but did not significantly modify the Complaint Order. *Id.* at P 7, JA 26.

This petition followed.

SUMMARY OF ARGUMENT

The Commission properly denied the Marketers' breach of contract claims, based on its reasonable interpretation of the contracts and the Midwest ISO Tariff, its rate discounting policy, and the nondiscrimination mandate of the Federal Power Act.

First, the Commission reasonably determined that the Marketers' contracts with the Midwest ISO did not fix the price of the reserved transmission service. The relevant contracts were the Service Agreements, which expressly incorporate the Midwest ISO Tariff, rather than, as the Marketers contend, only the OASIS confirmation sheets and the discount posting on OASIS, standing alone. Moreover, the applicable rate for the service reservations was subject to change under those contracts, because the Tariff established the filed rate, which could vary due to formula adjustments and discounting procedures, and expressly reserved the Midwest ISO's unilateral right to change its rates. Therefore, the Service Agreements and OASIS confirmation sheets, which did not purport to override any of those Tariff provisions, were not fixed-price contracts.

The Commission further found that the Marketers were on notice that the rate for the transmission service was not fixed. The Marketers had notice of the rate variability built into the Tariff. In addition, the Midwest ISO's OASIS posting did not commit to offer the discount beyond December 2003 or to retain the

discounted rate for any customer after that period. The Marketers' attempt to create binding obligations from the absence of explicit qualifications or negotiations fails in the face of the Commission's reasonable interpretation of the Service Agreements and the Tariff, and of its own discounting procedures.

Second, the Commission reasonably determined that the Midwest ISO had not violated the Commission's discount policy. The policy allows discounting only if necessary to increase throughput; once the Michigan-Ontario Interface became fully subscribed, to the point of constraint, the discount ceased to serve its sole purpose and its revocation was consistent with Commission policy. Indeed, the Commission concluded that allowing the Marketers to retain (in some instances until 2012) a discounted rate not given to new customers, on a constrained system, would result in a "clear violation" of the policy.

Finally, the Commission similarly found that the Midwest ISO's rescission of the discount was not unduly discriminatory and that, in fact, continuing the discount for the Marketers but not other customers would be discriminatory. Ending the discount for all customers receiving the same service in the same period was appropriate.

ARGUMENT

I. STANDARD OF REVIEW

The Court reviews FERC orders under the Administrative Procedure Act's arbitrary and capricious standard. *See, e.g., Sithe/Independence Power Partners v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999). A court must satisfy itself that the agency "articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

The Commission's decisions regarding rate issues are entitled to broad deference, because of "the breadth and complexity of the Commission's responsibilities." *Permian Basin Area Rate Cases*, 390 U.S. 747, 790 (1968); *see also, e.g., Missouri Pub. Serv. Comm'n v. FERC*, 215 F.3d 1, 3 (D.C. Cir. 2000). The Commission's policy assessments are also owed "great deference." *TAPS*, 225 F.3d at 702.

In addition, under the *Chevron* standard, this Court gives substantial deference to the Commission's interpretation of filed tariffs and of its own regulations. *See Public Serv. Elec. & Gas Co. v. FERC*, No. 05-1325, 2007 U.S. App. LEXIS 8468 at *10-11 (D.C. Cir. Apr. 13, 2007); *Koch Gateway Pipeline*

Co. v. FERC, 136 F.3d 810, 814 (D.C. Cir. 1998); *Amerada Hess Pipeline Corp. v. FERC*, 117 F.3d 596, 600 (D.C. Cir. 1997); *Natural Gas Clearinghouse v. FERC*, 965 F.2d 1066, 1070 (D.C. Cir. 1992). The Court likewise affords such deference to the Commission’s interpretation of contracts within its jurisdiction. *See Cajun Elec. Power Coop. v. FERC*, 924 F.2d 1132, 1135 (D.C. Cir. 1991); *accord Appalachian Power Co. v. FERC*, 101 F.3d 1432, 1435 (D.C. Cir. 1996).

II. THE COMMISSION REASONABLY DETERMINED THAT THE MIDWEST ISO PROPERLY APPLIED ITS FILED RATES AND DID NOT BREACH ITS CONTRACTS WITH THE MARKETERS

A. The Commission Reasonably Found That The Marketers Did Not Have Fixed-Price Contracts With The Midwest ISO

The Marketers’ claims rest on the premise that each OASIS confirmation sheet, together with the discount posted on OASIS in July 2002, contractually fixed the discounted price for the entire term of the capacity reservation, and that the Midwest ISO breached those contracts when it ended the discount and charged its filed rates for service at the Michigan-Ontario Interface. *See* Br. 12, 15-18. The Commission, however, rejected that premise based on its interpretation of the Midwest ISO Tariff and the filed Service Agreements, which are based on the *pro forma* tariff promulgated by the Commission itself.

1. The Relevant Contracts Are The Service Agreements That Incorporate The Terms Of The Midwest ISO Tariff

First, the Commission rejected the Marketers’ narrow view that the relevant “contracts” with the Midwest ISO were only the OASIS confirmation sheets and

the July 2002 OASIS posting that announced the discount. *See* Br. 16 (“When evaluating the scope of [Midwest ISO]’s contractual obligations associated with our reservations, FERC was required to look no further than what was clearly stated on OASIS and memorialized in our confirmation sheets.”); *see also* Br. 12, 19-20. The Commission explained that the Marketers “mischaracterize the nature of the relationship between confirmed [transmission service reservations] and discounts posted on the OASIS.” Rehearing Order at P 10, JA 19; *see also* Complaint Order at P 27 (“We disagree with the [Marketers’] characterization that the confirmed [service requests] represent a fixed-price contract”), JA 11. The Commission determined that “the rates, terms, and conditions applicable to the confirmed [transmission service reservations] are contained” in the Midwest ISO Tariff and in the Marketers’ Service Agreements with the Midwest ISO, which were entered pursuant to and expressly incorporated the terms of that Tariff, and which were (with one exception) filed with the Commission. *Id.* at P 27, JA 11; *see* Service Agreements § 3.0 (customer “agrees to take and pay for the requested service in accordance with the provisions of the Tariff and this Service Agreement.”), § 6.0 (“The Tariff . . . [is] incorporated herein and made a part hereof.”), JA 188, 194, 198, 200, 196 (§ 7.0). (Notably, the Marketers do not even mention the Service Agreements in their Brief.)

Each transmission service request, rather than being a self-contained

contractual relationship, is a specific transaction occurring pursuant to the Service Agreement. *See* Service Agreements §§ 2.0, 3.0, 4.0; *see supra* pages 9, 10-11.

The confirmed service requests simply “provide certain transactional details not provided in the [S]ervice [A]greements” Complaint Order at P 27, JA 11.

Although service requests may include in those details the posted price at the time of confirmation, the Commission concluded, based on its interpretation of the language and purpose of those requests, that when the Midwest ISO accepts a transmission service request “it is reserving capacity for a transmission customer for a designated period and is not making a commitment as to the specific price for that transmission service.” *Id.* at P 30, JA 12; Rehearing Order at P 10 (“The discount price posted on OASIS during the confirmation of the [reservation] does not constitute the price fixed for the duration of the confirmed [reservation] and thus[] is not contractually binding.”), JA 19.

Nor was the July 2002 OASIS posting itself a contractual commitment. As explained above, the Service Agreements reflect the procedures under the Midwest ISO Tariff. The specific procedures for offering discounts from filed transmission rates, such as the discount for service to the Michigan-Ontario Interface, are set forth in Schedules 7 and 14 and Attachment O of the Midwest ISO Tariff and adhere to the procedures established by the Commission in Order No. 888-A. *See supra* pages 7-8 (quoting Tariff); Complaint Order at P 28, JA 11. Thus, a posted

discount is a permissible deviation, under specified conditions (such as OASIS posting), from the maximum filed rate that the Midwest ISO has authority to charge, and has only the significance afforded it by the Tariff — not the determinative meaning the Marketers would assign to it. Here, the Commission determined that the contractual relationship was defined by the filed Service Agreements and the Midwest ISO Tariff, not by a discount that was posted in accordance with that Tariff. *See id.* at P 27, JA 11; Rehearing Order at P 10, JA 19-20.

The Marketers argue that this conclusion is inconsistent with the Commission’s standards of conduct rules, which they contend make a discount posting “contractually binding.” Br. 17 (citing 18 C.F.R. § 358.5(d)), 27 (same). But (even assuming the Marketers’ interpretation of § 358.5(d) to be accurate) the Midwest ISO and other regional transmission organizations “are exempt” from those regulations. Rehearing Order at P 11 n.13, JA 20; *see also* 18 C.F.R. § 358.1(c) (“This part does not apply to a public utility Transmission Provider that is a Commission-approved Independent System Operator (ISO) or Regional Transmission Organization (RTO).”). The rules cited by the Marketers are directed to regulating the functions and interactions of transmission providers with their marketing and/or energy affiliates; ISOs and RTOs have no such affiliates and no incentive to favor any particular transmission customers. *See generally*

Midwest ISO Transmission Owners, 373 F.3d at 1364. In any event, as explained in this section and the next section, the Commission acted here to enforce compliance with applicable contractual documents.

2. The Commission Reasonably Found That The Service Agreements Were Not Fixed-Price Contracts

The Commission began its analysis by looking at the language of the Midwest ISO Tariff, which is expressly incorporated into the Service Agreements. Schedules 7 and 14 of the Tariff establish the filed rates for firm point-to-point transmission service. Complaint Order at P 28, JA 11. Both of those schedules also set forth procedures for offering, and revoking, discounts from those rates, which the Commission found to track the procedures established in Order No. 888-A. *Id.* Schedule 7 also provides for the rates for Through-and-Out service to adjust at least once a year based on a formula that is set forth in Attachment O. *Id.*; *see supra* pages 6-7 (quoting Tariff); *see also* Rehearing Order at P 10 (“The filed rate charged by Midwest ISO for [Through-and-Out] Service for reservations sinking at the Michigan-Ontario Interface is determined by Attachment O . . . , not the [transmission service reservation]. Attachment O is Midwest ISO’s formula rate for [Through-and-Out] Service which calculates the maximum price that can be charged for the service.”), JA 19-20. The Commission concluded that these provisions of the Midwest ISO Tariff “confirm[] that transmission charges determined under [that Tariff] are subject to change and subject to discounting

procedures, consistent with Order Nos. 888 and 888-A.” Complaint Order at P 28, JA 11. Because the filed rate applicable to the Service Agreements is inherently changeable, “the [S]ervice [A]greements are not fixed-price contracts” *Id.*

Having found that rate variability is built into the Marketers’ contracts, the Commission further determined that nothing in the Midwest ISO Tariff or the Service Agreements purports to override the Midwest ISO’s right to change its rates unilaterally. Complaint Order at P 30, JA 12. The Marketers contended that the OASIS confirmation sheets are silent regarding unilateral modification by the Midwest ISO. Complaint at 20-21, JA 46-47. But the *Service Agreements* incorporate the Midwest ISO Tariff, which expressly provides that “[n]othing contained in the Tariff or any Service Agreement shall be construed as affecting in any way the right of the Transmission Provider . . . to unilaterally make application to the Commission for a change in rates, terms and conditions, [or] charges” under FPA § 205. Midwest ISO Tariff § 9, *quoted in* Complaint Order at P 31, JA 12. Therefore, the contracts between the Marketers and Midwest ISO did reserve the latter’s right to seek rate changes. *Id.* See generally *Union Pac. Fuels, Inc. v. FERC*, 129 F.3d 157, 161 (D.C. Cir. 1997) (where contracts included such unilateral reservations, known as “*Memphis* clauses,” “[t]he contracts . . . anticipated rate changes by FERC, and thus *Mobile-Sierra* doctrine does not apply.”).

It does not matter that the Midwest ISO did not, in fact, make an FPA § 205 filing with the Commission to change its maximum filed rate for service at the Michigan-Ontario Interface. *Cf.* Br. 17, 22. The Commission’s point was that the Midwest ISO expressly retained the unilateral right to change its rates at any time, and that nothing in any service agreement — including the Marketers’ Service Agreements in this case, much less the transmission service requests submitted thereunder — could be construed to, or in fact purported to, take away that right. *See* Complaint Order at P 30 (“Midwest ISO has the unilateral right to change the rates at issue and [the Marketers] have pointed to nothing in the [S]ervice [A]greements, [or] the [Tariff] . . . that overrides this right.”), JA 12; *see also id.* at P 31 (quoting Midwest ISO Tariff § 9), JA 12.

Nor does it matter that the revocation of the discount was not a rate change occurring under Attachment O, *cf.* Br. 22; the significance of that Tariff formula is that the filed rate is designed to change. *See, e.g., NSTAR Elec. & Gas Corp. v. FERC*, 481 F.3d 794, 801 (D.C. Cir. 2007) (under a rate formula, “rates may constantly change . . . without prior notice . . . and are thus not precisely knowable at the time of the sale”).⁹ Therefore, the Tariff language refutes the Marketers’

⁹ Even the Midwest ISO’s tariff rate is more predictable than the formula-derived rates described in *NSTAR*, as the Michigan-Ontario Interface rate is recalculated pursuant to the formula in Attachment O once a year, in June. *See* Midwest ISO Tariff, Schedule 7, *quoted supra* at pages 6-7.

contention that their OASIS confirmation sheets contractually fixed the applicable rate.

Furthermore, because the procedures for posting discounts are likewise provided in the Midwest ISO Tariff, consistent with Order Nos. 888 and 888-A, the Midwest ISO was not required to make an FPA § 205 filing either to institute or to discontinue a discount:

Order No. 888 contains no requirement that discounts, posted on OASIS, be filed pursuant to [FPA § 205] in order to be effective. The only requirements that must be followed when discounts are posted on OASIS are that the discount: (1) is limited to unconstrained paths; (2) extends for the same period for all customers taking the discounted service; and (3) is offered to all transmission customers. Order No. 888 does not state the requirements for removing a discount posted on OASIS. Accordingly, we find that there is no requirement for a section 205 filing to post a discount, and thus there is no requirement for a section 205 filing to remove a posted discount.

Rehearing Order at P 8, JA 18-19. (To the extent the Marketers argue that the Midwest ISO would have had to make an FPA § 205 filing to remove the discount, *see* Br. 10, they conspicuously avoid the corollary point that, under their theory, the discounted rate was never valid in the first place because the institution of the discount in July 2002 likewise was not submitted for FERC approval under § 205.) Nor is there any provision in the Midwest ISO Tariff indicating that a discount, once offered, is locked in for the full term of any long-term firm service reservation that is confirmed.

Based on these considerations of the Midwest ISO Tariff, the Service

Agreements, the OASIS confirmation sheets, and its own orders, the Commission found “that there was not a fixed-price contract regarding the [transmission service reservations] for the Michigan-Ontario Interface and, by rescinding the discount applicable to these [reservations], Midwest ISO did not breach the service agreements in question.” Complaint Order at P 32, JA 12.

The Marketers, while pressing their own construction of the OASIS confirmation sheets and the discounting procedures (wholly ignoring the Service Agreements and the Tariff), have not shown that the Commission’s interpretation is unreasonable. *See* Complaint Order at P 26 (“Midwest ISO acted consistent with its [Tariff] and [the Marketers] have not shown that any language in [the] [S]ervice [A]greements overrides the discounting and rate provisions of Midwest ISO’s [Tariff].”), JA 10. And even if any of the pertinent language, such as the transactional details reflected on the OASIS confirmation sheets (*see* Br. 16), were to be considered ambiguous, the Commission’s reasonable interpretation of those documents — together with the Midwest ISO Tariff and Service Agreements — must prevail. *See supra* pages 18-19.

The Marketers’ reliance on ordinary contract law, in contending that any ambiguity should be construed in their favor (Br. 19-20), is misplaced. The Commission is entitled to substantial deference to its interpretation because a FERC-jurisdictional contract “loses its status as a strictly private contract and takes

on a public interest gloss” *Cajun Elec. Power Coop.*, 924 F.2d at 1135.

Moreover, given that the particular contracts at issue are modeled on the *pro forma* tariff promulgated by the Commission itself, *see supra* pages 9-10, the Commission is essentially interpreting its own regulations. *See Amerada Hess*, 117 F.3d at 600. That the Marketers simply do not agree with the Commission’s view does not warrant remand.

B. The Commission Reasonably Found That The Marketers Had Notice That The Rate For The Transmission Service Was Subject To Change

The Commission further found, based on both the Midwest ISO Tariff and the OASIS posting, that the Marketers were on notice that their rates could change pursuant to the Midwest ISO Tariff and that the discounted rate was available for a limited period and was subject to unilateral adjustment by the Midwest ISO. Complaint Order at PP 29, 33, 38, JA 12-13, 14.

The Midwest ISO “determined the rate for the Michigan-Ontario Interface in accordance with the Attachment O formula and the discounting procedures in Schedule 7 [of the Midwest ISO Tariff] and posted the applicable rate on its OASIS.” *Id.* at P 29, JA 12. As discussed above, the Service Agreements expressly incorporated the Midwest ISO Tariff. Service Agreements § 6.0, JA 188, 194, 198, 200, 196 (§ 7.0); *see supra* pages 9, 20. Because Schedule 7 provided for continuing changes to that rate by two methods — annual adjustment

pursuant to the Attachment O formula and discount adjustments through OASIS postings — the Marketers “were on notice that the discounted rate could be adjusted.” Complaint Order at P 29, JA 12.

Further, in addressing the Marketers’ related claim for equitable relief (which they do not raise in their Brief on appeal), the Commission noted that the Marketers had “no justified expectation” that the discounted rate would remain in effect for the duration of their service reservations:

[A]t the time these transmission service requests were submitted (March 2003 to October 2003) and at the time Midwest ISO first accepted them (November-December 2003), the [Marketers], because of the OASIS language notifying customers that rates could change after 18 months, had no justified expectation that the discount would continue for the life of their service agreements.

Id. at P 33, JA 12. Therefore, the Commission found the Marketers “had no reason to expect that the discount would continue beyond December 31, 2003 — the date up to which Midwest ISO guaranteed the discount.” *Id.* at P 33, JA 12-13. *See* Complaint, Attachment C at 5 (July 2002 discount posting), JA 153; *supra* page 10 (quoting July 2002 posting).

Moreover, the Commission noted that the Marketers “do not allege that Midwest ISO otherwise expressly communicated to them that the discount would remain in effect for the duration of their service agreements.” Complaint Order at P 33, JA 13. Indeed, the Marketers point to no representation by the Midwest ISO, on OASIS or otherwise, that the discounted rate would remain in effect for any

customer for any period beyond the date the discount was removed.

Unable to point to any communication by the Midwest ISO, the Marketers instead attempt to build a contractual obligation on the *absence* of express communications. Specifically, the Marketers contend that their notice of the potential for rate changes was “irrelevant” because “*all* information concerning discounts must be posted on OASIS.” Br. 13 (emphasis in original); Br. 22. Thus, they argue, the Midwest ISO was required to qualify the posting in July 2002 by counteroffering different terms or by explicitly limiting the duration of the discount and reserving its right to revoke the discount unilaterally, and that in the absence of such express conditions the discount must be construed as locked-in for the duration of the Marketers’ capacity reservations. Br. 17, 19, 22. They also contend that the Midwest ISO bound itself to a contractual rate, instead of the filed rate, simply by confirming the Marketers’ service requests. *See* Br. 15.

These arguments, however, fail to confront the Commission’s determinations that: (1) the Midwest ISO Tariff and the Service Agreements govern the rates, terms, and conditions of service, including the terms applicable to discounts — so there was no need for the Midwest ISO to so qualify the July 2002 posting or to “vary[] the terms” in the confirmed service requests (Br. 15); and (2) the Midwest ISO fully complied with the discounting procedures set forth in Order Nos. 888 and 888-A, as incorporated in Schedules 7 and 14 of the governing

Midwest ISO Tariff. *See* Complaint Order at PP 27-28, 38, JA 11, 14; Rehearing Order at P 12, JA 21. The Midwest ISO properly posted the discount on OASIS, qualified by its commitment to maintain the discount for 18 months, and removed the discount the same way (after 31 months), reverting to the full filed rate for all service going forward. *See* Rehearing Order at PP 3, 8, JA 16, 18-19; Complaint, Attachment C at 1, 5, JA 152, 153. No further discussion, qualification, or negotiation of the discount occurred or was necessary.

As with the Tariff and Service Agreements, the Commission's reasonable interpretation of its own regulations is entitled to substantial deference, notwithstanding the Marketers' contrary view. *See, e.g., Amerada Hess*, 117 F.3d at 600. In any event, the Marketers' argument finds no support in the Commission's orders establishing the discounting procedures. Order Nos. 888 and 888-A contemplate that those procedures, including the requirements for disclosures on OASIS, will be set forth in the transmission provider's tariff, as part of Schedule 7 and alongside the Service Agreements, as well as the *Memphis* clause in Section 9. *See* Order No. 888-A at 30,540-42 (*pro forma* tariff Schedule 7, with discounting provisions, and corresponding Form of Service Agreement); *id.* at 30,514 (*pro forma* tariff Section 9); Order No. 888 at 31,936, 31,961-62; *see also supra* pages 4-5. Nothing in those orders supports the Marketers' view that every rate, term, and condition of a transaction — including every applicable tariff

provision, any reservation of the provider's right to seek unilateral rate changes, and any reservation of its right to revoke the discount — must be expressly restated on OASIS in the discount posting and/or in each OASIS confirmation sheet, or else be deemed omitted.

For that reason, the Commission appropriately construed its orders and the various sections of the Midwest ISO Tariff as operating together: “[P]rovisions of Midwest ISO's [Tariff], Order Nos. 888 and 888-A, and OASIS set forth the rules transmission providers are required to follow when administering discounts. Our analysis indicates that Midwest ISO adhered to those rules and thus acted fairly when it discontinued the discount to the Michigan-Ontario Interface.” Rehearing Order at P 12, JA 21.

Nor are the Marketers correct in characterizing the removal of the discount as “retroactive[.]” Br. 19. There is no dispute that the Marketers were properly billed at the discounted rate for service during the period that the discount remained in effect. They were billed the full Tariff rate only for service taken and billed after the discount ended in early 2005. Thus, the discount was removed only prospectively. Furthermore, because the Marketers had notice from the outset that the Midwest ISO could unilaterally remove the discount at any time, and had expressly committed only to retaining the discount through the end of 2003, rescission of the discount would not be considered retroactive in any event. *Cf.*,

e.g., *NSTAR*, 481 F.3d at 801 (holding that notice can change what might otherwise be deemed retroactive ratemaking into “a functionally prospective process” by placing affected parties on notice at the outset that rates are “provisional” and subject to revision) (citation and internal quotation marks omitted).

III. THE COMMISSION REASONABLY FOUND THAT THE MIDWEST ISO HAD NOT VIOLATED THE COMMISSION’S DISCOUNT POLICY

The Commission also reasonably concluded that the Midwest ISO, in revoking the discount for all customers after 31 months, did not violate the Commission’s policy regarding such discounts — to the contrary, the rescission actually furthered that policy.

The Commission’s policy is to allow rate discounting for the purpose of, and only to the extent needed for, drawing customers to an undersubscribed transmission system. Order No. 888-A at 30,274 (“A transmission provider should discount only if necessary to increase throughput on its system.”); Complaint Order at P 34 (“[T]he sole purpose of transmission rate discounting is to increase throughput.”) (citing Order No. 888-A), JA 13; *accord*, Rehearing Order at P 14, JA 21-22.

At the time that the Midwest ISO first posted the discount on OASIS in July 2002, the Michigan-Ontario Interface was not fully subscribed. *See* Br. 26. But

there is no dispute that the Michigan-Ontario Interface is now constrained. *See* Complaint Order at PP 19, 34, JA 9, 13; Rehearing Order at PP 2, 14, JA 16, 22; Complaint at 26, JA 52; Midwest ISO Answer at 16, JA 180. In fact, the Marketers themselves have repeatedly emphasized that, during the period when the Midwest ISO was offering the discounted rate, the Interface went from undersubscribed to oversubscribed. *See, e.g.*, Complaint at 26 (“[T]he Midwest ISO has known since at least the Fall of 2004 (and probably as far back as the Fall of 2002) that the [Michigan-Ontario] interface was oversubscribed.”), JA 52; First Rehearing Request at 4, JA 263; Br. 27. They assert that “the demand for access over the [Michigan-Ontario] [I]nterface has changed in such a manner that the market conditions that existed when we confirmed the Discounted Rate do not exist today.” Br. 26.

Therefore, by the time the Midwest ISO rescinded the discount (if not well before, by the Marketers’ account), the discount had served its purpose by encouraging the Marketers and other customers to reserve transmission capacity to the point where the available capacity was fully subscribed and even constrained. Thus, the discount had ceased to serve its sole purpose and Commission policy supported its removal: “a discount would have no effect on throughput at that interface and Midwest ISO properly determined that a discount was not needed and properly revoked the discount.” Complaint Order at P 34, JA 13; *see also id.* at

P 35 (“Midwest ISO’s discounting approach is consistent with Commission policy of providing discounts for the sole purpose of increasing throughput.”), JA 13. For that reason, the Commission reasonably denied the Marketers’ claim that the Midwest ISO violated Commission policy.

Nevertheless, the Marketers contend that the Commission’s ruling “undermine[s] the commercial integrity of discounts” and “effectively prohibit[s] any sort of rational business planning” Br. 27-28. The Commission, however, simply disagreed with the Marketers’ view of FERC’s policy. Because of the constraint at the Michigan-Ontario Interface, the Marketers’ “argument that Midwest ISO’s discount approach discourages long-term transmission reservations and market participants from purchasing excess transmission capacity is misplaced. Excess transmission capacity is simply no longer available at this interface.” Complaint Order at P 35, JA 13. In other words, the incentive provided by a discount would not serve to induce customers to purchase excess transmission capacity when there is no longer such excess capacity to be purchased.

Moreover, the Commission’s ruling does not, as the Marketers suggest, “undermine[] the commercial integrity of discounts.” Br. 27. There is no dispute that the Marketers received the benefit of the discounted rate throughout the period it was available — which was substantially longer than the Midwest ISO had

guaranteed its availability, as the promised 18-month period extended an additional 13 months. Though the Marketers believe that “commercial integrity” must mean a fixed discount for the entire term of a reservation — extending years beyond the end of the discount offer period — they fail to explain why the Midwest ISO’s honoring of its discount commitment for the entire period that it guaranteed (and then some) would not maintain the integrity of the discounting process.

The Commission further responded to the Marketers’ contentions on rehearing, explaining that it would be unfair to give the Marketers a 49 percent price advantage over competing marketers who can no longer obtain the discount. “[W]e note that if [the Marketers] were to retain the discounted rate (in some instances until 2012) on what they now recognize as a constrained interface, but Midwest ISO denies the discount to new customers, then the reason for our discount policy would be nullified.” Rehearing Order at P 14, JA 22. In particular, a “key tenet” of the Order No. 888 policy on discounts, as part of its overarching policy on open access, is that any discount on a particular transmission path must likewise be offered to all customers for the same time period on all unconstrained paths that go to the same delivery point. *Id.* The specific relief sought by the Marketers — a discount given only to them for service extending as much as seven years after the discount was ended for all other customers on the same transmission path — would be “a clear violation of Commission policy.” *Id.*

IV. THE COMMISSION REASONABLY FOUND THAT THE MIDWEST ISO'S RESCISSION OF THE DISCOUNT WAS NOT UNDULY DISCRIMINATORY

Finally, the Commission rejected the Marketers' contention that the rescission of the discount constituted undue discrimination. Pointing to its discount policy, which, as discussed *supra*, requires a transmission provider such as the Midwest ISO to make any discount available to all potential customers for service to the same delivery point(s) for the same period, the Commission determined that the Midwest ISO's revocation of the discount for *all* customers receiving Through-and-Out Service over the Michigan-Ontario Interface, including the Marketers, was appropriate and not discriminatory. Complaint Order at P 36 (citing Order No. 888-A at 30,275), JA 13-14.

But the Commission went further, concluding not only that the Midwest ISO had not discriminated but that, in fact, the Marketers' requested relief *would* constitute undue discrimination: "Indeed, if Midwest ISO were to continue the discount for the entire term of the [Marketers' service reservations], but not offer it to other customers taking service over the Michigan-Ontario Interface, it would be in violation of Order No. 888 and it would constitute undue discrimination." Complaint Order at P 37, JA 14.

The Marketers contend that the Commission's reasoning conflicts with its statement in Order No. 888-A that "it is not '*per se* unduly discriminatory' to offer

a discount in one time period and not in another.” Br. 23 (citing Order No. 888-A at 30,275). But that is not what the Marketers seek in this case. Rather, the Marketers wish to perpetuate the rescinded discount for themselves alone, in the *same* post-January 2005 time period during which other customers must pay the full filed rate. The discounted rate for service to the Michigan-Ontario Interface was available to all customers from July 2002 through January 2005. Under Order No. 888-A, that was not unduly discriminatory to customers taking service in June 2002 or in February 2005, who did not receive the discounted rate that other customers received a mere month later or earlier.

The Marketers further argue that the Commission erred because it failed to determine whether the Marketers are similarly situated to customers requesting service in the post-January 2005 period, after the Midwest ISO ceased offering the discount. Br. 24. The Marketers contend that they are differently situated from customers requesting service to the Michigan-Ontario Interface today because “the market conditions that existed” when the Marketers requested service — that is, an undersubscribed system — “do not exist today” because that same system is now

oversubscribed. Br. 26.¹⁰ Of course, as discussed *supra* at pages 34-35, that is precisely why the perpetuation of the discount for the Marketers alone is contrary to Commission policy and, indeed, unduly discriminatory.

¹⁰ This purported distinction, however, may not be accurate, according to the Marketers' own claims. They alleged that, at the very time that they requested service in 2003 (*see* Complaint Order at P 33, JA 12), and when the Midwest ISO confirmed their reservations in 2004 and 2005 (*see* Complaint, Attachment A, JA 73-146), the Michigan-Ontario Interface was *already* oversubscribed. Complaint at 26 (“[T]he Midwest ISO has known since at least the Fall of 2004 (and probably as far back as the Fall of 2002) that the [Michigan-Ontario] interface was oversubscribed.”), JA 52.

CONCLUSION

For the reasons stated, the petition for review should be denied and the challenged FERC Orders should be affirmed in all respects.

Respectfully submitted,

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