

121 FERC ¶ 61,166  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Sudeen G. Kelly, Marc Spitzer,  
Philip D. Moeller, and Jon Wellinghoff.

Midwest Independent Transmission System  
Operator, Inc.

Docket No. ER07-532-000

ORDER ON POST-TRANSITION  
TREATMENT OF GRANDFATHERED AGREEMENTS  
IN MIDWEST ISO ENERGY MARKETS

(Issued November 15, 2007)

1. This order addresses a filing by the Midwest Independent Transmission System Operator, Inc. (Midwest ISO) to comply with two earlier Commission orders that addressed the treatment of grandfathered agreements (GFAs) in Midwest ISO's energy markets from energy market start-up through a transition period ending on February 1, 2008.<sup>1</sup> The instant filing addresses the post-transition treatment of such agreements. As discussed below, we will accept Midwest ISO's compliance filing, subject to certain informational reporting requirements.

**I. Background**

**A. Midwest ISO's Open Access Transmission and Energy Markets Tariff**

2. On March 31, 2004, Midwest ISO filed an application to replace its Open Access Transmission Tariff (OATT) with its proposed Open Access Transmission and Energy Markets Tariff (TEMT or Tariff), providing for a market-based congestion management program and energy markets in the Midwest ISO region, including day-ahead and real-time energy markets, locational marginal pricing and a market for financial transmission rights (FTRs).

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<sup>1</sup> *Midwest Independent Transmission System Operator, Inc.*, 108 FERC ¶ 61,236 (2004) (GFA Order), *order on reh'g*, 111 FERC ¶ 61,042 (GFA Rehearing Order), *order on reh'g*, 112 FERC ¶ 61,311 (2005) (GFA Rehearing Order II) (collectively, the GFA Orders), *aff'd sub nom. Wisconsin Public Power, Inc. v. FERC*, 493 F.3d 239 (D.C. Cir. 2007) (*Wisconsin Public Power*).

3. As part of its application to implement the TEMT, Midwest ISO proposed to address transmission service provided under an estimated 300 long-term contracts, or GFAs, that were then effective in the Midwest ISO region. These GFAs, Midwest ISO explained, were exempt from the terms and conditions of Midwest ISO's OATT, pursuant to the original agreement under which Midwest ISO was formed,<sup>2</sup> for at least a six-year transition period ending on February 1, 2008. Midwest ISO estimated that up to 40,000 megawatts of transmission service – about 40 percent of total load in the region – was likely to be associated with the GFAs.<sup>3</sup> Midwest ISO explained that allowing holders of GFAs to have scheduling rights similar to their current practice would require a physical reservation, or carve-out, of transmission capacity in the day-ahead energy market and until the scheduling deadline prior to real-time dispatch. It stated that this “cannot be accomplished without negatively impacting Midwest ISO's ability to reliably operate the Energy Markets and without placing excessive financial burden on other Market Participants.”<sup>4</sup> In order to balance the contract rights of the GFA parties with benefits to all market participants of the TEMT, Midwest ISO proposed to require GFA parties to schedule and settle their GFA transactions under the TEMT through one of three options (A, B, or C).<sup>5</sup>

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<sup>2</sup> In *Midwest Independent Transmission System Operator, Inc.*, 84 FERC ¶ 61,231 (Formation Order), *order on reconsideration*, 85 FERC ¶ 61,250, *order on reh'g*, 85 FERC ¶ 61,372 (1998), the Commission conditionally approved the formation of Midwest ISO. The Formation Order also conditionally accepted for filing the Agreement of Transmission Facilities Owners to Organize the Midwest Independent Transmission System Operator, Inc. (Midwest ISO TO Agreement) and Midwest ISO's OATT. In addition, the Commission granted conditional approval for ten public utilities to transfer operational control of their jurisdictional transmission facilities to Midwest ISO.

<sup>3</sup> Midwest ISO's analysis assumed a peak capacity of 97,000 megawatts.

<sup>4</sup> Transmittal Letter at 9, Docket No. ER04-691-000 (March 31, 2004).

<sup>5</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 FTRs in order to transact under the GFA. Midwest ISO assesses congestion charges and the cost of losses for all transactions under the GFA. Under Option B, the GFA Responsible Entity does not nominate or receive FTRs, but if the GFA Scheduling Entity – a designated contract party responsible for submitting bilateral transaction schedules under the TEMT for transactions under the GFA – submits a schedule a day ahead, Midwest ISO credits back to the GFA Responsible Entity any congestion costs and the difference between marginal losses and system average losses. Under Option C, the GFA Responsible Entity does not nominate or hold FTRs for the GFA transactions but must pay the costs of congestion for all GFA transactions.

4. The Commission approved the TEMT in two parallel proceedings. In the first set of orders, the Commission considered the justness and reasonableness of the terms of the TEMT and accepted it with modifications and subject to a series of ongoing compliance filings.<sup>6</sup> In the second set of orders, the GFA Orders, the Commission considered the relationship between Midwest ISO's new markets and the GFAs.

#### **B. The Commission's GFA Orders**

5. The Commission's first effort to address the problem of how to treat the GFAs in the Midwest ISO's nascent energy markets was the Procedural Order, which, among other things, required further fact-finding and hearings to obtain information that would assist the Commission in evaluating the propriety of carving out GFAs from the Midwest ISO energy markets, whether and to what extent the transmission owners should bear the costs of taking service to fulfill their obligations in existing contracts, and whether and to what extent the GFAs should be modified.<sup>7</sup> The Commission also offered GFA holders an opportunity to settle their GFAs by voluntarily accepting the optional GFA treatment that Midwest ISO proposed in the TEMT, by July 28, 2004.

6. Based on the results of the GFA fact-finding process and through the series of GFA Orders, the Commission required the carve-out of certain GFAs and approved

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<sup>6</sup> *Midwest Independent Transmission System Operator, Inc.*, 108 FERC ¶ 61,163, *order on reh'g*, 109 FERC ¶ 61,157 (2004), *order on reh'g*, 111 FERC ¶ 61,043, *reh'g denied*, 112 FERC ¶ 61,086, *aff'd*, *Wisconsin Public Power*, 493 F.3d 239. Midwest ISO's energy markets commenced successfully on April 1, 2005.

<sup>7</sup> *Midwest Independent Transmission System Operator, Inc.*, 107 FERC ¶ 61,191, at P 67 (2004) (Procedural Order), *order on reh'g*, GFA Rehearing Order, 111 FERC ¶ 61,042, *order on reh'g*, GFA Rehearing Order II, 112 FERC ¶ 61,311, *aff'd*, *Wisconsin Public Power*, 493 F.3d 239. The Commission initiated a three-step investigation of the GFAs under section 206 of the Federal Power Act (FPA). 16 U.S.C. § 824e (2000). In step 1 of the investigation, the Commission established a paper hearing, ordered GFA parties to file interpretations of their contracts, and required Midwest ISO to provide additional information and analysis of the GFAs. In step 2, the Commission established trial-type hearing procedures before administrative law judges to elicit the GFA information from those parties who were not able to agree in step 1. Step 2 of the investigation concluded with the presiding judges' oral presentation to the Commission of the results of the hearing and the issuance of their written Findings of Fact. *Midwest Independent Transmission System Operator, Inc.*, 108 FERC ¶ 63,013 (2004). In step 3, based on the record in the paper hearing and the Finding of Fact, the Commission issued the GFA Order, which addressed the treatment of GFAs in the Midwest ISO energy markets.

Midwest ISO's proposed options for the treatment of other GFAs under the TEMT.<sup>8</sup> Specifically, the Commission determined that there were approximately 232 GFAs, representing approximately 25,000 megawatts of transmission service (23 percent of the then-total Midwest ISO peak load)<sup>9</sup> that would remain in effect when the energy markets began. The Commission then divided the GFAs into three categories.

7. The first category of GFAs, representing approximately 10,370 megawatts (then 9.6 percent of total Midwest ISO load), were carved out and therefore were not subject to the scheduling and financial settlement rules of the energy markets. The 132 carved-out GFAs represent transmission service provided under those GFAs that: (1) explicitly provide that modification is subject to the *Mobile-Sierra*<sup>10</sup> "public interest" standard of review (representing about 6,914.4 megawatts); (2) are silent with respect to the standard of review (representing about 1,272.9 megawatts); or (3) provide for transmission service by an entity that is not a public utility (representing about 2,198 megawatts).<sup>11</sup> The Commission found that the public interest did not require modification of this narrow class of GFAs because Midwest ISO would be able to reliably operate its energy markets, with net benefits to the public, notwithstanding a carve-out of these GFAs, until the transition period ends in 2008.<sup>12</sup>

8. The second category of GFAs, representing approximately 5,000 megawatts (then 4.5 percent of total Midwest ISO load), included 47 GFAs for which unilateral modification is subject to the "just and reasonable" standard of review under sections 205 and 206 of the FPA.<sup>13</sup> The Commission found that it was unjust and unreasonable for

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<sup>8</sup> GFA Order, 108 FERC ¶ 61,236 at P 104, Appendix B; GFA Rehearing Order, 111 FERC ¶ 61,042 at P 52, Appendix B.

<sup>9</sup> These GFA statistics are based on Midwest ISO's peak load as of September 16, 2004, which was 107,552 megawatts. The statistics were compiled from the several orders in this proceeding at the time of market start-up. Due to further refinements in the GFA data with each subsequent order, they will not exactly match the statistics in any one particular order.

<sup>10</sup> See *United Gas Pipe Line Company v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956) (*Mobile*); *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) (*Sierra*).

<sup>11</sup> GFA Order, 108 FERC ¶ 61,236 at P 130, 147-50.

<sup>12</sup> *Id.* at P 5, 142.

<sup>13</sup> 16 U.S.C. §§ 824d-824e (2000). GFA Order, 108 FERC ¶ 61,236 at P 137 & n.104. The parties to these GFAs did not voluntarily settle during step 1 or step 2 of the investigation.

these GFAs to remain outside the Midwest ISO energy markets and directed these GFA parties to integrate their GFA transactions into the energy markets by choosing either Option A or C, or by converting to TEMT service.<sup>14</sup>

9. The third category of GFAs, representing approximately 9,200 megawatts (then 9 percent of total Midwest ISO load), included 53 GFAs for which the parties entered into voluntary settlement agreements. These GFA holders would participate in Midwest ISO's energy markets as a result of their selection of one of Midwest ISO's proposed three options (A, B, or C)<sup>15</sup> for scheduling and financially settling GFA transactions or their voluntary conversion to service under the TEMT.

10. The Commission accepted Option B as just and reasonable for those GFA parties that voluntarily settled on Option B treatment before July 28, 2004, but stated that Option B would not be available for parties that did not settle by that date.<sup>16</sup> The Commission acknowledged that although the use of Option B causes uplift for other market participants, the extent of that uplift is mitigated by the limited amount of megawatts under, and number of parties that chose, Option B. The Commission found that its decision struck the appropriate balance between encouraging GFA party settlements and minimizing the potential for uplift by limiting the availability of Option B to parties that voluntarily and timely settled on an option for integrating their GFAs into the energy markets.<sup>17</sup>

11. The Commission allowed the carve-out and Option B treatment to continue until February 1, 2008. In this regard, the Commission also accepted a provision in the TEMT obligating Midwest ISO to: (1) evaluate the impact that the optional treatments for GFAs

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<sup>14</sup> GFA Order, 108 FERC ¶ 61,236 at P 139.

<sup>15</sup> *Id.* at P 275. Parties to 15 GFAs (approximately 1,719 megawatts) chose Option A; parties to 33 GFAs (approximately 5,588 megawatts) chose Option B; and parties to 5 GFAs (approximately 2,487 megawatts) chose to convert their GFAs to TEMT service. No party chose Option C.

<sup>16</sup> GFA Order, 108 FERC ¶ 61,236 at P 264. *See also* Procedural Order, 107 FERC ¶ 61,191 at P 80. GFA parties that settled prior to July 28, 2004 (the date of the conclusion of the Commission's fact-finding investigative hearings) are allowed to switch between the three settlement options on an annual basis. Market participants that did not voluntarily settle by that date may request a change of treatment annually between Options A and C, but they may not choose Option B.

<sup>17</sup> GFA Order, 108 FERC ¶ 61,236 at P 268-70; GFA Rehearing Order, 111 FERC ¶ 61,042 at P 106, 130; GFA Rehearing Order II, 112 FERC ¶ 61,311 at P 44.

have on the energy markets; and (2) make an FPA section 205 filing 12 months prior to February 1, 2008 that details a new proposal for the treatment of GFAs after the transition period concludes.<sup>18</sup> The Commission stated that at that time, it would evaluate any proposals to extend the availability of Option B and the carve-out beyond February 1, 2008.<sup>19</sup> The Commission “made no determination that either would preclude or would allow the continuance” of Option B or the carve out “or otherwise predetermine[] the treatment of GFAs” beyond the transition period.<sup>20</sup>

### C. Midwest ISO’s February 1, 2007 Filing

12. As discussed in more detail below, on February 1, 2007, Midwest ISO made the required filing on post-transition GFA treatment (February 2007 Filing). Midwest ISO states that in light of the relatively small and gradually decreasing percentage of GFAs in its footprint, and based on its analysis finding that the GFAs do not significantly affect other transmission customers, it does not propose to make substantial changes to the current treatment of GFAs, including carved-out GFAs. Specifically, it proposes to continue the carve-out, subject to further evaluation of issues associated with settlement of energy losses under the TEMT.<sup>21</sup> Midwest ISO also proposes to continue the availability of Option A, B, and C GFA treatment, subject to potential modification of the Option B loss rebate mechanism and maintaining the Commission’s condition on the availability of Option B treatment only to parties that voluntarily elected that option before July 28, 2004.<sup>22</sup>

13. Midwest ISO states that the results of its evaluation of the impact of GFAs, and the proposal to continue the current treatment of GFAs, were discussed with stakeholders at the Midwest ISO Market Subcommittee meetings on December 5, 2006 and January 9,

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<sup>18</sup> See TEMT Module C, section 38.8.5.

<sup>19</sup> GFA Order, 108 FERC ¶ 61,236 at P 268. The Commission further directed that Midwest ISO’s proposal analyze the effect Option B treatment has had on the other market participants, including the amount of uplift that has been needed to cover the costs of congestion and the difference between marginal and average losses.

<sup>20</sup> GFA Rehearing Order, 111 FERC ¶ 61,042 at P 130.

<sup>21</sup> Midwest ISO also states that it is performing a study of losses over the Midwest ISO region and will consider modifying the loss calculations that apply to GFA transactions based on the results of that study.

<sup>22</sup> February 2007 Filing at 3-8 (citing GFA Order, 108 FERC ¶ 61,236 at P 264).

2007. It states that although stakeholders did not choose to vote to affirmatively approve the recommendation to continue the current treatment of GFAs, no substantive issue or concern with the proposal was raised at those meetings.

**D. Court of Appeals Ruling on GFA Orders**

14. Several parties appealed the Commission's GFA orders to the United States Court of Appeals for the District of Columbia Circuit alleging, among other things, that the Commission erred in approving: (1) the carve-out of GFAs for which modification is subject to the "public interest" standard of review; (2) the Option B settlements; and (3) the carve-out and Option B settlement together as just and reasonable. Petitioners argued that the Commission's decision regarding the treatment of GFAs impermissibly shifts GFA congestion costs to ordinary market participants. They also argued that all GFAs should have been required to choose between conversion to the TEMT, Option A, or Option C, and that the Commission acted arbitrarily by carving out some GFAs entirely and granting others favorable treatment under Option B.

15. The Court of Appeals denied the petitions for review and affirmed the Commission's GFA orders.<sup>23</sup> In sum, the court found that the Commission appropriately carved out those GFAs that were subject to the *Mobile-Sierra* standard of review;<sup>24</sup> appropriately approved the Option B settlements;<sup>25</sup> and that approval of the carve-out and Option B in combination was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."<sup>26</sup>

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<sup>23</sup> *Wisconsin Public Power*, 493 F.3d at 278-79.

<sup>24</sup> The court agreed with the Commission's finding that subjecting the GFAs to the terms of the TEMT would result in "significant changes . . . affect[ing] the bargain between the parties to the individual GFAs." *Id.* at 272 (quoting GFA Rehearing Order, 111 FERC ¶ 61,042 at P 87). It further found that the Commission's determination 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." *Id.* at 273 (emphasis in original). We note that *Wisconsin Public Power* refers to all three categories of carved-out GFAs (*i.e.*, those GFAs that do not specify a standard of review, those that specifically provide that they are protected by *Mobile-Sierra*, and those outside the Commission's jurisdiction) as "GFAs protected by the *Mobile-Sierra* doctrine and subject to the public interest standard of review." *Id.* at 270.

<sup>25</sup> *Id.* at 275-76.

<sup>26</sup> *Id.* at 278.

## II. Notice and Responsive Pleadings

16. Notice of Midwest ISO's February 2007 Filing, as amended on August 3, 2007, was published in the *Federal Register*, 72 Fed. Reg. 6,557 (2007), with protests and interventions due on or before February 22, 2007.<sup>27</sup> Timely motions to intervene were filed by Consumers Energy Company and Hoosier Energy Rural Electric Cooperative, Inc. Timely motions to intervene and protest were filed by Duke Energy Shared Services, Inc., on behalf of its affiliates Duke Energy Ohio, Inc., Duke Energy Indiana, Inc., and Duke Energy Kentucky, Inc. (collectively, Duke Energy) and Wisconsin Electric Power Company (Wisconsin Electric).

17. Motions to intervene out of time were filed by Detroit Edison Company; Sempra Energy Trading Corp.; DC Energy Midwest, LLC; and Lincoln Electric System, Midwest Municipal Transmission Group, Missouri River Energy Services, and Wisconsin Public Power Inc (collectively, Municipal Intervenors).

18. In its protest, Duke Energy states that it does not support Midwest ISO's proposal to indefinitely perpetuate the special treatment that Option B and carved-out GFAs currently enjoy, after February 1, 2008. It states that the Commission's reasons for approving Option B and the carve-out are no longer viable. Duke Energy asserts that any claim that GFA parties might have had to special treatment under the Midwest ISO TO Agreement, which was filed more than nine years ago, has disappeared. It explains that the Commission's decision in the Formation Order to allow a six-year transition period was originally rendered more than eight years ago. Duke Energy notes that, in that order, the Commission directed GFA parties to begin renegotiating their contracts three years after the transition period began (*i.e.*, in January 2005), and emphasized that nothing prevented GFA parties from negotiating sooner.<sup>28</sup> It asserts that GFA parties have had

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<sup>27</sup> The Commission initially noticed Midwest ISO's February 2007 Filing on February 6, 2007, in Docket Nos. ER04-691-083, ER04-106-020, and EL04-104-070. On February 21, 2007, the Commission issued a notice canceling the original docket numbers and changed the docket number of the proceeding to ER07-532-000. The February 21, 2007 notice did not change the February 22, 2007 comment date.

<sup>28</sup> Duke Energy Protest at 17 (citing Formation Order, 84 FERC ¶ 61,231 at 62,167, 62,169-70; *Midwest Independent Transmission System Operator, Inc.*, Opinion No. 453, 97 FERC ¶ 61,033, at 61,169 (2001), *order on reh'g*, Opinion No. 453-A, 98 FERC ¶ 61,141, at 61,414 & n.27 (2002), *order on remand*, 102 FERC ¶ 61,192 (2003), *reh'g denied*, 104 FERC ¶ 61,012 (2003), *aff'd sub nom. Midwest ISO Transmission Owners, et al. v. FERC*, 373 F.3d 1361 (D.C. Cir. July 16, 2004)).



more than adequate notice and opportunity to reform their contracts and that the Commission should not hesitate in requiring GFA parties to conform to the TEMT if they wish to continue receiving the benefits of Midwest ISO's energy markets.<sup>29</sup>

19. Duke Energy states that the Commission, in approving Option B and carve-out treatment in the GFA orders, was primarily concerned that both measures were required in order to prevent further delays in the start-up of Midwest ISO's energy markets and to provide incentives for GFA parties to participate in (or at least not exit from) those markets. It argues that the Commission's decision to limit the carve-out exclusively to non-jurisdictional GFAs and GFAs subject to the public interest standard of review appears to have been motivated by a desire to avoid extensive litigation over *Mobile-Sierra* issues and difficult questions concerning the Commission's jurisdiction. Duke Energy states that, assuming that such concerns were valid before the Midwest ISO energy markets went into effect, neither of these factors should bear any weight in the Commission's evaluation of Midwest ISO's post-transition GFA proposal. It argues that Midwest ISO's energy markets are operational; therefore, it is no longer necessary for the Commission to perpetuate Option B or the carve-out in order to avoid delays in market start-up. Furthermore, Duke Energy asserts, the Commission no longer needs to induce new or continued participation in Midwest ISO's energy markets by parties to public interest or non-jurisdictional GFAs.<sup>30</sup>

20. Duke Energy also argues that the substantial undue preference afforded to Option B and carved-out GFA parties inflicts unreasonable cost shifts on other market participants and unnecessarily reduces market efficiency. According to Duke Energy, Midwest ISO's filing provides facially significant evidence of the undue preference that Option B and carved-out GFAs enjoy: (1) congestion rebates to GFA parties have been more than \$19 million for Option B GFAs and over \$32 million for carved-out GFAs;<sup>31</sup> (2) market participants have made direct uplift payments totaling at least \$767,420 for Option B GFAs and \$4.9 million for carve-out GFAs to make up the difference in congestion hedges where those hedges fail to cover the required rebates;<sup>32</sup> and (3) loss

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<sup>29</sup> *Id.* at 17-18 (citing, *e.g.*, *Ameren Services Co.*, 104 FERC ¶ 61,297, at P 6 (2003) (directing modifications to the Independent Transmission Company Agreement between GridAmerica and Midwest ISO "to state that after the six-year transition period expires, the Commission will institute a proceeding pursuant to section 206 of the FPA with respect to any grandfathered agreements that have not been converted to service under the Midwest ISO Tariff"))).

<sup>30</sup> *Id.* at 18-19.

<sup>31</sup> *Id.* at 20-21 (citing February 2007 Filing at 5, 9).

<sup>32</sup> *Id.*

rebates to GFA parties have been more than \$17.5 million for Option B and more than \$94 million for carved-out GFAs, which is two to three times the rebate for losses they would receive if they were settled in the same manner as TEMT service.<sup>33</sup>

21. Furthermore, Duke Energy asserts that Midwest ISO's request to perpetuate the carve-out and Option B is too vague and should be rejected because Midwest ISO has not met its burden under FPA section 205. It states that both the TEMT and the Commission's prior orders appear to require Midwest ISO to submit a complete FPA section 205 rate proposal that details Midwest ISO's proposed treatment of GFAs after the transition period.<sup>34</sup> Duke Energy argues that Midwest ISO's proposal to continue Option B and the carve-out, subject to future "potential modifications," does not fulfill this requirement.<sup>35</sup> It also argues that Midwest ISO's analysis fails to quantify substantial hidden cost-shifts and market inefficiencies associated with Option B and carved-out GFA schedules.<sup>36</sup> Duke Energy requests that the Commission direct Midwest ISO to present a more robust analysis of such hidden costs and require that Midwest ISO explain its unsupported conclusion that "the inclusion of Option B GFAs in the annual FTR allocation has not significantly affected other Market Participants."<sup>37</sup> According to Duke Energy, Midwest ISO's vague proposal is inappropriate in a compliance filing and makes it impossible to provide informed comments.

22. Finally, Duke Energy argues that Midwest ISO's long-term firm transmission rights (LTTRs) proposal, submitted in Docket No. ER07-478-000, may result in the preferential allocation of LTTRs to carved-out and Option B GFAs that will discriminate between different classes of load-serving entities. Duke Energy asserts that it is also unclear whether and how Midwest ISO's LTTR proposal would allow carved-out and Option B GFAs to acquire auction revenue rights (ARRs) and thereby potentially extend GFA preferences beyond the terms of the GFAs themselves. In sum, Duke Energy asserts, Midwest ISO's failure to even attempt to explain how GFAs will be treated in the

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<sup>33</sup> *Id.* (citing February 2007 Filing at 6, 10).

<sup>34</sup> *Id.* at 22 (citing TEMT section 38.8.4; GFA Order, 108 FERC ¶ 61,236 at P 268; GFA Rehearing Order, 111 FERC ¶ 61,042 at P 106, 130).

<sup>35</sup> *Id.* (citing February 2007 Filing at 7, 10).

<sup>36</sup> *Id.* at 21-22.

<sup>37</sup> *Id.* (quoting February 2007 Filing at 5).

“new world” of LTTRs provides an additional reason for the Commission to reject Midwest ISO’s proposal and require that carved-out and Option B GFAs convert to standard TEMT service at the end of the transition period.<sup>38</sup>

23. Wisconsin Electric protests Midwest ISO’s proposed treatment of congestion and losses for Option B and carved-out GFAs. It argues that the Commission should require Midwest ISO to assess all GFAs the cost of marginal losses when the current over-collected loss provisions in the TEMT expire (*i.e.*, five years after start-up of Midwest ISO’s energy markets).<sup>39</sup>

24. Wisconsin Electric urges the Commission to reject Midwest ISO’s proposal to indefinitely extend GFAs beyond their current sunset date. While Midwest ISO contends that GFAs do not significantly affect stakeholders, Wisconsin Electric is concerned that Midwest ISO has not fully identified the costs of continuing the GFAs. It believes that the inefficiencies produced by having market participants interact under different rules will result in additional costs that have not been taken into account in Midwest ISO’s analysis of uplifts. Wisconsin Electric does not oppose the socialization of congestion costs and losses not paid by GFAs during the transition to fully functioning energy markets in Midwest ISO.<sup>40</sup> However, it questions whether the continued socialization of costs and the perpetuation of inefficiencies associated with the transitional GFA treatment are appropriate – particularly as Midwest ISO is preparing to implement the new Ancillary Services Market and introduce new rules governing FTRs. Wisconsin Electric argues that it is unjust and unreasonable to require Wisconsin Electric’s ratepayers to subsidize the GFAs of other utilities beyond the transition period originally contemplated and that the Commission should require Midwest ISO to propose a more definitive plan to converge the treatment of GFAs to TEMT service.

25. Municipal Intervenors support continuation of Option B and the carve-out and accept the record as it exists.

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<sup>38</sup> We note that the Commission recently addressed Midwest ISO’s LTTR proposal in *Midwest Independent Transmission System Operator, Inc.*, 119 FERC ¶ 61,143, at P 162-66 & n.51, *order on reh’g*, 121 FERC ¶ 61,063 (2007) (LTTR Order).

<sup>39</sup> Wisconsin Electric Protest at 3.

<sup>40</sup> *Id.* at 4.

### **III. Discussion**

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

26. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,<sup>41</sup> the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

27. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure,<sup>42</sup> the Commission will grant the late-filed motions to intervene given the parties' interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

#### **B. Analysis**

28. The Commission has reviewed Midwest ISO's proposal on the post-transition treatment of GFAs. We have also independently analyzed the current status of GFAs participating in the Midwest ISO region. Our examination of the information indicates that, of the original approximately 232 GFAs, about 191 GFAs remain in effect as of July 2007. Based on the information that the GFA parties originally reported, the 191 remaining GFAs represent approximately 15 percent of Midwest ISO's current peak load (down from approximately 23 percent that the GFAs represented at market inception), or approximately 16,470 megawatts.<sup>43</sup>

29. Our analysis further indicates that the remaining GFAs currently represent approximately:

- (i) 101 carved-out GFAs, representing 7,273 megawatts (or 6.65 percent of total Midwest ISO peak load). At the start of the energy markets, this group included 132 carved-out GFAs, representing 10,370 megawatts

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<sup>41</sup> 18 C.F.R. § 385.214 (2007).

<sup>42</sup> 18 C.F.R. § 385.214(d) (2007).

<sup>43</sup> These GFA statistics were compiled based on the Commission's analysis as of July 2007. The Commission used peak load of 109,298 MW. This is the 2006 peak load that Midwest ISO reported as occurring on July 31, 2006 (116,030 MW) minus Louisville Gas and Electric Company and Kentucky Utilities Company's July 2006 peak load, as reported in their FERC Form No. 1 (since these companies withdrew from Midwest ISO after July 31, 2006).

(or 9.65 percent of the total Midwest ISO peak load). These GFAs are subject to the public interest standard of review, are silent, or are non-jurisdictional;

- (ii) 41 GFAs for which unilateral modification is subject to the “just and reasonable” standard of review participate in Midwest ISO’s markets through either Option A or Option C as a result of the Commission’s GFA orders (*i.e.*, these GFA parties did not initially settle). These GFAs represent approximately 4,316 megawatts (or 3.95 percent of total Midwest ISO load). At the start of the energy markets, this group included 47 GFAs, representing 4,943 megawatts (or 4.6 percent of the total Midwest ISO peak load);
- (iii) 30 GFAs, representing 3,911 megawatts (3.58 percent of total Midwest ISO load) participate in Midwest ISO’s energy markets as a result of these GFA parties’ voluntary election of Option B for scheduling and financially settling GFA transactions. At the start of the energy markets, this group included 33 GFAs, representing 5,589 megawatts (or 5.20 percent of the total Midwest ISO peak load);
- (iv) 19 GFAs, representing 970 megawatts (or 0.89 percent of total Midwest ISO load) participate in Midwest ISO’s energy markets as a result of these GFA parties’ voluntary election of Option A for scheduling and financially settling GFA transactions. At the start of the energy markets, Option A GFAs represented 1.6 percent of the total Midwest ISO peak load.<sup>44</sup>

30. Based on the evidence and analysis before us, we will accept Midwest ISO’s February 2007 Filing, as discussed below.

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<sup>44</sup> At the start of the energy markets, there were 15 Option A GFAs, whereas there are currently 19 Option A GFAs. Although the total number of megawatts (and percentage of total Midwest ISO load) has decreased for this category of GFAs, the total number of actual contracts has increased by 4 GFAs. The reason for the increased number of GFAs at market start-up is due to the Commission’s direction in the GFA Order that for those GFAs that did not settle and that are subject to a just and reasonable standard of review to choose between the scheduling and settlement provisions of Option A or Option C (or convert to the TEMT), before the commencement of FTR nominations. GFA Order, 108 FERC ¶ 61,236 at P 139.

### C. Carved-Out GFAs

31. As noted above, the Commission in the GFA Orders directed Midwest ISO to carve out, and therefore not subject to the energy markets' scheduling and settlement provisions, transmission service provided under GFAs that: (1) explicitly provide that unilateral modification is subject to the *Mobile-Sierra* "public interest" standard of review; (2) are silent with respect to the standard of review; or (3) provide for transmission service by an entity that is not a public utility.<sup>45</sup> The Commission stated that:

the record before us suggests that the Energy Markets...can be operated reliably, with net benefits to the public, notwithstanding a carve-out of these 77 GFAs until the transition period ends in 2008. We therefore cannot find today that the public interest requires that these GFAs be modified in order for the Energy Markets to operate reliably.<sup>46</sup>

32. The Commission required Midwest ISO "to include in its February 2007 Filing a proposal for the post-transition-period status and treatment of carved-out GFAs," stating that "[o]nce the Midwest ISO's proposal is filed, the Commission will evaluate any proposals to extend the carve-out for the GFAs beyond February 1, 2008."<sup>47</sup>

#### 1. Midwest ISO's Proposal

33. Pursuant to the Commission's directives, Midwest ISO states that it analyzed the effects that carved-out GFA treatment may have had on other market participants, including the amount of any uplift to cover congestion costs and losses.<sup>48</sup> It states that the portion of carved-out GFA congestion rebates that has been uplifted to market participants, at around 15 percent, has been moderate, although higher than for Option B

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<sup>45</sup> GFA Order, 108 FERC ¶ 61,236 at P 141; GFA Rehearing Order, 111 FERC ¶ 61,042 at P 68.

<sup>46</sup> GFA Order, 108 FERC ¶ 61,236 at P 142.

<sup>47</sup> GFA Rehearing Order, 111 FERC ¶ 61,042 at 204; GFA Rehearing Order II, 112 FERC ¶ 61,311 at P 41. *See also* GFA Order, 108 FERC ¶ 61,236 at P 268; GFA Rehearing Order, 111 FERC ¶ 61,042 at P 130; TEMT Module C, section 38.8.5.

<sup>48</sup> GFA Order, 108 FERC ¶ 61,236 at P 90; GFA Rehearing Order, 111 FERC ¶ 61,042 at P 406, 415.

GFA. The higher portion of uplift associated with carved-out GFAs, Midwest ISO explains, reflects relatively greater scheduling flexibility and hence a less precise match between the FTRs set aside during the annual FTR allocation to fund carved-out GFA congestion rebates and the actual congestion rebates provided under carved-out GFAs when scheduled. It states that the evaluation of carved-out GFA marginal loss refunds reveals that such refunds result in a cost shift for similar causes, but of a greater magnitude, than that associated with Option B GFAs. Midwest ISO notes that the rebates to the carved-out GFAs have been over three times the rebate that the GFA parties would receive if the GFAs were settled for losses in the same manner as TEMT service.<sup>49</sup>

34. Further, Midwest ISO explains, since the entire marginal loss charge is rebated to the carved-out GFA, neither the party taking service nor the party providing service under the carved-out GFA pays for any of the cost of the losses associated with the schedules under the carved-out GFA. The cost of energy needed to serve the losses caused by the GFA schedules reduces the over-collected marginal loss revenue that can be refunded to market participants taking TEMT service. Midwest ISO states that in essence, those taking TEMT service pay for all of the cost of the losses associated with the carved-out GFAs.<sup>50</sup>

35. Midwest ISO also conducted an analysis to determine whether carved-out GFA schedules were consistent with the participant's load and generation. The purpose, it states, was to determine whether participants with carved-out GFAs were using them to extract congestion and loss revenues from the market rather than scheduling them to offset charges incurred when moving energy from their generation to load. Midwest ISO conducted a statistical analysis of the carved-out GFA schedules, divided by the scheduled generation or scheduled load, both in day-ahead and real-time markets, by Commercial Pricing Nodes and by hour from market start-up to the most recent period for which the data were available. According to Midwest ISO, the results suggest that on average, "carved out GFAs were scheduled as expected, that is, to serve the participant's load with its generation."<sup>51</sup>

36. Thus, based on its analysis, Midwest ISO proposes to continue the GFA carve-out, subject to a potential modification. It explains that the settlement of losses for carved-out GFAs should not result in a shift of cost responsibility for providing losses associated with carved-out GFA schedules to other market participants. Midwest ISO states that it is currently evaluating loss settlement issues under the TEMT. When that evaluation is

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<sup>49</sup> February 2007 Filing at 10.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 11.

complete, Midwest ISO states that it will again evaluate settlement of losses for carved-out GFAs and propose appropriate modifications as part of a future GFA quarterly informational filing. In the event modifications are warranted, Midwest ISO states that it will advise the Commission of its proposed remedy in advance of the end of the transition period to permit interested parties to comment and to allow the Commission time to render a decision.<sup>52</sup>

## 2. Commission Determination

37. The Commission will accept Midwest ISO's proposal to continue its existing treatment of carved-out GFAs beyond February 1, 2008. Our decision here is based on the evidence before us, the settled expectations of the parties to carved-out GFA contracts, and the Midwest ISO TO Agreement. As discussed below, we find that Midwest ISO's proposal is sufficiently supported to extend the carve-out of those GFAs protected by the *Mobile-Sierra* doctrine because the public interest does not require their modification.

38. First, we note that the Commission's reasons for approving the carve-out, and the court's reasons for upholding it in *Wisconsin Public Power*, are relevant to our decision here because they address some of protesters' instant concerns.<sup>53</sup> In *Wisconsin Public Power*, the court explained that the first step in the *Mobile-Sierra* analysis is to determine whether the challenged regulatory action constitutes an abrogation or modification of the contracts protected by the doctrine.<sup>54</sup> The court agreed with the Commission that while subjecting the GFA parties to Midwest ISO Tariff terms would not "rewrite" the plain text of the GFAs, "coercing them through congestion charges to conform to the scheduling requirements of the Day-Ahead market – would result in 'significant changes . . . affect[ing] the bargain between the parties to the individual GFAs.'"<sup>55</sup> The court

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<sup>52</sup> *Id.* We note that we received Midwest ISO's most recent quarterly report on October 31, 2007. That report did not propose changes to the Option B or carved-out GFAs. However, Midwest ISO did state that it expects to file the proposed Tariff changes soon before or after February 1, 2008.

<sup>53</sup> We note that Duke Energy was a petitioner in the *Wisconsin Public Power* proceeding. It raises many of the same arguments in this case as it did there.

<sup>54</sup> *Wisconsin Public Power*, 493 F.3d at 272.

<sup>55</sup> *Id.* at 273 (citing GFA Rehearing Order, 111 FERC ¶ 61,042 at P 87).



determined that the Commission's "significant changes" conclusion was not only reasonable, but "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."<sup>56</sup>

39. Next, the court examined the second step in the *Mobile-Sierra* analysis, which is to determine whether the challenged modification or abrogation of the contracts protected by the doctrine is necessary in the public interest. The court agreed with the Commission's finding that because "'the Energy Markets . . . can be operated reliably, with net benefits to the public' even with the *Mobile-Sierra* GFAs carved out, 'unequivocal public necessity' did not support subjecting the relevant GFAs to the [Midwest ISO] Tariff."<sup>57</sup> The court stated that petitioners did not prove that the cost shift to others in the market was "so severe as to threaten the 'financial ability' of any utility 'to continue its service,' or that the cost shift amounted to an 'excessive' burden on any other market participants."<sup>58</sup>

40. With regard to petitioners' claim of undue discrimination, the court acknowledged that exempting the GFA parties from Tariff requirements was "in some loose sense discriminatory" because it allows GFA parties to schedule on short notice and with greater flexibility than non-GFA market participants.<sup>59</sup> It found, however, that the Commission "reasonably concluded . . . that such discrimination was inherent in the solution to the GFA problem, and that the extent of the discrimination was relatively small and not 'undue.'"<sup>60</sup> Further, the court recognized that forcing the parties to "public

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<sup>56</sup> *Id.* (emphasis in original).

<sup>57</sup> *Id.* (citing GFA Order, 108 FERC ¶ 61,236 at P 142; *Permian Basin Area Rate Cases*, 390 U.S. 747, 822 (1968)).

<sup>58</sup> *Id.* at 273-74 (citing *Sierra*, 390 U.S. at 355). The court explained that in order to succeed in a challenge that the public interest standard is not met, petitioners must generally show one of the following circumstances: that the contract rate the Commission aims to modify "might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory." *Id.*

<sup>59</sup> *Id.* at 274.

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

interest”-standard GFAs to conform to the TEMT “would have had comparatively small advantages, compared to the distinct *disadvantages* that would result from not exempting them.”<sup>61</sup>

41. In addition, the court pointed out that the Commission reasonably determined that “unequivocal public necessity” did not mandate overriding the GFAs at issue because doing so would have disrespected the Midwest ISO TO Agreement.<sup>62</sup> The court recognized that the Commission, “[h]aving long ago approved a filing supporting the expectation that the GFAs would receive ‘special treatment’ in the establishment of [Midwest ISO’s] new markets. . . would have upset that settled expectation if it did not carve out those GFAs protected by the *Mobile-Sierra* doctrine.”<sup>63</sup> The court concluded that the Commission appropriately “weighed the need to preserve the terms of the formation bargain.”<sup>64</sup>

42. Protesters’ main argument is that the Commission’s reasons for approving the carve-out are not viable for the post-transition period, and that GFA parties can no longer expect special treatment under their bilateral contracts or the Midwest ISO TO Agreement. We disagree and find that, in weighing the interests, the public interest does not require modifying the *Mobile-Sierra* GFAs when the transition period ends.

43. First, we disagree with Duke Energy that GFA parties can no longer claim special treatment beyond 2008 under their bilateral contracts or the Midwest ISO TO Agreement. Duke Energy claims that because the Commission’s decision to allow GFAs “special treatment” for a six-year transition period was issued more than eight years ago, GFA parties had more than adequate notice to conform their contracts to the TEMT.<sup>65</sup> However, while the Midwest ISO TO Agreement states that GFAs shall continue according to their terms during the transition period,<sup>66</sup> it also states that the GFAs are not abrogated or modified by the terms of the Midwest ISO TO Agreement after the transition period.<sup>67</sup> Further, in the Formation Order, which approved the Midwest ISO

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<sup>61</sup> *Id.* (emphasis in original).

<sup>62</sup> *Id.* at 275 (citing Opinion No. 453, 97 FERC ¶ 61,033 at 61,169).

<sup>63</sup> *Id.* (citing, *e.g.*, Procedural Order, 107 FERC ¶ 61,191 at P 15; GFA Order, 108 FERC ¶ 61,236 at P 125; GFA Rehearing Order, 111 FERC ¶ 61,042 at P 81).

<sup>64</sup> *Id.* (citing *Union Electric Co. v. FERC*, 890 F.2d 1193, 1195 (D.C. Cir. 1989)).

<sup>65</sup> Duke Energy Protest at 17.

<sup>66</sup> *See* Midwest ISO TO Agreement, Appendix C, section II(A)(3)(f).

<sup>67</sup> *Id.*, Appendix C, section II(B)(2) .

TO Agreement, the Commission stated that it did “not preclude, at this time, a request to extend that initial rate method for more than six years.”<sup>68</sup> Further, the Commission in the GFA orders emphasized that it made no predetermination that would either preclude or allow the continuance of the carve-out beyond 2008.<sup>69</sup> The TEMT also specifically states that the treatment of the GFAs “shall terminate *no earlier* than February 1, 2008, and thereafter upon acceptance by the Commission of new provisions governing treatment of GFAs.”<sup>70</sup> Thus, parties have – and have always had – a basis to understand that the Commission could continue to honor the terms of the GFAs beyond the six-year transition period.

44. In addition, as the court noted in *Wisconsin Public Power*, the carved-out GFAs are protected by the *Mobile-Sierra* “public interest” standard of review,<sup>71</sup> and are private contracts “subject to only limited [Commission] intervention.”<sup>72</sup> The court also warned that it has “previously cautioned [the Commission] against ‘cavalierly disregarding private contracts.’”<sup>73</sup> Accordingly, we must determine whether “unequivocal public necessity” requires abrogating “the bargain between the parties to GFAs protected by the

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<sup>68</sup> Formation Order, 84 FERC ¶ 61,231 at 62,168.

<sup>69</sup> GFA Order, 108 FERC ¶ 61,236 at P 268; GFA Rehearing Order, 111 FERC ¶ 61,042 at P 130. In the GFA Rehearing Order II, the Commission reiterated that “it is premature to make a determination on how any particular GFA will be treated after the transition period ends on February 1, 2008,” and that when Midwest ISO files “the details of a new proposal for the treatment of GFAs after the transition period concludes...[t]he Commission will consider post-transition period issues at that time.” GFA Rehearing Order II, 112 FERC ¶ 61,311 at P 44.

<sup>70</sup> TEMT Module C, section 38.8.5 (emphasis added).

<sup>71</sup> We reiterate that *Wisconsin Public Power* refers to all three categories of carved-out GFAs (*i.e.*, those GFAs that do not specify a standard of review, those that specifically provide that they are protected by *Mobile-Sierra*, and those outside the Commission’s jurisdiction) as “GFAs protected by the *Mobile-Sierra* doctrine and subject to the public interest standard of review.” *Id.* at 270.

<sup>72</sup> *Wisconsin Public Power*, 493 F.3d at 271.

<sup>73</sup> *Id.* at 275 (citing *Union Electric Co. v. FERC*, 890 F.2d 1193, 1195 (D.C. Cir. 1989)).

*Mobile-Sierra* doctrine.”<sup>74</sup> We must also consider whether to extinguish “the promise of special treatment for GFAs set forth in the [Midwest ISO] formation agreement,” beyond 2008.<sup>75</sup>

45. In this regard, we agree with Midwest ISO’s conclusion that the relatively small and gradually decreasing percentage of GFAs in its footprint “[does] not significantly affect other transmission customers.”<sup>76</sup> As noted above, there are currently approximately 101 carved-out GFAs remaining, representing about 6.7 percent of total Midwest ISO load (or about 7,273 megawatts), which is down from the original approximately 132 carved-out GFAs representing about 9.6 percent of total Midwest ISO load. That number will continue to decrease over time, which results in a more reliable Midwest ISO system.

46. Further, Midwest ISO states that its analysis of carved-out GFA schedules suggests that carved-out GFAs were for the most part scheduled as expected (*i.e.*, to serve the participant’s load with its generation) and not to extract congestion and loss revenues from the market.<sup>77</sup> Midwest ISO has also shown in its quarterly reports that there is a generally high level of scheduling accuracy related to carved-out GFAs and that it has not found any instances where a reduction of FTRs was significantly impacted by carved-out GFAs. We continue to encourage Midwest ISO Transmission Owners, to the extent that they take service under the Midwest ISO Tariff, to submit to Midwest ISO day-ahead and modified real-time schedules (that are as accurate as possible) for the carved-out GFAs, in accordance with the timelines set forth in the TEMT.<sup>78</sup> As we stated in the GFA Order “[t]his additional information will allow Midwest ISO to better accommodate the GFAs ... and further minimize the impact of the carve-out on the Day 2 markets.”<sup>79</sup>

47. Midwest ISO also explains that uplifts to the market associated with carved-out GFA congestion rebates have been moderate. It states that, from April 2005 through December 2006, carved-out GFAs received a total of about \$32 million in congestion rebates, but only about \$5 million (15 percent) was uplifted to market participants. (The rest was covered by implicit FTRs that Midwest ISO holds for the carved-out GFAs.)

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<sup>74</sup> *Id.* at 277.

<sup>75</sup> *Id.*

<sup>76</sup> February 2007 Filing at 3.

<sup>77</sup> *Id.* at 11.

<sup>78</sup> *See* Midwest ISO TEMT sections 39.1.1 and 40.1.1.

<sup>79</sup> GFA Order at P 144.

It also states that its evaluation of carved-out GFA marginal loss refunds over the same period reveals that such refunds result in a cost shift of greater magnitude – approximately \$60 million. Midwest ISO indicates that this is due to the fact that carved-out GFAs are not responsible for any losses, not even on a Day 1 system average basis. It states that it is evaluating options for addressing this cost shift and, if modifications are warranted, it will advise the Commission of its proposal in time for the Commission to render a decision on it by February 1.<sup>80</sup> Nonetheless, the court found that “such discrimination was inherent in the solution to the GFA problem, and that the extent of the discrimination was relatively small and not ‘undue.’”<sup>81</sup>

48. Thus, given the comparatively small number of megawatts associated with carved-out GFAs and Midwest ISO’s conclusion that “GFAs do not significantly affect other transmission customers,” we cannot find that the cost-shifts alleged by protesters rise to the level of discrimination required for contract modification under the *Mobile-Sierra* doctrine. In balancing the interests, we find that there would be relatively small advantages to integrating the carved-out GFAs into the markets in 2008, compared to the clear disadvantages that would result from not exempting them and requiring them to conform to the TEMT.<sup>82</sup> As we stated in the GFA Order, carving out the GFAs protected by *Mobile-Sierra* “is possible only because of the small number of megawatts involved; larger carve-outs, in contrast, would require us to reevaluate this treatment.”<sup>83</sup> Therefore, “unequivocal public necessity” does not require that we abrogate this small number of carved-out GFAs and integrate them into the market beyond the transition period.

49. Finally, we note that protesters have not shown other circumstances that would justify modifying the GFA contracts under the “public interest” standard of review. We find that the court’s holding that “petitioners do not claim – let alone prove – that the cost shift [is] so severe as to threaten the ‘financial ability’ of any utility ‘to continue its service,’ or that the cost shift amount[s] to an ‘excessive’ burden on any other market

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<sup>80</sup> Further, Midwest ISO indicated in its September 19, 2007 Advisory Committee meeting that, following stakeholder review, it intends to modify the TEMT so that all load within the region is treated identically for losses. See Midwest ISO Advisory Committee Meeting Minutes – Draft, at 4-5 (available at [http://www.midwestiso.org/publish/Document/4285c4\\_115415e4f37\\_-7e180a48324a?rev=1](http://www.midwestiso.org/publish/Document/4285c4_115415e4f37_-7e180a48324a?rev=1)).

<sup>81</sup> *Wisconsin Public Power*, 493 F.3d at 274.

<sup>82</sup> See *Wisconsin Public Power*, 493 F.3d at 274.

<sup>83</sup> GFA Order, 108 FERC ¶ 61,236 at P 143.

participants” applies here.<sup>84</sup> Protesters do not allege a significant change in circumstances under which continuing the current GFA treatment would impair any utility’s ability to do business, or that would impose an excessive burden on other utilities. The end of the transition period, as we have discussed above, is not significant enough to justify modification of the existing GFAs or a change in their treatment.

#### **D. Option A, B, and C Treatment of GFAs**

50. As noted above, in the GFA orders, the Commission found that Midwest ISO’s proposed Options A, B, and C treatment under the TEMT were reasonable. The Commission made Option B treatment available only to parties voluntarily electing that option before July 28, 2004. Market participants that did not settle on Option B by that date, or that did not voluntarily settle, could request a change of treatment annually between Options A and C, or they could convert their agreements to service under the TEMT, but they could not choose Option B.<sup>85</sup>

##### **1. Midwest ISO’s Proposal**

51. Midwest ISO proposes to continue the Option A, B, and C GFA treatment, subject to maintaining the Commission’s condition that Option B treatment be available only to parties voluntarily electing that option before July 28, 2004. It proposes no changes to Options A and C.

52. With respect to Option B GFA treatment, Midwest ISO states that, as required by the GFA Order,<sup>86</sup> it analyzed the effect any uplift due to Option B treatment may have had on other market participants, including the amount of such uplift to cover congestion costs, and the difference between marginal and average losses. Midwest ISO explains that uplifts to the market associated with Option B congestion cost rebates have been small, around four percent. It states that the remainder of the Option B congestion cost rebates has been funded via FTRs that are set aside during the annual FTR allocation to provide for such Option B GFA congestion refunds. Midwest ISO states that the inclusion of Option B GFAs in the annual FTR allocation has not significantly affected other market participants. Moreover, it states, the potential for adverse effects has

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<sup>84</sup> *Id.* at 273-74 (citing *Sierra*, 390 U.S. at 355).

<sup>85</sup> GFA Order, 108 FERC ¶ 61,236 at P 264.

<sup>86</sup> *Id.* P 268.

declined as Option B GFA transmission service has expired such that Option B GFAs now represent a very small portion of total transmission service in the Midwest ISO region.<sup>87</sup>

53. However, Midwest ISO explains that the evaluation of GFA impacts to other market participants did reveal a potential cost shift resulting from the Option B marginal loss rebates. Under the current GFA settlement provisions, Option B GFAs receive both a congestion refund and a refund of one-half of the marginal losses assessed to day-ahead market transactions. Midwest ISO's evaluation of these marginal loss refunds shows that rebates to the Option B GFAs have been approximately twice the rebate that Option B GFAs would receive if they were settled in the same manner as transmission service under the TEMT.<sup>88</sup>

54. Further, Midwest ISO explains that the day-ahead market loss sensitivities and loss offset are estimates based on historical experience. It states that since the loss sensitivities change from the day-ahead estimate to the real-time state estimator solution, the energy required to cover losses due to the day-ahead schedule changes in real time. While these losses are caused by the Option B schedules, the Option B GFAs are not assessed the cost of these losses. Instead, the costs are borne by the market and those taking TEMT service may be cross-subsidizing those taking service under Option B GFAs. In addition, those taking transmission service under the TEMT pay for the cost of losses caused by loop flows on the system while Option B GFAs do not.

55. Midwest ISO proposes to continue the availability of Option B GFA treatment, subject to potentially modifying the Option B loss rebate mechanism to more closely mimic the distribution of over-collected marginal losses to those taking TEMT service.<sup>89</sup> When its evaluation of losses settlement issues under the TEMT is complete, Midwest ISO will again evaluate Option B losses settlement and propose appropriate modifications.<sup>90</sup> Midwest ISO states that when the results of that evaluation are complete, it will include that information in a future GFA quarterly informational filing with the Commission prior to the end of the transition period.

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<sup>87</sup> February 2007 Filing at 5.

<sup>88</sup> *Id.* at 6.

<sup>89</sup> Over-collected marginal losses, also referred to as marginal loss surpluses, are the difference between marginal losses and historical or average losses that are refunded to load.

<sup>90</sup> As noted above, Midwest ISO has indicated its intent to begin this process in the near future.

## 2. Commission Determination

56. We find that Midwest ISO has supported its proposal to allow the Option B settlements to continue beyond February 2008. The amount of service provided under GFAs covered by Option B settlements is small and will continue to decline as these GFAs expire. As discussed further below, we find that the Option B settlements remain just and reasonable and we are not convinced that protesters' request for an investigation of the GFAs under FPA section 206 is warranted.

57. We disagree with Duke Energy that the Commission must find that the Option B GFA settlements are no longer just and reasonable after the transition period ends. In the GFA orders, the Commission encouraged GFA parties to renegotiate their contracts, but it did not find that their contracts would be abrogated if the parties were not successful in such renegotiations.<sup>91</sup> The TEMT states that treatment of GFAs, including the Option B GFAs, "shall terminate no *earlier* than February 1, 2008, and thereafter upon acceptance by the Commission of new provisions governing treatment of GFAs."<sup>92</sup> The TEMT also requires Midwest ISO to evaluate the impact of Option B and to make a section 205 filing 12 months prior to February 1, 2008 that details a new proposal for treatment of GFAs after the transition period concludes, which is the subject of the instant filing.<sup>93</sup> The Commission understood that Option B GFAs might continue after the transition period and specifically stated that it would evaluate any proposals (such as Midwest ISO's instant proposal) to extend the availability of Option B beyond February 1, 2008.<sup>94</sup>

58. As noted above, the Option B GFA settlements represent a small and decreasing proportion of both the total number of GFAs and overall Midwest ISO load. There are currently 30 Option B GFAs listed in Attachment P (List of Grandfathered Agreements) to the TEMT. Although Attachment P does not list the megawatts associated with each

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<sup>91</sup> Procedural Order, 107 FERC ¶ 61,191 at P 80; GFA Order, 108 FERC ¶ 61,236 at P 105.

<sup>92</sup> TEMT Module C, section 38.8.5 (emphasis added). *See also* GFA Order, 108 FERC ¶ 61,236 at P 268.

<sup>93</sup> *Id.*

<sup>94</sup> GFA Order, 108 FERC ¶ 61,236 at P 268; GFA Rehearing Order, 111 FERC ¶ 61,042 at P 106.



GFA, it appears, based on the information in prior Commission orders,<sup>95</sup> that the Option B GFAs represent approximately 3,900 megawatts, a very small portion (less than four percent) of the total transmission service in the Midwest ISO region.

59. In addition, although Option B GFAs receive rebates for congestion costs, the uplift to the market associated with those rebates has been small. Since the start of the energy markets in April 2005, Option B GFA parties have received a total of approximately \$19 million in congestion rebates, but only \$767,420 of that amount, or about four percent of the total congestion rebate, has been uplifted to other market participants. As Midwest ISO explains, the remainder of the Option B congestion cost rebates has been funded via FTRs that are set aside during the annual FTR allocation to provide for such Option B GFA congestion refunds. Midwest ISO also states that setting aside FTRs for the Option B GFAs has not significantly affected other market participants.<sup>96</sup>

60. Both Option B and non-GFA transactions also receive a rebate meant to represent the difference between the cost for marginal losses assessed under the energy market and the cost for system, or average, losses that were previously assessed. The rebate for non-GFAs is reduced by the amount refunded to the Option B GFAs, but the impact of the Option B rebate on the non-GFA rebate is comparatively small. According to Midwest ISO, Option B marginal loss rebates were approximately twice the marginal loss rebate they would have received if the rebate was calculated in the same way that it is for non-GFA transactions.<sup>97</sup> Duke Energy cites the larger Option B marginal loss rebate as a reason to reject the Option B settlements. However, the relative reduction of the total marginal loss rebate for non-GFA transactions caused by the Option B rebate will be small because the Option B GFAs represent such a small amount (about four percent) of load in the Midwest ISO region.

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<sup>95</sup> See GFA Order, 108 FERC ¶ 61,236 at Appendix B; GFA Rehearing Order, 111 FERC ¶ 61,042 at Appendix B. Appendix B is a list of GFAs that includes the megawatts associated with each GFA.

<sup>96</sup> February 2007 Filing at 5.

<sup>97</sup> The Option B marginal loss rebate methodology that Midwest ISO proposed and that the Commission accepted as part of the Option B settlements is different than the methodology Midwest ISO uses to calculate the non-GFA rebates. The Option B marginal loss rebate is calculated by dividing the amount of marginal loss costs assessed for a GFA transaction by two and refunding that amount to the Option B GFA. See TEMT at Module C, section 38.8.3(c)(iii). The non-GFA marginal loss rebate is calculated using market loss sensitivity and loss offset estimates that are based on historical experience. See February 2007 Filing at 6-7; TEMT at Module C, section 40.6.

61. Option B was an incentive to settle and receive a hedge against congestion and marginal loss charges and, in return, parties to the Option B settlements agreed to give up scheduling preferences that they were otherwise entitled to under their GFAs.<sup>98</sup> As the court in *Wisconsin Public Power* recognized in upholding the Option B settlements, eliminating scheduling preferences “increased the markets’ reliability (by increasing the accuracy of [Midwest ISO]’s estimates of how much electricity would flow through the grids each day).”<sup>99</sup> Here, Midwest ISO has proposed to allow the Option B settlements to continue. If we were to find that continuing the availability of Option B was not just and reasonable after the end of the transition period, the GFAs would regain their scheduling preferences because the rates, terms, and conditions of their underlying GFAs would again control.

62. In that case, the Commission would be required to institute proceedings under FPA section 206 to determine whether it is appropriate to abrogate the GFAs that were previously covered by the Option B settlements, and force them to stay in the energy markets (and continue to be subject to, among other things, the binding scheduling requirements of the TEMT). As the court explained, “[d]ifficult issues” might arise in that litigation, “such as whether the *Mobile-Sierra* doctrine applies to each GFA, and if so, whether the public interest standard could be satisfied . . . .”<sup>100</sup>

63. As before, we find that the benefits of avoiding lengthy and difficult proceedings warrants continuation of the Option B settlements. The Option B settlements ensure that these GFAs remain in the market and continue to be subject to the binding scheduling requirements of the TEMT. Option B eliminates scheduling preferences as a cost of uplift for congestion costs that are shared among Option B and non-GFA parties, and thereby greatly reduces the burden of the GFAs to energy market operations.<sup>101</sup> We have no reason to believe that litigation would bring about a better result. Thus, on balance, we find that the relatively small impact of the Option B GFAs on the non-GFA parties is

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<sup>98</sup> GFA Order, 108 FERC ¶ 61,236 at P 264.

<sup>99</sup> 493 F.3d at 276.

<sup>100</sup> *Id.* at 277. The parties to the Option B GFAs provided a statement listing what standard of review they believe applies to the underlying GFA, but that statement was made as part of the parties’ agreement to settle on Option B. Because the parties agreed to settle, the Commission did not make a finding on the standard of review for the Option B GFAs and would have to revisit the issue *de novo*.

<sup>101</sup> GFA Order, 108 FERC ¶ 61,236 at P 282.

outweighed by the benefits associated with the Option B GFAs' voluntarily agreeing to participate in the energy market and abiding by the binding scheduling requirements of the TEMT.

**E. Protesters' Other Concerns**

64. Protesters are concerned that Midwest ISO's filing is incomplete due to its statement that it may propose modifications to how losses are treated for the Option B and carved-out GFAs in a future GFA quarterly filing when its evaluation of losses under the TEMT is complete.<sup>102</sup> We disagree. Midwest ISO's proposal in the instant proceeding is to allow the existing GFA treatments, including Option B and carve-out, to continue without change. Although Midwest ISO states that it may in the future propose modifications, it has not done so here.<sup>103</sup> If and when Midwest ISO files modifications to its instant proposal, intervenors will then have an opportunity to fully respond.<sup>104</sup>

65. The Commission also disagrees with Duke Energy's argument that Midwest ISO's filing is too vague to constitute a complete section 205 filing. Midwest ISO's proposal to maintain the existing GFA treatment analyzes the effectiveness of the current treatment of GFAs and proposes to continue that treatment, which the Commission has previously found to be just and reasonable, without change. The filing includes a description of cost shifts that may result from the carve-out and Option B, and we do not find (as Duke alleges) additional, unquantified costs shifts.<sup>105</sup> We therefore find that Midwest ISO's proposal is sufficiently detailed to constitute a complete FPA section 205 filing. Duke Energy will have the opportunity to comment on any proposals to change the marginal loss refund methodology if and when Midwest ISO files such changes.

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<sup>102</sup> February 2007 Filing at 7, 11.

<sup>103</sup> As noted above, we received Midwest ISO's most recent quarterly report on October 31, 2007. That report did not propose changes to the Option B or carved-out GFAs. However, Midwest ISO did state that it expects to file the proposed Tariff changes soon before or after February 1, 2008.

<sup>104</sup> The treatment of losses for carved-out GFAs is currently being considered in Midwest ISO's stakeholder process. See Midwest ISO Advisory Committee Meeting Minutes – Draft, at 4-5 (available at [http://www.midwestiso.org/publish/Document/4285c4\\_115415e4f37\\_-7e180a48324a?rev=1](http://www.midwestiso.org/publish/Document/4285c4_115415e4f37_-7e180a48324a?rev=1)).

<sup>105</sup> See Duke Energy Protest at 21-22 (citing February 2007 Filing at 10).

66. Wisconsin Electric also argues that all GFAs should be assessed the cost of marginal losses when the over-collected losses provisions in the TEMT expire for those taking OATT service (*i.e.*, non-GFA transactions) after a five-year transition period that ends in 2010.<sup>106</sup> Midwest ISO has not proposed to subject all GFAs to the cost of marginal losses, and so it would be premature to decide this issue at this time. Wisconsin Electric may raise its arguments on this point again if Midwest ISO files such a proposal.

67. Duke Energy argues that an additional reason for the Commission to reject Midwest ISO's GFA proposal is that Midwest ISO has not explained how its GFA proposal will impact the Midwest ISO LTTR proposal, which the Commission conditionally accepted in Docket No. ER07-478-000. Duke Energy believes that Midwest ISO's LTTR proposal may result in the preferential allocation of LTTRs to carve-out and Option B GFAs, and that this will discriminate between different classes of load-serving entities. Duke Energy also states that it is unclear whether and how Midwest ISO's LTTR proposal would allow carved-out and Option B GFAs to acquire ARR's.

68. We find that the issue of how GFAs will be treated in association with LTTRs is already being addressed as part of the on-going LTTR proceeding in Docket No. ER07-478. Duke Energy properly raised in that proceeding its concerns about how GFAs will be treated under Midwest ISO's LTTR proposal and the Commission addressed those concerns in the LTTR Order.<sup>107</sup> In addition, the Commission specifically stated that "[t]reatment of the FTR rights for GFAs after the transition period ends will be dependent on the outcome of the proceeding in Docket No. ER07-532-000 that address future treatment of GFAs. Provisions relating to FTR and ARR treatment for GFAs will be subject to the outcome of those proceedings, and therefore future modifications may be made to these provisions."<sup>108</sup> Consistent with that finding, Midwest ISO will have to file as a compliance filing in the on-going LTTR proceeding, and Duke Energy will have opportunity to comment on, any changes to the LTTR provisions that may be necessary as a result of our findings in the instant proceeding.

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<sup>106</sup> TEMT section 40.6.1. *See also Midwest Independent Transmission System Operator, Inc.*, 119 FERC ¶ 61,215, at P 29 (2007).

<sup>107</sup> *See* LTTR Order, 119 FERC ¶ 61,143 at P 117-22, 139-40, & n.51. *See also Midwest Independent Transmission System Operator, Inc.*, 121 FERC ¶ 61,062, at P 87-88 (2007) (addressing Midwest ISO's LTTR compliance filing).

<sup>108</sup> LTTR Order, 119 FERC ¶ 61,143 at n.51.

## F. Quarterly Informational Reports

69. Midwest ISO submits to the Commission an informational report each quarter on certain aspects of the GFAs. The reports include: (1) accuracy of the day-ahead schedules submitted by carved-out GFAs;<sup>109</sup> (2) instances of *pro rata* FTR reductions that were significantly impacted by carved-out GFAs;<sup>110</sup> and (3) requests made by all GFAs to increase their GFA service above what was originally provided, along with the actual service taken, until such time as the GFAs notify Midwest ISO that they no longer need the increased megawatts to cover service under the GFA.<sup>111</sup>

70. Here, we will direct Midwest ISO to continue filing these quarterly informational reports on GFAs. In addition, we note that Attachment P to the TEMT lists all of the GFAs and whether they are Option A, B, C or carved out. As we note above, the amount of service covered by GFAs is small and will continue to decrease as GFAs expire and/or are converted to TEMT service. Accordingly, we direct Midwest ISO to provide in its next quarterly report a table similar to what is already in Attachment P but that includes the expiration date for each GFA and the number of megawatts associated with each GFA.<sup>112</sup> Midwest ISO should report any changes to the table in each subsequent quarterly report, but it need not re-submit the entire table each quarter.

### The Commission orders:

(A) Midwest ISO's February 2007 Filing is hereby accepted, as discussed in the body of this order.

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<sup>109</sup> GFA Order, 108 FERC ¶ 61,236 at P 144, 149-150; GFA Rehearing Order, 111 FERC ¶ 61,042 at P 133.

<sup>110</sup> GFA Rehearing Order, 111 FERC ¶ 61,042 at P 99.

<sup>111</sup> *Id.* at P 189.

<sup>112</sup> We request that the table be submitted in Microsoft Excel format.

(B) Midwest ISO is hereby directed to file quarterly reports with the Commission, as described in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.