

UNITED STATES OF AMERICA 110 FERC 61, 380
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, and Joseph T. Kelliher.

Midwest Independent Transmission System
Operator, Inc.

Docket No. RT01-87-010

ORDER APPROVING SETTLEMENT

(Issued March 29, 2005)

1. On November 30, 2004, the Midwest Independent Transmission System Operator, Inc. (Midwest ISO) and the Midwest ISO Transmission Owners (TOs)¹ (collectively, the Settling Parties) filed a Settlement Agreement Between Transmission

¹ The TOs for this filing consist of: Ameren Services Company, as agent for Union Electric Company d/b/a AmerenUE, Central Illinois Public Service Company d/b/a AmerenCIPS, Central Illinois Light Co. d/b/a AmerenCILCO, and Illinois Power Company d/b/a AmerenIP; Alliant Energy Corporate Services, Inc. on behalf of its operating company affiliate Interstate Power and Light Company (f/k/a IES Utilities Inc. and Interstate Power Company); American Transmission Company LLC; American Transmission Systems, Incorporated, a subsidiary of FirstEnergy Corp.; Aquila, Inc. d/b/a Aquila Networks (f/k/a Utilicorp United, Inc.); Cinergy Services, Inc. (for Cincinnati Gas & Electric Co., PSI Energy, Inc., and Union Light Heat & Power Co.); City of Columbia Water and Light Department (Columbia, MO); City Water, Light & Power (Springfield, IL); Great River Energy; GridAmerica LLC, Hoosier Energy Rural Electric Cooperative, Inc.; Indiana Municipal Power Agency; Indianapolis Power & Light Company; International Transmission Company; LG&E Energy LLC (for Louisville Gas and Electric Company and Kentucky Utilities Company); Lincoln Electric System; Michigan Electric Transmission Company, LLC; Minnesota Power (and its subsidiary Superior Water, L&P); Michigan Public Power Agency; Montana-Dakota Utilities Co.; Northern Indiana Public Service Company; Northern States Power Company and Northern States Power Company (Wisconsin), subsidiaries of Xcel Energy Inc.; Northwestern Wisconsin Electric Company; Otter Tail Corporation d/b/a Otter Tail Power Company; Southern Illinois Power Cooperative; Southern Indiana Gas & Electric Company (d/b/a Vectren Energy Delivery of Indiana); and Wabash Valley Power Association, Inc.

Owners and the Midwest ISO on Filing Rights (Settlement Agreement) in the above-captioned proceeding. The Settlement Agreement is intended to resolve issues in this proceeding concerning the allocation of filing rights under section 205 of the Federal Power Act² within the Midwest ISO. For the reasons discussed below, we will approve the Settlement Agreement.

Background

2. On December 20, 2001, the Commission granted regional transmission organization (RTO) status to the Midwest ISO.³ The December 20 Order also directed the Midwest ISO to eliminate Article Two, section IX, Paragraph C(7) of the Agreement of Transmission Facilities Owners to Organize the Midwest Independent Transmission System Operator, Inc. (Midwest ISO Agreement).⁴ The proposed provisions would have required the unanimous consent of all of the TOs in order to change the pricing protocols during the transition period (*i.e.*, the transmission owners would have had veto rights). The Commission ordered the elimination of this provision because Order No. 2000⁵ requires that the RTO have exclusive and independent authority under section 205 to propose rates, terms and conditions of transmission service under its open access transmission tariff (OATT), and the veto privileges set forth in this provision of the Midwest ISO Agreement violated this requirement.⁶

² 16 U.S.C. § 824d (2000).

³ *Midwest Independent Transmission System Operator, Inc.*, 97 FERC ¶ 61,326 (2001) (December 20 Order), *order on reh'g and compliance filing*, 103 FERC ¶ 61,169 (2003) (May 14 Order), *appeal dismissed, Midwest ISO Transmission Owners v. FERC*, No. 03-1194 (D.C. Cir. Nov. 25, 2003) (unpublished). The court dismissed the appeal for lack of ripeness.

⁴ 97 FERC at 62,505.

⁵ *Regional Transmission Organizations*, Order No. 2000, 65 Fed. Reg. 809 (Jan. 6, 2000), FERC Statutes & Regulations, Regulations Preambles July 1996-December 2000 ¶ 31,089 (1999), *order on reh'g*, Order No. 2000-A, 65 Fed. Reg. 12,088 (Mar. 8, 2000), FERC Statutes & Regulations, Regulations Preambles July 1996-December 2000 ¶ 31,092 (2000), *aff'd sub nom. Public Utility District. No. 1 of Snohomish County, Washington v. FERC*, 272 F.3d 607 (D.C. Cir. 2001).

⁶ 97 FERC at 62,505.

3. On January 22, 2002, the TOs filed a request for rehearing of the December 20 Order, taking issue with the Commission's determination concerning the allocation of section 205 filing rights. On January 28, 2002, the Midwest ISO and the TOs submitted a compliance filing in which they deleted Article Two, section IX, Paragraph C(7) of the Midwest ISO Agreement pursuant to the December 20 Order.

4. In the May 14 Order, the Commission accepted the compliance filing and denied the TOs' request for rehearing. But the Commission deemed that the Midwest ISO Agreement was outdated and did not reflect the type of flexibility the Commission is now willing to afford to ISOs and RTOs with respect to allocation of section 205 filing rights. Accordingly, the Commission provided clarification of its determination and invited further comment on the allocation of section 205 filing rights. Specifically, the Commission permitted the TOs to file either (i) an explanation stating why the originally-proposed filing rights ensured RTO independence and did not result in undue discrimination, or, in the alternative, (ii) another model for allocation of filing rights in a new section 205 filing and an explanation as to why that allocation of filing responsibilities ensures independence.⁷

5. On June 30, 2003, the TOs, pursuant to the May 14 Order, filed an explanation of how the originally-filed allocation of filing rights satisfied the independence and non-discrimination requirements of Order No. 2000.

6. In the meantime, since the June 30, 2003 filing, the TOs and the Midwest ISO began negotiating an agreement regarding the allocation of section 205 filing rights among them. On November 30, 2004, the Settling Parties submitted the instant Settlement Agreement.

Settlement Agreement

7. The Explanatory Statement of the Settlement Agreement states that the Settlement Agreement is intended to resolve issues relating to the allocation of section 205 filing rights between individual TOs, the TOs as a group, and the Midwest ISO. The general bases for the allocation of filing rights, according to the filing parties, are that: (1) individual TOs should possess full and exclusive filing authority over their own revenue requirements and rate structures, so long as other TOs are not impacted; (2) authority to submit rate filings that impact multiple TOs should belong to the TOs collectively; (3) filing rights for certain rates, such as for ancillary services and the

⁷ 103 FERC ¶ 61,169 at P 28-32, P 41.

pricing of certain new transmission investment, should be shared between the Midwest ISO and the TOs; and (4) the authority to make filings with respect to all other tariff provisions and related documents should be exclusively held by the Midwest ISO.

8. Section 3 of the Settlement Agreement prescribes, in detail, how the filing rights are allocated under different circumstances. It gives a TO the right to make filings regarding its revenue requirement, including the right to propose a new formula, or to modify any component of an existing formula used to calculate its revenue requirement. A TO is also afforded the exclusive right to submit rate design filings for its pricing zone, including changing to or from formula rates or stated rates and proposing incentive or performance based rates, so long as the filing does not affect the rates charged or revenues collected in any other zone. In cases where there are multiple TOs within a zone, the TOs should seek to reach an agreement on section 205 filings; but, absent a consensus, each TO has the right to submit a filing. An individual TO would also have exclusive filing authority to recover the costs of new transmission facilities affecting only the rates within the applicable TO pricing zone.

9. Section 3 of the Settlement Agreement also outlines circumstances in which filing rights should be held by the TOs collectively. For example, circumstances include filings to change the Attachment O rate formula, filings that affect the rates in more than one zone and/or through-and-out rates, filings for cost recovery under Schedule 1 (Scheduling System Control and Dispatch Service) of the OATT (as it applies to multiple pricing zones), and other instances as provided for. Additionally, section 3 addresses circumstances in which the TOs and the Midwest ISO are to have mutual filing authority. An example of such filings would be rate filings for ancillary services, filings to recover the costs of transmission upgrades and new facilities affecting multiple pricing zones, and certain other filings affecting transmission revenues.

10. Section 3 of the Settlement Agreement also provides that, except as provided above (section 205 filing rights retained exclusively by the TOs or shared between the TOs and the Midwest ISO), the Midwest ISO shall have full and exclusive rights to submit section 205 filings with regard to its OATT and related documents.

11. Instances of shared filing rights, as described above, are to be subject to governance and coordination procedures set forth in sections 4 and 5, which provide the rules under which the shared filing rights may be executed and rules for coordination of filings between the Midwest ISO and the TOs. For example, section 4 provides that decisions among the TOs on whether to make a joint section 205 filing are to be made

on a majority vote.⁸ However, a minority of TOs may also make a filing if the minority group consists of three or more TOs owning combined gross transmission assets of at least \$2.5 billion. Section 5 provides for coordination between the Midwest ISO and the TOs where filing rights are shared among the TOs or between the TOs and the Midwest ISO, including a requirement for notification of the proposed filings and a description of rate impacts and procedures for pre-filing meetings if the other party deems it necessary.

12. Section 6 contains various clauses further clarifying the scope and intent of the Settlement Agreement. Section 6 establishes the *Mobile-Sierra* public interest standard as the standard of review for modifying the Settlement Agreement. Section 6 also places certain limits on the intent of the Settlement Agreement, including but not limited to stating that the Settlement Agreement is not intended to limit the FPA section 206 rights of the affected parties, that it is not intended to affect the rights of Independent Transmission Companies pursuant to Appendix I of the Midwest ISO Agreement, and that it is not intended to limit the Midwest ISO's responsibility for administration of the Midwest ISO OATT. Section 7 establishes an initial 5-year term for the Settlement Agreement and prescribes procedures for modifying the Settlement Agreement during and after that term.

13. The Settling Parties also filed revised sheets to the Midwest ISO OATT and the Midwest ISO Agreement to incorporate the allocation of section 205 filing rights contained in the Settlement Agreement. The Settling Parties request that the Settlement Agreement and proposed revisions to the Midwest ISO OATT and Midwest ISO Agreement be accepted to become effective on December 1, 2004.

14. Notice of the Settlement Agreement was published in the *Federal Register*,⁹ with motions to intervene or protests due on or before January 3, 2005. Wisconsin Public Power Inc. (WPPI) filed a timely protest. On January 18, 2005, the Settling Parties filed an answer.

⁸ Section 4 provides that votes are on a one TO to one vote basis.

⁹ 69 Fed. Reg. 74,517 (2004).

Discussion

A. Procedural Matters

15. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure¹⁰ prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept the Settling Parties' answer, as it has provided information that assisted us in our decision-making process.

B. Analysis

1. Section 205 Filing Rights

a. Pleadings

16. WPPI requests that the Commission reject the Settlement Agreement and modifications to the Midwest OATT and the Midwest ISO Agreement. It objects to the allocation of section 205 filing rights under the Settlement Agreement, arguing that it does not comply with Order No. 2000 and fundamentally undercuts the basis on which the Midwest ISO obtained RTO status. WPPI acknowledges that the Commission has accepted similar allocations of section 205 filing rights in cases involving ISO New England, Inc. and PJM Interconnection, L.L.C.¹¹ But, WPPI contends that in *ISO New England* and *PJM*, the Commission appears to have retreated from Order No. 2000's minimum RTO qualification that an RTO possess exclusive section 205 filing rights regarding the rates, terms and conditions of transmission service under its tariff. Alternatively, as discussed below, if the Commission does not reject the Settlement Agreement and conforming revisions to the Midwest ISO OATT and Midwest ISO Agreement, WPPI requests that the Commission make its acceptance subject to the outcome of appellate review of Commission orders in other pending proceedings.

17. The Settling Parties respond that the issue before the Commission is whether the proposed allocation of section 205 filing rights is just and reasonable, not whether it is inconsistent with Order No. 2000. They contend that the proposal is just and reasonable

¹⁰ 18 C.F.R. § 385.213(a)(2)(2004).

¹¹ See *ISO New England, Inc.*, 106 FERC ¶ 61,280, *order on reh'g*, 109 FERC ¶ 61,147 (2004), *reh'g pending (ISO New England)*; *Pennsylvania-New Jersey-Maryland Interconnection*, 105 FERC ¶ 61,294 (2003), *reh'g denied*, 108 FERC ¶ 61,032 (2004), *pet. for rev. docketed sub nom Old Dominion Electric Cooperative, Inc. v. FERC*, D.C. Cir. No. 04-1307 (filed Sept. 7, 2004) (*PJM*).

because it is consistent with applicable judicial precedent and Commission orders involving similar allocations of section 205 filing rights for other existing RTOs. Further, they state that the Settlement Agreement expressly provides that the rights of the Commission and all other parties not a signatory to the Settlement Agreement are to remain unaffected.¹²

b. Commission Determination

18. We will deny WPPI's request that we reject the Settlement Agreement's allocation of section 205 filing rights. The Court of Appeals for the District of Columbia Circuit has rendered a decision on the issue of section 205 filing rights, and we are bound by that precedent. In *Atlantic City Electric Company v. FERC*,¹³ the court held that public utilities are permitted to make their own section 205 filings,¹⁴ and it held that the Commission was without authority under section 206 of the FPA¹⁵ to require transmission owners to change their filing rights allocation.¹⁶

19. Further, in *PJM* and *ISO New England*, the Commission approved similar allocations of section 205 filing rights as proposed by the Settling Parties here. For example, in *PJM*, the Commission stated:

¹² Section 6.5 of the Settlement Agreement (Others' Filing Rights) provides in pertinent part:

Nothing in this Settlement Agreement is intended to affect the FPA section 205 filing rights of any entity which is not a Party. Nor is anything in this Settlement Agreement intended to affect the procedural rights of any other interested party, including state regulatory commissions, regarding a filing submitted by the Midwest ISO or a Transmission Owner (or both). . . .

¹³ 295 F.3d 1 (D.C. Cir. 2002) (*Atlantic City*).

¹⁴ The Midwest ISO Transmission Owners remain public utilities after the Midwest ISO commenced operations as an RTO.

¹⁵ 16 U.S.C. § 824e (2000).

¹⁶ 295 F.3d at 10 ("nothing in section 206 sanctions denying petitioners their right to unilaterally file rate and term changes").

The Settlement Agreement constitutes a voluntary, compromise agreement of the sort found permissible by the court. While [*Atlantic City*] does not require us, as a matter of law, to limit RTO filing rights to the extent they are limited in the Settlement Agreement, voluntary agreements to allocate these rights may be acceptable where, as here, the interests of market participants are protected. We note, in this regard, that the Commission's section 206 authority is limited only as to the extent of the Settlement Agreement, which addresses only the allocation of these rights. In other words, the Commission retains its authority to find a given rate to be unjust and unreasonable and to establish a just and reasonable rate.^[17]

In *ISO New England*, the Commission found that a similar allocation of section 205 filing rights adequately safeguarded the interests of the region as a whole.¹⁸

2. Mobile Sierra Provisions

20. Under the Settlement Agreement, for the first five years from the date of execution of the Settlement Agreement, the allocation of section 205 filing rights among the Settling Parties may, in the absence of a voluntary filing by those parties, be changed only under the *Mobile Sierra* "public interest" standard.¹⁹ Beginning five years from the date of execution of the Settlement Agreement, actions initiated by the Commission, acting sua sponte pursuant to section 206 of the FPA, shall be governed by the "just and reasonable" standard, according to the Settlement Agreement.

a. Pleadings

21. WPPI argues that the Commission should reject the Settlement Agreement's *Mobile Sierra* provision in order to preserve the Commission's ability to respond to the outcome of appellate proceedings and to protect the interests of customers who will be affected by the allocation of section 205 filing rights. First, WPPI argues non-parties to the agreement have a right under sections 206 and 306 of the FPA to seek changes to

¹⁷ 105 FERC ¶ 61,294 at P 32.

¹⁸ 106 FERC ¶ 61,280 at P 72. See also *Southwest Power Pool, Inc.*, 106 FERC ¶ 61,110 at P 98 (2004), in which the Commission, citing *Atlantic City*, summarily denied a request to limit TOs' section 205 filing rights.

¹⁹ See *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332, 345 (1956); *F.P.C. v. Sierra Pacific Power Co.*, 350 U.S. 348, 355 (1956).

filed agreements on grounds that they are unjust and unreasonable and those rights should not be affected by the Settlement Agreement's *Mobile Sierra* provision. Second, it contends that the Commission has the power and obligation to ensure that the rates, terms and conditions of transmission service and the related contracts remain just and reasonable and not unduly discriminatory or preferential, and the Commission must not abdicate that responsibility by approving the Settlement Agreement's *Mobile Sierra* provision, even for a five year period. Third, it contends that *Mobile Sierra* protection is particularly inappropriate here because the contract provisions at issue will directly affect non-contracting parties. Fourth, it argues that non-contracting parties must be able to seek change pursuant to a just and reasonable standard, where the issues raised by the instant filing are the subject of a pending judicial review proceeding.

22. The Settling Parties respond that the Commission has approved the use of the *Mobile Sierra* provision in *ISO New England* and *PJM*. Further, they argue that the Commission held in *PJM* that protecting the allocation of section 205 filing rights through the use of a *Mobile Sierra* clause does not infringe upon the RTO's independence. Finally, they argue that the Commission, in *PJM*, rejected the argument that a *Mobile Sierra* provision unjustly deprives non-settling parties of their statutory right to seek changes to filed agreements.

b. Commission Determination

23. We find that the *Mobile Sierra* provision is just and reasonable.

24. We reject WPPI's claim that non-parties have a statutory right to seek changes under sections 206 and 306 of the FPA. As the Commission held in rejecting the same argument in *PJM*:

There is no Commission or court precedent that supports a finding that a non-signatory may unilaterally seek changes to a *Mobile-Sierra* 'public interest' contract under the 'just and reasonable' standard of review.^[20]

25. Further, acceptance of a *Mobile Sierra* provision regarding the allocation of section 205 filing rights does not affect the Commission's authority to act on the substance of such a filing under sections 205 and 206 to determine whether the filing is just and reasonable. Neither does it affect the procedural rights of interested parties, such as WPPI, to protest the substance of any such section 205 filing that is made by the

²⁰ *PJM*, 108 FERC ¶ 61,032 at P 7, citing *Public Utilities Commission of the State of California*, 105 FERC ¶ 61,182 at P 50 (2003).

TOs, or change the TOs' burden under section 205 to justify any change in rates. Indeed, as noted above, the Settlement Agreement expressly preserves the procedural rights of intervenors with respect to a section 205 filing. Thus, acceptance of the *Mobile Sierra* provision with respect to the allocation of the rights to make section 205 filings is not an abdication of the Commission's obligation to ensure that rates are just and reasonable.

26. Finally, with regard to WPPI's concern about the effect of the *Mobile Sierra* provision regarding section 205 filing rights on non-contracting parties, neither WPPI nor the Settling Parties cite to any provision in the Settlement Agreement which purports to resolve the applicability of its terms to new members. In the absence of such a provision in the Settlement Agreement, the Midwest ISO Agreement, or the OATT, "the appropriate forum to consider such issues would be the proceedings in which those issues are before us, *e.g.*, where a new member is seeking to join" the Midwest ISO.²¹

3. WPPI's Alternative Request

a. Pleadings

27. WPPI asserts that the issues concerning section 205 filing rights that were raised in the *PJM* and *ISO New England* orders are likely to be resolved through judicial review proceedings that are either already pending or may be initiated. If the Commission does not reject the Settlement Agreement and related modifications to the Midwest ISO OATT and Midwest ISO Agreement, WPPI requests that the Commission make its acceptance of them subject to the outcome of those appellate proceedings and any subsequent proceedings on remand.

28. The Settling Parties respond that it is unnecessary to tie the approval of the Settlement Agreement to the outcome of the pending judicial review of the *PJM* order. If the *PJM* settlement is overturned on appeal and WPPI seeks rehearing and appeals of any order approving the Settlement Agreement in this case, then it will have fully protected its rights here to later argue that any court decision on the *PJM* settlement should be applied here.

b. Commission Determination

29. We deny WPPI's alternative request to make our approval of the Settlement Agreement subject to the outcome of pending or potential court appeals. We have determined that the interests of market participants are protected under the Settlement

²¹ See *PJM*, 108 FERC ¶ 61,032 at P 8.

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Agreement, as discussed above. Further, as the Settling Parties note, WPPI has procedural options available to preserve its right to argue for the application of subsequent appellate decisions concerning *PJM* or *ISO New England* to this case. Thus, it is unnecessary for us to condition the order as WPPI requests.

The Commission orders:

(A) The Settlement Agreement is hereby approved.

(B) The Settling Parties' proposed revisions to the Midwest ISO Agreement and the Midwest ISO OATT are hereby accepted, to become effective on December 1, 2004.

By the Commission. Commission Kelly not participating.

(S E A L)

Linda Mitry,
Deputy Secretary.