

Docket No. ER04-691-001, *et al.*

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1. On May 26, 2004, the Commission issued an order on the Midwest Independent Transmission System Operator, Inc.'s (Midwest ISO) proposed Transmission and Energy Markets Tariff (TEMT or Tariff)¹ and, among other things, initiated, under section 206 of the Federal Power Act (FPA),² a three-step process to address the treatment of transmission service provided under an estimated 300 grandfathered agreements (GFAs)

¹ The TEMT, when implemented on April 1, 2005, allowed the Midwest ISO to initiate Day 2 operations in its 15-state region. The Midwest ISO's Day 2 operations include, among other things, a day-ahead energy market and a real-time energy market (collectively, Energy Markets), with locational marginal pricing (LMP) and financial transmission rights (FTRs) for hedging congestion costs.

² 16 U.S.C. § 824e (2000).

in the Midwest ISO Energy Markets and offered an option for GFA parties to settle.³ In an order dated August 6, 2004, the Commission accepted and suspended the proposed TEMT and permitted it to become effective March 1, 2005, subject to conditions and further orders, and required the Midwest ISO to make compliance filings to implement various Commission directives.⁴

2. Subsequently, on September 15, 2004, the Commission addressed the results of its investigation of the GFAs and how they should be treated in the Midwest ISO's Energy Markets.⁵ Among other things, the GFA Order required the Midwest ISO to carve some of the GFAs out of its markets and accepted the tariff sheets that described the prospective treatment of GFAs. The GFA Order also addressed the applicability of charges under TEMT Schedule 16 (FTR Service) and Schedule 17 (Energy Market Service), to transactions taking place under GFAs. Finally, the Commission directed the Midwest ISO to make further compliance filings.

3. Today's order addresses all issues raised on rehearing of both the Procedural Order and the GFA Order. It also addresses the Midwest ISO's October 18, 2004 compliance filing (October Compliance Filing) and its November 15, 2004 compliance filing (November Compliance Filing), in response to the GFA Order. In addition, this order addresses the GFA-specific aspects of the Midwest ISO's January 21, 2005 compliance filing (January Compliance Filing), in response to Compliance Order I, and directs further compliance filings.

³ *Midwest Independent Transmission System Operator, Inc.*, 107 FERC ¶ 61,191 (2004) (Procedural Order). In the Procedural Order, the Commission set the date for implementation of the Energy Markets at March 1, 2005. However, on January 27, 2005, the Midwest ISO announced that it was changing the date it will begin its Energy Markets to April 1, 2005. On February 17, 2005, the Commission extended the effective dates of certain tariff sheets in the TEMT to accommodate an April 1, 2005 market launch date. *Midwest Independent Transmission System Operator, Inc.*, 110 FERC ¶ 61,169 (2005) (Motion Order).

⁴ *Midwest Independent Transmission System Operator, Inc.*, 108 FERC ¶ 61,163 (TEMT II Order), *order on reh'g*, 109 FERC ¶ 61,157 (2004) (TEMT II Rehearing Order). The Commission accepted the Midwest ISO's first of two compliance filings on December 20, 2004, subject to further modifications. *Midwest Independent Transmission System Operator, Inc.*, 109 FERC ¶ 61,285 (2004) (Compliance Order I).

⁵ *Midwest Independent Transmission System Operator, Inc.*, 108 FERC ¶ 61,236 (2004) (GFA Order).

I. Background

4. By order issued September 16, 1998, the Commission conditionally approved the formation of the Midwest ISO.⁶ The Formation Order also conditionally accepted for filing an open access transmission tariff (OATT) for the Midwest ISO, an Agreement of Transmission Facilities Owners to Organize the Midwest Independent Transmission System Operator, Inc. (Midwest ISO Agreement), and established hearing procedures. In addition, the Commission granted conditional approval for ten public utilities to transfer operational control of their jurisdictional transmission facilities to the Midwest ISO.

5. On December 20, 2001, the Commission found that the Midwest ISO's proposal to become a Regional Transmission Organization (RTO), with certain conditions, satisfied the requirements of Order No. 2000,⁷ and thus conditionally granted the Midwest ISO RTO status.⁸ The Commission also determined that the Midwest ISO's proposal for congestion management was a reasonable initial approach to managing congestion that satisfied the requirements of Order No. 2000 for Day 1 operation of an RTO. It directed the Midwest ISO to develop a market-based approach to managing congestion to satisfy the requirements for Day 2 operations under Order No. 2000.

6. Subsequently, the Midwest ISO filed a petition for declaratory order – the culmination of over a year of stakeholder discussions⁹ – that sought the Commission's endorsement of the general approach represented in three proposed market rules (Market Rules). The proposed Market Rules provided for: (1) a security-constrained, centralized bid-based scheduling and dispatch system (*i.e.*, day-ahead and real-time market rules); (2) FTRs for hedging congestion costs; and (3) market settlement rules. The Commission

⁶ *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).

⁷ *Regional Transmission Organizations*, Order No. 2000, 65 Fed. Reg. 809 (Jan. 6, 2000), FERC Stats. & Regs. ¶ 31,089 (2000), *order on reh'g*, Order No. 2000-A, 65 Fed. Reg. 12,088 (Feb. 25, 2000), FERC Stats. & Regs. ¶ 31,092 (2000), *aff'd*, *Public Utility District No. 1 of Snohomish County, Washington v. FERC*, 272 F.3d 607 (D.C. Cir. 2001).

⁸ *Midwest Independent Transmission System Operator, Inc.*, 97 FERC ¶ 61,326 (2001), *reh'g denied*, 103 FERC ¶ 61,169 (2003).

⁹ *See* Doying testimony at 4 (March 31, 2004).

approved the general direction of the Midwest ISO's proposals, reserving judgment on some issues and providing guidance on others.¹⁰ The Commission affirmed many of its conclusions on rehearing.¹¹

7. On July 25, 2003, the Midwest ISO filed a proposed TEMT (July 25 Filing) pursuant to section 205 of the FPA.¹² The July 25 Filing included terms and conditions necessary to implement a day-ahead energy market, real-time energy market, and FTRs. The July 25 Filing met with numerous protests, many of which alleged that the filing was incomplete and premature. Following a stakeholder vote, the Midwest ISO filed a motion to withdraw the filing, but it requested "any and all guidance the Commission can give the Midwest ISO and its stakeholders on the matters presented in the July 25 Filing."¹³

8. The Commission granted the Midwest ISO's motion to withdraw the July 25 Filing and provided, on an advisory basis, guidance on a number of issues raised in that filing.¹⁴ The Commission stated in the TEMT I Order that it expected its guidance to better enable the Midwest ISO to prepare and file a complete version of the TEMT or a similar proposal. The Commission instructed the Midwest ISO to include five elements in its revised Energy Markets filing: (1) a *pro forma* System Support Resource Agreement; (2) a marginal loss crediting mechanism; (3) a methodology for initial FTR allocations; (4) creditworthiness provisions; and (5) market power mitigation measures.

9. The Midwest ISO filed a revised TEMT on March 31, 2004 (March 31 Filing), raising an issue important to the operation of the proposed energy markets. The Midwest ISO stated in its transmittal letter, and through the testimony of two witnesses, that it

¹⁰ *Midwest Independent Transmission System Operator, Inc.*, 102 FERC ¶ 61,196 (2003) (Declaratory Order).

¹¹ *Midwest Independent Transmission System Operator, Inc.*, 103 FERC ¶ 61,210 (2003) (Declaratory Order Rehearing).

¹² 16 U.S.C. § 824d (2000).

¹³ Motion of the Midwest Independent Transmission System Operator, Inc., to Withdraw Without Prejudice the July 25, 2003 Energy Markets Tariff Filing, Docket No. ER03-1118-000 at 5 (Oct. 17, 2003).

¹⁴ *Midwest Independent Transmission System Operator, Inc.*, 105 FERC ¶ 61,145 (2003) (TEMT I Order), *reh'g dismissed*, 105 FERC ¶ 61,272 (2003).

would be unable to operate its Energy Markets without integrating an estimated 300 GFAs that are currently effective in the Midwest ISO region. It also concluded that up to 40,000 megawatts of transmission service – about 40 percent of total load in the region¹⁵ – was likely to be associated with the GFAs.¹⁶ The Midwest ISO argued that allowing holders of GFAs 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 the Midwest ISO’s ability to reliably operate the Energy Markets and without placing excessive financial burden on other Market Participants.”¹⁷

10. On May 26, 2004, the Commission issued the Procedural Order, which provided an initial response to the threshold GFA issue. The Commission explained that “the development of the Midwest ISO as an RTO has reached a point at which the Commission must examine the potential conflict between our desire to preserve the GFAs and our instructions that the Midwest ISO should develop a market-based system of congestion management.”¹⁸ The Commission identified a need for further information about the GFAs and a desire to better understand how the GFAs and the proposed Energy Markets would affect one another. Accordingly, the Commission initiated an

¹⁵ The Midwest ISO stated that, after reviewing all of the contracts listed in Attachment P of the OATT, the specific details of the contracts, such as usage, scheduling requirements and megawatt quantity or capacity, were not readily apparent on the face of some of the contracts. The Midwest ISO added, however, that about half the contracts had a specific megawatt value associated with them, and that in the aggregate those contracts accounted for approximately 20,000 megawatts of capacity. The Midwest ISO projected that the remaining half of the GFAs were likely to be associated with a similar number of megawatts.

¹⁶ The Midwest ISO’s analysis assumed a peak capacity of 97,000 megawatts. *See* McNamara testimony at 84 n.5 (March 31, 2004).

¹⁷ Midwest ISO Transmittal Letter at 9, Docket No. ER04-691-000 (March 31, 2004).

¹⁸ Procedural Order at P 65. *See also* Declaratory Order at P 29-32, 64 (“We continue to believe that customers under existing contracts, both real or implicit, should continue to receive the same level and quality of service under a standard market design.”); Declaratory Order Rehearing at P 27-31; *cf.* TEMT I Order at P 22 (encouraging the Midwest ISO to resubmit its Energy Markets proposal).

investigation, under section 206 of the FPA, of the GFAs “to decide whether GFA operations can be coordinated with energy market operations, whether and to what extent the [transmission owners] should bear the costs of taking service to fulfill the existing contracts and whether and to what extent the GFAs should be modified.”¹⁹

11. The Commission issued two orders addressing the merits of the March 31 Filing. The first of these orders – the TEMT II Order,²⁰ issued August 6, 2004 – accepted and suspended the proposed TEMT and permitted it to become effective March 1, 2005, subject to conditions and further orders on GFAs and Schedules 16 and 17. The Commission also accepted certain tariff sheets (pertaining to FTRs) to be effective on August 6, 2004, subject to conditions and further order. In order to address the Midwest ISO’s unique features, such as the fact that it lacks experience operating as a single power pool and has only a short period of experience operating under a single reliability framework, the Commission ordered the Midwest ISO to implement certain safeguards to ensure additional protections for wholesale customers during startup and transition to fully-functioning Day 2 energy markets. In addition, the TEMT II Order required the Midwest ISO to make other compliance filings to implement various Commission directives.

12. As discussed more fully below, on September 15, 2004, the Commission issued the GFA Order, which concluded its investigation of the GFAs and addressed how the GFAs should be treated in the Midwest ISO’s Energy Markets. The GFA Order divided the GFAs into several categories, and outlined how each category should be treated. Among other things, the GFA Order found that the Midwest ISO could reliably carve-out some of the GFAs from its markets (ultimately less than 10 percent of total Midwest ISO peak load) and accepted the tariff sheets that described the prospective treatment of GFAs. The Commission also required the Midwest ISO to make compliance filings.²¹ On October 18, 2004 and November 15, 2004, the Midwest ISO filed to comply with the Commission’s directives in the GFA Order.

¹⁹ Procedural Order at P 67.

²⁰ *Midwest Independent Transmission System Operator, Inc.*, 108 FERC ¶ 61,163 (2004) (TEMT II Order).

²¹ GFA Order at P 97.

13. The Commission next issued an order, on November 8, 2004, addressing all issues raised on rehearing of the TEMT II Order,²² except for the issue of data confidentiality.²³ On most major issues, including market start-up safeguards, application of marginal losses, mitigation, the resource adequacy plan and the System Supply Resource program, except in limited instances, the Commission denied rehearing and reaffirmed the TEMT II Order. The Commission granted the Independent Market Monitor's (IMM) request to postpone the establishment of Automatic Mitigation Procedures, provided various clarifications and responded to several procedural motions. The Commission also granted rehearing and clarification with regard to certain issues raised regarding FTR allocations.²⁴

14. In Compliance Order I, the Commission accepted, subject to modification, the Midwest ISO's first three filings to comply with the TEMT II Order.²⁵ Compliance Order I addressed the first two of those filings, which, *inter alia*: (1) proposed to revise the TEMT to eliminate Michigan-specific energy imbalance provisions; (2) developed tariff language for market startup safeguards; (3) modified the FTR allocation process; (4) made new proposals for automatic market power mitigation and control area mitigation; and (5) revised various other aspects of the TEMT. The Midwest ISO was also required to make further filings to comply with Compliance Order I.

15. Compliance Order II,²⁶ which was issued on January 21, 2005, accepted: (1) proposed rules providing for corrective measures in the event of temporary inability to calculate accurate market prices; (2) a proposed plan for cutover to decentralized

²² *Midwest Independent Transmission System Operator, Inc.*, 109 FERC ¶ 61,157 (2004) (TEMT II Rehearing Order).

²³ *See Midwest Independent Transmission System Operator, Inc.*, 108 FERC ¶ 61,321 (2004) (Confidentiality Order).

²⁴ The FTR allocation process, as stated in the Midwest ISO's October 18, 2004 compliance filing, began on November 22, 2004. *See* Midwest ISO October Compliance Filing, Revised FTR Allocation Timeline Attachment.

²⁵ The Midwest ISO's third filing to comply with the TEMT II Order, in Docket No. ER04-691-012, *et al.*, 111 FERC ¶ 61,043 (2005) is addressed in an order issued concurrently with this order.

²⁶ *Midwest Independent Transmission System Operator, Inc.*, 110 FERC ¶ 61,049 (2005) (Compliance Order II).

power system operations in the event of a serious failure of the Day 2 energy market operations; (3) an update on the Midwest ISO's effort to adjust the day-ahead energy trading deadline from 0900 EST to 1100 EST, and (4) a Readiness Advisor Verification Plan. The Midwest ISO was required to make further filings to comply with Compliance Order II, and those filings will be addressed in a future order.

16. Finally, as a result of several meetings and telephone conferences with stakeholders, the Midwest ISO agreed to a 30-day delay of the market start to allow for testing, training and refining of market participants' internal systems.²⁷ Further, on January 28, 2005, the Midwest ISO filed a motion to change the effective dates of certain tariff sheets in the TEMT to be consistent with financially binding market operations commencing on April 1, 2005. On February 17, 2005, the Commission issued an order extending the effective dates of certain tariff sheets in the TEMT to accommodate the April 1, 2005 market start date.²⁸

II. Rehearing of the Procedural Order - Docket Nos. ER04-691-001 and EL04-104-001

A. Background of the Procedural Order

17. In the Procedural Order, the Commission initiated a three-step investigation of the GFAs under section 206 of the FPA. The first step of the analysis required jurisdictional public utilities providing or taking service under GFAs (and invited any non-jurisdictional parties on a voluntary basis) to submit the following GFA information to the Commission: (1) the name of the GFA Responsible Entity, as defined in the proposed TEMT;²⁹ (2) the name of the GFA Scheduling Entity, as defined in the proposed TEMT;³⁰ (3) the source point(s) applicable to the GFA; (4) the sink point(s) applicable to the GFA; (5) the maximum number of megawatts transmitted pursuant to the GFA for

²⁷ See Letter from Stephen G. Kozey to the Commission, Docket No. ER04-691-000, *et al.* (January 28, 2005).

²⁸ Motion Order at P 15.

²⁹ Section 1.127 of the TEMT defines GFA Responsible Entity as “[a]n entity financially responsible for all costs incurred by transactions pursuant to [GFAs] under this Tariff.”

³⁰ Section 1.128 of the TEMT defines GFA Scheduling Entity as “[a]n entity responsible for scheduling transmission service or energy transactions related to [GFAs] under this Tariff.”

each set of source and sink points; and (6) whether modification to the GFA is subject to a “just and reasonable” standard of review or a *Mobile-Sierra*³¹ “public interest” standard of review.³²

18. The Commission also stated that, if the parties to each GFA were able to agree on the GFA information, they should file the GFA information jointly and that the Commission would evaluate these joint filings as a group to help determine the effects of the GFAs on the proposed Energy Markets. If parties to a particular GFA or GFAs were not able to agree on the GFA information, then the Commission required each party to file its own interpretation of the GFA and proceed to Step 2.

19. Additionally, the Commission strongly encouraged GFA party settlements and stated that it would be receptive to GFA parties voluntarily agreeing, in settlement, to accept one of the Midwest ISO’s proposed scheduling and settlement options,³³ including Option B, for treatment of GFA transactions, or to convert their contracts to TEMT

³¹ See *United Gas Pipe Line Company v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956) (*Mobile*); *FPC v. Sierra Pacific Power Company*, 350 U.S. 348 (1956) (*Sierra*).

³² By notice issued June 22, 2004, the Commission issued instructions to all parties for filing their GFA information and a template for filing summary GFA information.

³³ In its March 31 Filing, the Midwest ISO proposed to require GFA parties to schedule and settle their GFA transactions under the Midwest ISO’s Energy and FTR Markets through one of three options. Option A of the TEMT requires the GFA Responsible Entity to nominate and hold FTRs in order to transact under GFAs. The Midwest ISO assesses congestion charges and the cost of losses for all transactions under the GFA. Option B provides that the GFA Responsible Entity will not nominate or receive FTRs. The Midwest ISO will charge the GFA Responsible Entity the cost of congestion for all transactions pursuant to the GFA, but, if the GFA Scheduling Entity submits the bilateral transaction schedule a day-ahead, the Midwest ISO will credit back to the GFA Responsible Entity the costs of congestion resulting from day-ahead schedules that the GFA Responsible Entity clears in the day-ahead market. The Midwest ISO will also charge the GFA Responsible Entity the cost of losses for all transactions under the GFA, then, if the GFA Scheduling Entity has timely submitted a conforming schedule for the GFA, credit back to the GFA Responsible Entity the difference between marginal losses and system losses at the GFA source and sink points. Option C requires the GFA Responsible Entity to pay the costs of congestion for all GFA transactions.

service.³⁴ The parties were directed to make a simple statement in their joint filings to indicate whether or not they were willing to voluntarily convert their contract to TEMT service or settle by accepting the Midwest ISO's proposed treatment of GFAs.³⁵ The Commission also stated that, if the Commission approved a settlement, it did not intend to later revisit its decision when it addressed the non-settling parties' GFAs.³⁶ Parties that did not settle their GFAs prior to July 28, 2004, would be subject to the Commission's analysis of how the GFAs should be treated in the Day 2 Energy Markets.³⁷

20. To assist the Commission in determining whether to modify GFAs that were not settled, the Midwest ISO and its IMM were directed to provide evidence, by June 25, 2004, concerning the reliability and economic benefits of the Midwest ISO's congestion management system with GFAs included in the market.³⁸ Parties were given an opportunity to comment on the Midwest ISO's analysis. The Commission also sought comments from all affected parties on: (1) whether keeping the GFAs separate from the market would negatively impact reliability; (2) the extent to which accommodating GFAs would shift costs to third parties; and (3) whether keeping the GFAs separate from the market would result in undue discrimination. Parties were given an opportunity to submit reply comments.³⁹

³⁴ Procedural Order at P 80. The Commission stated that the GFA scheduling and settlement treatment options, including Option B, as drafted in the Midwest ISO proposal, would be available to GFA parties that jointly provided GFA information to the Commission in Step 1 (or prior to the conclusion of Step 2) of our three-step analysis, and that jointly indicated that they would accept this treatment. *Id.* at P 82.

³⁵ *Id.* at P 69.

³⁶ *Id.* at P 80.

³⁷ *Id.* at P 78.

³⁸ *Id.* at P 72.

³⁹ *Id.* at P 73. By notice issued June 18, 2004, the Commission allowed reply comments regarding the three issues enumerated above to be filed on July 16, 2004.

21. In Step 2 of the analysis, the Commission set for hearing before two administrative law judges those GFAs for which the parties could not agree on all of the GFA information. The sole purpose of the hearing was to identify GFA information for every GFA on which the parties had not agreed by June 25, 2004.⁴⁰ The Commission required the presiding judges to issue written findings on the same six informational GFA criteria required in Step 1,⁴¹ and to present these written findings at the Commission meeting on July 28, 2004.⁴²

22. In Step 3 of the analysis, following the presiding judges' oral presentation, the Commission stated that it would use the GFA information, and the other information and comments submitted in Step 1, to determine in a subsequent order (*i.e.*, the GFA Order): (1) whether the GFAs can function as written within the proposed Energy Markets; (2) whether the GFAs can function within the Energy Markets under the Midwest ISO's proposed treatment; or (3) whether modifications to the GFAs should be required.⁴³

⁴⁰ The Commission held that hearing proceedings would begin on June 28, 2004, and terminate on July 23, 2004.

⁴¹ *Midwest Independent Transmission System Operator, Inc.*, 108 FERC ¶ 63,013 (2004) (Findings of Fact).

⁴² Procedural Order at P 76. In the event that GFA parties reached an agreement on their GFA information prior to the conclusion of the Step 2 proceeding, they were directed to seek the presiding judges' permission to withdraw from the hearing. If the presiding judges granted permission, the parties were required to make a joint filing with the Commission as described in Step 1. Parties could voluntarily agree to convert or settle their GFAs in this filing no later than July 27, 2004, the day before the presiding judges' report issued. *Id.* at P 77.

⁴³ *Id.* at 78.

B. Procedural Matters

23. Parties filed a total of 13 requests for rehearing and clarification of the Procedural Order, as listed in Appendix A (Procedural Rehearing Requests).⁴⁴ They raise, among other things, the Energy Markets start-up timeline, due process concerns, and the Procedural Order's application to non-jurisdictional parties and facilities.⁴⁵

24. On June 23, 2004, the Midwest Parties filed an answer to Cinergy's June 9, 2004, request for expedited rehearing or alternative motion to stay. On July 12, 2004, the Midwest TDUs filed an answer to the Midwest ISO's request for clarification and FirstEnergy filed an answer and request for clarification in response to the request for rehearing, clarification and comments of AMP-Ohio.

25. The Commission's Rules of Practice and Procedure prohibit answers to requests for rehearing,⁴⁶ and, accordingly, we will reject the answers listed above.

1. Motion for Expedited Rehearing or Stay

26. On June 9, 2004, Cinergy filed a request for expedited rehearing or, in the alternative, motion to stay. Specifically, Cinergy requests expedited action and a rehearing determination that the Commission will not accept or approve Option B settlements prior to determining that Option B is just, reasonable, and not unduly discriminatory.⁴⁷ In order to avoid considerable harm if settlements adopting Option B are submitted and approved prior to resolution of the lawfulness of Option B, Cinergy

⁴⁴ Acronyms and short forms used for party names throughout the order can be found in Appendix A.

⁴⁵ To the extent that parties raise issues on rehearing of the Procedural Order that are the same or similar to issues raised on rehearing of the GFA Order, we will discuss those requests/concerns in the next section of this order, which addresses the requests for rehearing of the GFA Order.

⁴⁶ 18 C.F.R. § 385.713(d)(1) (2004).

⁴⁷ Although it does not seek review on an expedited basis, in its Procedural Rehearing Request, LG&E similarly argues that the Commission's indication that it will automatically approve settlements reached under Option B, an option with direct rate effects on third parties, is a violation of the FPA requirement that the Commission must find settlements reasonable before they become effective.

requests action prior to the June 25, 2004 settlement submittal due date. Cinergy argues that expedited action will ensure that resolution of this issue does not lead to extensive litigation and further delays in market implementation, which might be an issue if a later determination that Option B is unlawful requires “unwinding” of settlement agreements.

27. Alternatively, Cinergy requests a stay of the Procedural Order. It states that a stay will benefit the market and market participants by allowing for orderly resolution of the lawfulness of Option B, which in turn allows for orderly resolution of the GFA process, allocation of FTRs, and market implementation. Specifically, Cinergy states that a stay is warranted because: (1) the irreparable injury here would be not just to Cinergy, but to the process for resolution of GFA issues and the larger process of market design and implementation; (2) a stay would not harm third parties because the Commission can resolve the legality of Option B quickly, and a stay would benefit third parties by avoiding litigation, administrative inefficiency, and delay of market implementation; and (3) because a stay would help all involved in avoiding the litigation, administrative inefficiencies, and delay to market implementation, it would be in the public interest.⁴⁸

2. Commission Determination

28. Prior to ruling on the GFA party settlements in the GFA Order, the Commission ruled on the just and reasonableness of Option B stating that “we find Option B to be just and reasonable for those parties that voluntarily settled prior to July 28, 2004, in accordance with the Procedural Order.”⁴⁹ Following that determination, the Commission stated that, after reviewing the joint filings, it accepted all of the GFA settlements, including those of parties who chose Option B, and found them to be just and reasonable.⁵⁰ Thus, because the Commission ruled on the lawfulness of Option B prior to accepting the GFA party settlements choosing Option B, Cinergy’s request for expedited rehearing is no longer relevant and we will deny its request.

⁴⁸ Cinergy Procedural Rehearing Request at 9.

⁴⁹ GFA Order at P 264.

⁵⁰ *Id.* at P 280.

29. Further, the Commission may stay its action “when justice so requires.”⁵¹ In addressing motions for stay, the Commission considers: (1) whether the moving party will suffer irreparable injury without a stay; (2) whether issuing the stay will substantially harm other parties; and (3) whether a stay is in the public interest.⁵² The Commission’s general policy is to refrain from granting a stay of its orders, to assure definiteness and finality in Commission proceedings.⁵³ The key element in the inquiry is irreparable injury to the moving party.⁵⁴ If a party is unable to demonstrate that it will suffer irreparable harm absent a stay, we need not examine the other factors.⁵⁵

30. We find that Cinergy has not demonstrated that it will suffer irreparable harm absent a stay. Cinergy alleges that it may suffer irreparable harm if a stay is denied. But, “[m]ere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough.”⁵⁶ It is well settled that absent a threat to the existence of a movant’s business (which neither party alleges is present here), “economic loss does not, in and of itself, constitute irreparable harm.”⁵⁷ We therefore deny Cinergy’s request for stay of the Procedural Order.

C. TEMT Processing and Markets Start-Up Timeline

31. In the Procedural Order, as opposed to a date of December 1, 2004, the Commission established a new date of March 1, 2005 for the start of the Energy Markets. The Commission found that the new start date would allow for more time to complete the initial allocation of FTRs, including incorporation of the GFA Order results, and would

⁵¹ 5 U.S.C. § 705 (2000).

⁵² *See, e.g., CMS Midland, Inc., Midland Cogeneration Venture Ltd. P’ship*, 56 FERC ¶ 61,177 at 61,631 (1991), *aff’d sub nom. Michigan Municipal Coop. Group v. FERC*, 990 F.2d 1377 (D.C. Cir.), *cert. denied*, 510 U.S. 990 (1993).

⁵³ *Id.* at 61,630-31. *See also Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985).

⁵⁴ *See CMS Midland*, 56 FERC ¶ 61,177 at 61,631.

⁵⁵ *See id.*

⁵⁶ *Wisconsin Gas Co.*, 758 F.2d at 674.

⁵⁷ *Id.*

allow for sufficient market trials and address Sarbanes-Oxley Act of 2002⁵⁸ compliance issues.⁵⁹ The Commission laid out a suggested schedule for FTR allocations and market trials in accord with that new March 1, 2005 start date. The Commission also accepted and suspended the FTR provisions of the proposed TEMT, subject to refund and further orders.

1. Requests for Rehearing

32. Midwest Parties and WPS Resources state that the market implementation date selected by the Commission in the Procedural Order is arbitrary and capricious, unsupported by the record, and based on a procedurally flawed approach to settlement of the GFA issues.

33. IMEA requests that the Commission clarify its intent to deal substantively in further orders with issues related to the details of FTR provisions in Module C. IMEA reiterates its protest on FTR issues, should the Commission clarify that the Procedural Order approved all the FTR provisions, *sub silentio*. Midwest Parties state that the Commission erred in its wholesale acceptance of Module C pertaining to FTRs without considering the proposal in context and without discussing or addressing protestors' comments. Midwest Parties assert that the Commission's adoption of the FTR allocation schedule in the Procedural Order is arbitrary and capricious and will unreasonably deprive market participants of vital and timely information regarding FTR decisions. In addition, Midwest Parties contend that the Commission erred by adopting an inadequate period for performing market trials, thereby jeopardizing reliability in the region by requiring the start of untested markets.

34. The Midwest ISO requests clarification that: (1) the timing specified in the Procedural Order for commencement of the Energy Markets is contingent on timely, substantive direction from the Commission; (2) the Midwest ISO should file final FTR allocations with the Commission as soon as practicable even if the FTR filing may not be able to be made on December 1, 2004 as provided in the Procedural Order; (3) the Midwest ISO will have met the training directive of the Procedural Order by providing several opportunities for training even if all the market trials are not complete by February 1, 2005; and (4) the Midwest ISO is authorized to commence the FTR

⁵⁸ Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified in scattered sections of 15 U.S.C.).

⁵⁹ Procedural Order at P 94.

allocation process within 10 business days after the GFA Order issues. Further, the Midwest ISO requests that the Commission confirm that the Procedural Order requires all market participants to make good faith efforts to comply with all of the terms and conditions of the TEMT, specifically the provisions related to resource registration for the FTR allocation.

35. Detroit Edison and LG&E assert that the Procedural Order violated the filed rate doctrine by requiring parties to negotiate GFAs prior to the Commission's determination of the justness and reasonableness of the Midwest ISO's proposed TEMT. They argue that by putting the cart before the horse in the three-step process, the Commission is depriving the parties of the necessary predictability to which industry participants are entitled prior to making their business decisions.

2. Commission Determination

36. In the Procedural Order, the Commission stated that, in order to have sufficient market trials in advance of implementation of the Day 2 market, it directed the Midwest ISO to move the start of the Energy Markets from December 1, 2004 to March 1, 2005. This three-month extension, the Commission stated, would allow more time to complete the initial allocation of FTRs, including an update of the model to include changes to the system.⁶⁰ Further, the later time frame would permit the Commission time to complete its analysis of the GFAs and the Midwest ISO time to continue to refine its FTR allocation model. The Commission added that it "recognizes the need for a timely order on the GFAs and the FTR allocation proposal to permit nominations to begin on October 1, 2004."⁶¹ In conformance with the stated need for the orders, the Commission issued its order on the Midwest ISO's proposed TEMT on August 6, 2004, and its analysis of the GFAs on September 16, 2004. Recognizing that the Midwest ISO's "proposed method of congestion management is a high priority for the Commission, due to its reliability benefits and its economic efficiency benefits," this three-month extension was more than reasonable.⁶²

⁶⁰ *Id.*

⁶¹ *Id.* at P 100.

⁶² Procedural Order at P 3.

37. Further, in the TEMT II Rehearing Order, the Commission denied the Midwest Parties' claim that the Commission had cast aside due process in order to meet the March 1, 2005 start-up date for the Energy Markets.⁶³ The Commission noted that "the Midwest Parties' arguments that the Commission has not permitted it an opportunity to conduct discovery, proffer testimony and cross-examine the Midwest ISO's witnesses amounts to an argument that the Commission should have set the TEMT for trial-type evidentiary hearing."⁶⁴ In response, the Commission found that "the record in this proceeding is sufficient to allow us to make a reasoned decision on the merits of the TEMT, and trial-type evidentiary hearing procedures have not been necessary."⁶⁵ The same conclusion applies in this proceeding. Thus, the Midwest Parties and WPS Resources' requests for rehearing regarding the market implementation date are denied.

38. With regard to the FTR allocation schedule and Module C, in the TEMT II Order the Commission substantively addressed commenters' concerns.⁶⁶ In accepting the Midwest ISO's proposed FTR allocation methodology, with modifications, the Commission recognized that the Midwest ISO's proposed allocation method reflected a compromise between advocates of flexibility in the allocation and advocates of approaches that stress mandatory allocation based on historical uses.⁶⁷ For the same reasons, we will deny IMEA's and the Midwest Parties' requests for rehearing on this issue.

39. With regard to the Midwest ISO's request for clarification regarding the schedule for completing FTR allocations and market trials, in Compliance Order I, the Commission accepted a revised schedule for completion of Midwest ISO's four-tier FTR allocation in order to provide the Midwest ISO additional time to comply with the directives of the GFA Order. Pursuant to the revised schedule, the Midwest ISO would complete the four-tier allocation and report the results to the Commission and market

⁶³ TEMT II Rehearing Order at P 45.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ TEMT II Order at P 145-53.

⁶⁷ *Id.* at P 154-56.

participants by January 31, 2005.⁶⁸ Thus, the Commission has already addressed the Midwest ISO's request for additional time to complete the FTR allocation by providing the Midwest ISO additional time to comply with the directives of the GFA Order.

40. In response to Detroit Edison and LG&E's concerns, in the TEMT II Rehearing Order, the Commission acknowledged that, as outlined in the Procedural Order, the Commission could begin to evaluate how the GFAs should be treated in the Midwest ISO's Energy Markets after Step 2 of the three-step investigation had ended with the presiding judges' presentation of the hearing results to the Commission.⁶⁹ The Commission also stated that it denied requests for rehearing insofar as they attacked the issuance of the TEMT II Order before the end of the three-step investigation, stating that:

[t]he Procedural Order made abundantly clear that the Commission expected the process of investigating the GFAs to move forward during the same time the Commission was evaluating the merits of the TEMT...If FTR nominations were to begin on October 1, 2004, then the Commission's analysis of the TEMT would have had to be completed prior to this date so that the appropriate tariff sheets could be made effective. The Commission was required to act in accordance with statutory deadlines,⁷⁰ and the process delineated in the Procedural Order made clear how the Commission would fulfill those obligations. Further...the Commission's acceptance of the TEMT was made subject to further order on the GFAs. If the GFA issues had been so intractable as to make it impossible for the Midwest ISO to start its energy markets, or if further proceedings were needed, the Commission could (and would) have made this finding in the GFA Order and, if necessary, rejected the TEMT at

that time...the Commission retained throughout the process its

⁶⁸ Compliance Order I at P 53, 88.

⁶⁹ TEMT II Rehearing Order at P 43 (*citing* TEMT II Order at P 11).

⁷⁰ The Midwest ISO proposed in the March 31 Filing to make some portions of the TEMT effective June 7, 2004, and the remainder on December 1, 2004. The Commission was required to act on the entire TEMT within those deadlines. *See* 18 C.F.R. § 824d (2000).

authority to reject the TEMT on the ground that the Midwest ISO would be unable to reliably accommodate the GFAs in its energy markets.⁷¹

41. In addition, parties were neither required to settle, nor were they required to agree on all six elements, allowing them the opportunity to take their disputes to the hearing established in Step 3 of the investigation and to have the Commission decide the appropriate treatment of their GFAs. Thus, we will deny Detroit Edison and LG&E's requests for rehearing on this issue.

D. Section 206 Investigation's Application to Non-Jurisdictional Parties and Facilities

42. In the Procedural Order, the Commission required that jurisdictional public utility parties to GFAs produce relevant GFA information and invited any non-jurisdictional parties to GFAs to do likewise on a voluntary basis.

1. Requests for Rehearing

43. Manitoba Hydro and Hoosier request that the Commission clarify that non-jurisdictional parties are excluded from the expedited hearing and that the Midwest ISO's proposed treatment of GFAs does not apply to GFAs involving at least one non-jurisdictional party. The parties assert that where the Commission has jurisdiction over only one aspect of a GFA because another aspect is controlled by a non-jurisdictional party, neither the just and reasonable nor the *Mobile-Sierra* public interest standard applies. Manitoba Hydro asserts that transmission service and energy sales by Manitoba Hydro to utilities in the United States are not subject to the Commission's jurisdiction and thus the Commission has only partial jurisdiction over its agreement with utilities in the United States.

2. Commission Determination

44. In the Procedural Order, in order to give the Commission a more comprehensive understanding of the effects of the GFAs on the Energy Markets, and the effect of the Energy Markets on the GFAs, the Commission merely *invited* non-jurisdictional parties to GFAs, *on a voluntary basis*, to submit their GFA information. The Commission in no way required non-jurisdictional entities to produce such information and clarified that "non-jurisdictional GFAs" were those GFAs for which the transmission provider is not a

⁷¹ TEMT II Rehearing Order at P 44.

public utility, as defined in section 201 of the FPA.⁷² The Commission also recognized that it had no authority to make modifications to these contracts, but also recognized that it does have jurisdiction over the service that the transmission owners must take under the Midwest ISO Tariff to meet their obligations under their GFAs.⁷³ Thus, the Commission has already addressed and clarified these concerns and we will deny the requests for rehearing on this issue.

45. Finally, as is more fully addressed in the following section, in response to Manitoba Hydro's jurisdictional concerns, the Commission reassured Manitoba Hydro in the TEMT II Rehearing Order "that our rulings on the TEMT and GFAs apply only to jurisdictional services in interstate commerce, not to services provided within Canada."⁷⁴

E. Other Issues on Rehearing

1. Requests for Rehearing

46. LG&E asserts that the Commission erred in the Procedural Order in failing to address recovery of Day 2 costs. LG&E states that this failure ignores the Commission's prior holding that utilities should be provided an opportunity to recover transition costs incurred in moving to a competitive market.

47. AMP-Ohio asks that the Commission find that provisions in GFA Nos. 410 and 411 concerning energy transactions that do not involve transmission capacity will not be affected by the three-step analysis, irrespective of who might be named unilaterally as a Responsible Entity. AMP-Ohio also requests that the Commission reiterate that the underlying agreements themselves govern the GFA parties' rights rather than Attachment P.

2. Commission Determination

48. With respect to LG&E's allegation that the Commission erred by failing to address

⁷² 16 U.S.C. § 824 (2000).

⁷³ GFA Order at P 150.

⁷⁴ TEMT II Rehearing Order at P 47.

recovery of Day 2 costs in the Procedural Order, we note that the Commission addressed such issues in the GFA Order⁷⁵ and LG&E's request for rehearing of that aspect of the GFA Order is addressed below.

49. With respect to AMP-Ohio's request for clarification that energy transactions that do not involve transmission capacity will not be affected by the three-step analysis, in the GFA Order, the Commission required that the contracts at issue be subject to Options A or C. Those options require that GFA energy transactions over the Midwest ISO transmission system be scheduled and settled pursuant to the TEMT, regardless of whether the GFA specifically addresses transmission capacity associated with such transactions. Thus, AMP-Ohio's request for clarification is denied.⁷⁶

50. As to AMP-Ohio's request that the Commission clarify that the underlying agreements govern the GFA parties' rights rather than Attachment P, we reiterate the Commission's holding in its March 25, 2004 Order Accepting Compliance Filing and Directing Further Compliance Filing,⁷⁷ stating that:

the protestors request confirmation that if the contested agreements are not ultimately included in Attachment P, they will remain in effect and will not be impacted by such lack of inclusion...Since the underlying agreements themselves govern the parties' rights and obligations rather than Attachment P, protestors request for confirmation is hereby granted.⁷⁸

51. Further, the GFA Order required that Attachment P be modified to specify for each contract the treatment per the directives of the GFA Order. Thus, Attachment P reflects the status of each GFA and any rights and obligations of the GFA parties under

⁷⁵ GFA Order at P 293-99.

⁷⁶ AMP-Ohio's specific concerns regarding GFA Nos. 410 and 411 are addressed below.

⁷⁷ *Midwest Independent Transmission System Operator, Inc.*, 106 FERC ¶ 61,288 (2004).

⁷⁸ *Id.* at P 18.

the Midwest ISO Tariff pursuant to that treatment. However, the GFA parties' obligations to each other are governed by their agreements.

III. Rehearing of GFA Order - Docket Nos. ER04-691-006; ER04-106-003; and EL04-104-005

A. Background of GFA Order

52. In the GFA Order, the Commission addressed the results of its investigation of the GFAs and how the GFAs should be treated in the Midwest ISO's Energy Markets. The results of the fact finding investigation indicated that only approximately 25,000 megawatts of transmission service (23 percent of total Midwest ISO load) was provided under 229 GFAs that would remain in effect when the Midwest ISO commences operation of its Energy Markets. Of this 25,000 megawatts of transmission service, approximately 9,700 megawatts (9 percent of total Midwest ISO load) would participate in the Midwest ISO's Energy Markets as a result of GFA parties' voluntary election of one of the Midwest ISO's three options proposed for scheduling and financially settling GFA transactions or by voluntarily converting their service to the TEMT.⁷⁹ The Commission found that another approximately 5,000 megawatts (4.5 percent of total Midwest ISO load), representing those GFAs for which modification is subject to the just and reasonable standard of review,⁸⁰ should also participate in the Midwest ISO's Energy Markets. This left only approximately 10,385 megawatts (9.6 percent of total Midwest ISO load), which the Commission found should be "carved-out" and therefore not participate in the Midwest ISO's Energy Markets, representing transmission service provided under: (1) those GFAs (representing 6,914.4 megawatts) for which the parties explicitly provided that modification is subject to the *Mobile-Sierra* public interest standard of review; (2) those GFAs (representing 1,272.9 megawatts) that are silent with

⁷⁹ GFA Order at P 275. Parties settled 52 contracts. In specific, 14 GFA parties chose to settle on Option A (a total of approximately 1,599 MW); 30 GFA parties chose to settle on Option B (a total of approximately 5,247 MW); 3 GFA parties chose a combination of Options A and B (396 MW); and 5 GFA parties chose to convert their contracts to TEMT service (representing 2,487 MW). *Id.*

⁸⁰ The Commission determined that 50 of the non-settling GFAs (representing 4,992.7 megawatts) were subject to a just and reasonable standard of review. Of those, parties to 31 of these GFAs explicitly agreed that their contracts are subject to a just and reasonable standard of review. For the remaining 19 GFAs, the presiding judges made a finding that the contracts were subject to a just and reasonable standard of review, and we affirmed those findings.

respect to the standard of review; and (3) those GFAs (representing 2,198 megawatts) providing for transmission service by an entity that is not a public utility.⁸¹ The Commission found that the Midwest ISO would be able to reliably operate its Energy Markets with this carve-out of GFAs given the relatively small amount of transmission service involved.⁸²

53. The GFA Order also addressed the applicability of charges under Schedule 16, FTR Service, and Schedule 17, Energy Market Service, to transactions taking place under GFAs.

B. Procedural Matters

54. Parties filed a total of 33 requests for rehearing and clarification of the GFA Order, as listed in Appendix A. They raise, among other things, issues concerning Options A, B, and C treatment, Schedules 16 and 17, the appropriate standards of review, GFA-specific findings contained in Appendix B, and GFA treatment after 2008.

C. Due Process Concerns

55. As noted above, in the Procedural Order, the Commission instituted a proceeding in Docket No. EL04-104-000, under section 206 of the FPA, for the initial purpose of enhancing the Commission's understanding of the GFAs.⁸³

1. Requests for Rehearing of Procedural Order

56. Hoosier, Midwest Parties, and Rural Electric Cooperatives state that the Commission erred by arbitrarily and capriciously initiating a section 206 proceeding to address whether modification to the GFAs should be required. Additionally, Rural Electric Cooperatives assert that the Commission failed to provide adequate notice under section 206. LG&E argues that the three-step and settlement process is internally inconsistent as described in the Procedural Order and does not constitute reasoned decision-making. Hoosier argues that the Commission erred in initiating a section 206 investigation on unsupported claims by the Midwest ISO such as the claim that the GFAs

⁸¹ GFA Order at P 130, 142, and 149. The Commission required the Midwest ISO to carve these GFAs out of its Energy Markets until the transition period ends in 2008.

⁸² *Id.* at P 5.

⁸³ Procedural Order at P 3, 65.

constitute 40 percent of the capacity in the Midwest ISO footprint.

57. Xcel, Hoosier, WPS Resources, Detroit Edison and Rural Electric Cooperatives assert that the Commission's failure to establish adequate hearing procedures to examine issues under the GFAs is not consistent with the Administrative Procedure Act, the FPA, or the United States Constitution and violates the parties' right to due process. They state that the procedures set forth in the Procedural Order ignore that the fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner."⁸⁴ In order to provide appropriate due process, Xcel requests that the Commission allow adequate time for discovery on initial testimony in the expedited hearing and an opportunity for all parties to submit rebuttal testimony. Xcel states that without discovery and the opportunity for rebuttal, the record developed at hearing will likely be inadequate for reasoned Commission decisions. WPS Resources states that the Commission has allowed only 18 working days, approximately 20 minutes per GFA, to resolve unsettled GFA issues in hearing.

58. Midwest Parties assert that the Commission's limited factual inquiry and invitation to submit comments do not satisfy due process requirements. Midwest Parties state that due process was violated because they were not provided the opportunity during the hearings addressing the six factual issues to challenge the Midwest ISO's submittal regarding the GFA threat to reliability. Midwest Parties also argue that the three questions that the Commission posed for comment were argumentative rather than objective and stacked the deck against the GFA parties. Midwest Parties state that the first question regarding the GFA threat to reliability is legally immaterial. Midwest Parties object to the phrasing of the remaining two questions posed by the Commission. Midwest Parties conclude that allowing 30 days for comment on the issues of reliability, costs and discriminatory impacts is not a sufficient basis upon which the Commission can ignore legal rights. They assert that first a *prima facie* case must be made by the party challenging the GFAs, then a sufficient time and opportunity for cross examination must be provided to the parties whose rights under the GFAs are threatened.

59. Detroit Edison and Rural Electric Cooperatives argue that the Commission failed to engage in reasoned decision-making when it ordered GFA parties to engage in expedited negotiations and potential hearing proceedings, even as the Commission declined to rule on fundamental issues related to the Midwest ISO's proposed treatment of those same GFAs. Midwest Parties and WPS Resources state that it is unreasonable for the Commission to require GFA parties to make substantive determinations, such as

⁸⁴ Rural Electric Cooperatives Procedural Rehearing Request at 21 (*citing Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)).

which GFA party will serve what role, prior to knowing what the market rules actually are and the consequences that will befall them as a result of such decisions. They assert that additional information from the Midwest ISO and an order from the Commission are needed before parties can evaluate their positions on GFA issues.

60. Midwest TDUs state that the Commission has instituted a process that is likely to eliminate GFA rights without adequate due process examination of each GFA to determine whether the legal and factual grounds for eliminating those rights are present. They assert that the Procedural Order applies improper pressure to settle for less-than-full preservation of GFA rights. Midwest TDUs state that the Procedural Order's implicit closure of other factual inquiries, beyond the six specified, was in error. Midwest TDUs request that the Commission clarify that several concerns stated in the Procedural Order are not binding factual findings by the Commission.

2. Requests for Rehearing of GFA Order

61. Xcel argues that the Commission's decision to fast track hearing procedures and expedite orders in this docket in order to provide the Midwest ISO prompt GFA resolution is misguided given the variety and complexity of the issues. Moreover, Xcel argues that due process and public interest demand that parties be afforded a meaningful opportunity to evaluate, consider and respond to information regarding the hundreds of GFAs in the Midwest ISO markets. Xcel explains that the GFA Order required the GFA parties to notify the Midwest ISO of selection of Option A or C for scheduling and settlement and that the deadline for this notification requirement expires on October 22, 2004, before the parties obtain rehearing or clarification of the numerous issues in the GFA Order.⁸⁵ Therefore, Xcel asks that the Midwest ISO be obligated to provide parties an opportunity to revise their October 22, 2004 elections upon issuance of the Commission order on rehearing of the GFA Order.

62. LG&E argues that the Commission's departure from established time standards constitutes arbitrary and capricious decision-making and violates due process standards by limiting its ability to adequately prepare for hearing through meaningful discovery and trial preparation.

3. Commission Determination

63. The Commission issued the Procedural Order on May 26, 2004, giving GFA parties a month, or by June 25, 2004, to file their GFA information with the Commission.

⁸⁵ Xcel GFA Rehearing Request at 11 (*citing* GFA Order at P 139).

Those parties that could not agree on their GFA information were provided an opportunity to litigate their disputes before two presiding judges at the Commission. GFA parties were given an extra month, or by July 27, 2004, to settle their GFAs. The Commission reiterates that the contractual terms, such as source and sink and megawatts for GFA transactions, as well as standard of review for the contract, should have been readily known and available to the GFA parties. Additionally, since each GFA required scheduling over a transmission owner's system prior to the implementation of Midwest ISO's Energy Markets, the identification of the Scheduling Entity should also have been readily accessible information. While we recognize that identification of the Responsible Entity is the one data point that was not readily determined from the GFAs since it involved expectations about the integration of the GFA into the Midwest ISO's Energy Markets, we note the following: (1) GFA parties were on notice since well before the Midwest ISO's initial TEMT filing on July 23, 2003, that GFAs would need to be integrated in some fashion into the Midwest ISO Energy Markets and that responsibilities for the market costs was a major issue of this integration; (2) many GFA parties were able to reach agreement on the determination of the Responsible Entity in the 30 day timeframe; and (3) the proceedings before the presiding judges were available for parties to litigate this issue. Thus, two months was more than sufficient time for the GFA parties to submit this contract information, identifying their rights and obligations thereunder, to the Commission.

64. Further, in response to earlier due process concerns, in the GFA Order, the Commission stated that it had provided numerous procedural safeguards to streamline and simplify the process of discovering GFA information. Specifically, the Commission explained:

The Procedural Order specified that the hearing should be narrowly focused in order to facilitate discovery of well-defined GFA information that the Commission needed to complete the record for the instant order. The Procedural Order allowed parties to avoid the Step 2 hearing entirely by agreeing to their GFA information and filing it, jointly, with the Commission before the hearing began. It also allowed parties to agree on their GFA information during – or even after – the hearing, to withdraw from the proceeding and to

submit their own resolution of any disputes regarding GFA information. These safeguards allowed the parties a continued

opportunity to determine the information in a cooperative, rather than an adversarial, setting.⁸⁶

65. Based on the amount and quality of detailed GFA information that the Commission obtained from the GFA parties through the section 206 investigation and the additional evidence and comments provided in response to the Procedural Order, the record in this proceeding was sufficient to allow the Commission to make a reasoned decision on the appropriate treatment of GFAs in the Midwest ISO Energy Markets.

66. In response to the Midwest Parties' concerns that due process was violated because parties were not provided an opportunity during the hearings on the six data points to challenge the Midwest ISO's reliability submittal, filed on June 25, 2004, we note that the Procedural Order allowed parties 14 days, later extended to the normal 21 days, to comment on that submittal.⁸⁷ In making our decisions on the GFAs in the GFA Order, the Commission not only considered the Midwest ISO's reliability submittal and the comments in response to that submittal, but all of the information received as a result of the 206 investigation, including the hearing established in Step 2.

67. Similarly, in response to the Midwest Parties' and WPS Resources' concerns that additional information from the Midwest ISO and an order from the Commission are needed before parties can evaluate their positions on GFA issues, we note that the parties did not have to agree on the information or settle on the treatment of their GFAs under the TEMT. They also had the opportunity to present their positions on the GFA information and the appropriate treatment of their GFAs under the TEMT in the hearing established in Step 2, the paper hearing, and their initial pleadings in response to the March 31 Filing. Finally, with respect to Midwest TDU's assertion that the Procedural Order applied improper pressure to settle for less-than-full preservation of GFA rights, we note that Commission merely encouraged settlement and by no means forced parties to settle. Further, as stated above, parties had the opportunity to present their positions on the GFA information and the appropriate treatment of their GFAs under the TEMT in the hearing established in Step 2. For these reasons, the Commission denies rehearing on this issue.

D. Appropriate Standard of Review – Carve-Out of GFAs Where the Parties Explicitly Provided that the *Mobile-Sierra* Public Interest

⁸⁶ GFA Order at P 176 (footnotes omitted).

⁸⁷ Procedural Order at P 73. By notice issued June 18, 2004, the Commission allowed initial comments to be filed on July 16, 2004.

Standard of Review Applies, Silent GFAs, and Non-Jurisdictional GFAs

68. In the GFA Order, the Commission required the Midwest ISO to carve out of the Energy Markets 77 GFAs, comprising 6,914.4 megawatts, where the parties explicitly provided that they were subject to a *Mobile-Sierra* public interest standard of review. 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.⁸⁸

The Commission clarified that a carve-out for this category of contracts was possible because of the small number of megawatts involved and that a larger carve-out, in contrast, would require us to reevaluate this treatment.

69. Similarly, the Commission required the Midwest ISO to carve out 20 “silent”⁸⁹ contracts until the transition period ends in 2008 “because the record before us suggests that the Energy Markets, which are scheduled to start up on March 1, 2005, can be operated reliably, with net benefits to the public, notwithstanding the carve-out of these 20 GFAs.”⁹⁰

70. The Commission also required the Midwest ISO to carve out of the Energy Markets the 30 GFAs, representing 2,198 megawatts, for which the transmission provider

⁸⁸ *Id.* at P 141.

⁸⁹ Sixteen of the GFAs (totaling 1,240 MW), represented GFAs for which the parties did not agree on what standard of review applied and that the presiding judges’ found were silent on the standard of review. The Commission found that the four contracts (totaling 32.4 MW) that Xcel disputed would be included in the carve-out whether they were silent as to standard of review, as Xcel alleged, or whether they were subject to the *Mobile-Sierra* public interest standard, as the presiding judges found. Therefore, for the same “net benefit to the public” reasons, the Commission did not need to make a finding as to the standard of review for these contracts. GFA Order at P 149.

⁹⁰ *Id.*

is not a public utility as defined in section 201 of the FPA.⁹¹ The Commission acknowledged that it has no authority to make any modifications to these contracts, but noted that “the Commission does have jurisdiction over the service that the Transmission Owners must take under the Midwest ISO Tariff to meet their obligations under their GFAs.”⁹²

1. Requests for Rehearing

71. Cinergy argues that the Commission erred in finding that GFAs with a *Mobile-Sierra* clause require a public interest finding because those GFAs do not need to be modified. Cinergy explains that, in accordance with Opinion Nos. 453 and 453-A,⁹³ the Midwest ISO’s transmission owners have turned over operation of all of their transmission facilities to the Midwest ISO, including the transmission facilities needed to serve the GFA load, and take transmission service to meet their GFA obligations pursuant to service agreements under the Midwest ISO Tariff. Thus, the transmission owners take service from the Midwest ISO and provide service under the GFAs in a back-to-back fashion.⁹⁴ Cinergy explains that the Midwest ISO’s Options A, B, and C treatment for GFAs pertain to service provided by the Midwest ISO under the TEMT, and therefore affect the service taken by transmission owners, not the back-to-back service that the transmission owners provide to the GFA counterparties. Thus, at issue in this proceeding, Cinergy argues, is only the service provided by the Midwest ISO to the transmission owners (because this proceeding concerns the Midwest ISO Tariff), not the service provided by the transmission owners to their GFA counterparties. It notes that the TEMT will not modify the terms of any GFA, but rather is addressed to the terms and

conditions of the transmission service taken by the transmission owners in support of

⁹¹ *Id.* at P 150.

⁹² *Id.*

⁹³ *Midwest Independent Transmission System Operator, Inc.*, Opinion No. 453, 97 FERC ¶ 61,033 at 61,170-71 (2001), *order on reh'g*, Opinion No. 453-A, 98 FERC ¶ 61,141 (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 v. FERC*, 373 F.3d 1361 (D.C. Cir. 2004). *See also* Midwest ISO Tariff at section 37.1.

⁹⁴ Cinergy GFA Rehearing Request at 27.

such service. Therefore, Cinergy argues that because there is no modification to the GFAs, the public interest standard is not applicable and the Commission's classification of contracts based on the inclusion of a *Mobile-Sierra* clause was unnecessary.

72. Cinergy also argues that the Commission erred in finding the jurisdictional status of the GFA transmission provider relevant in addressing the GFAs. It states that, contrary to the Commission's statement that it has no authority to make any modifications to these contracts, the GFA service does not need to be modified. It states that any transmission owner – jurisdictional or not – that is a signatory of the Midwest ISO Agreement has turned over operation of its transmission system to the Midwest ISO. Further, each transmission owner – jurisdictional or not – takes service from the Midwest ISO and provides service under the GFAs on a back-to-back basis.⁹⁵ Thus, it states that the jurisdictional status of the GFA is irrelevant. Cinergy argues that what is at issue here is the service provided to the transmission owners under the TEMT, not the status of the service under the GFA. Further, it asserts that the Midwest ISO's proposal to require transmission owners to take Option A or C as part of their service in support of their GFA obligations is just, reasonable, and not unduly discriminatory. However, Cinergy states that if modification is relevant with respect to non-jurisdictional GFAs, the Commission should require them to elect Option A or C, or voluntarily convert their GFAs to TEMT service, as a condition of their use of transmission under the Midwest ISO's control associated with the service they take under the TEMT.⁹⁶

73. Thus, Cinergy argues, the question is not whether the Midwest ISO's proposal is in the public interest, but whether it is just, reasonable, and not unduly discriminatory for the transmission owners. It explains that the Midwest ISO proposes to provide the same service found to be just and reasonable with respect to the GFAs under the Commission's "just and reasonable" category, at the same rate, to the transmission owners in support of their obligations under the *Mobile-Sierra* GFAs.⁹⁷ As a result, Cinergy argues that "same service plus same rate should equal same just and reasonable result."⁹⁸ Thus, Cinergy asserts that the Commission should have applied the same just and reasonable standard to all service to transmission owners in support of their GFA obligations, and reached the

⁹⁵ *Id.* at 39.

⁹⁶ *Id.* at 39-40 (citing *San Diego Gas & Electric Company*, 95 FERC ¶ 61,115 at 61,355 (2001)).

⁹⁷ Cinergy GFA Rehearing Request at 30.

⁹⁸ *Id.*

same conclusion reached for the just and reasonable GFAs (*i.e.*, that the Midwest ISO's proposal is just and reasonable and that the *Mobile-Sierra* GFAs should be included in the Energy Markets).

74. However, Cinergy argues that even if the *Mobile-Sierra* standard were the appropriate standard of review, the record supports a determination that such modification is in the public interest if the Day 2 markets go forward. Further, Cinergy states that the evidence in this case shows that failure to include GFAs in the market to the limited extent necessary under Options A or C results in undue discrimination against nonparties, and will undermine gains in reliability and efficiency for the Midwest ISO market.⁹⁹ Cinergy asserts that the carve-out of GFAs goes beyond protecting the existing contract rights that *Mobile-Sierra* intended, and will provide parties to these GFAs with greater rights in superior transmission service than they currently receive.

75. Further, Cinergy argues that the GFA Order's authorization of Option B and carve-out for certain GFAs creates an unduly discriminatory rate structure and that the Commission's finding that such rate structure is justified based on the net benefits of a Midwest ISO market that is subject to the carved out and Option B GFAs is factually and legally in error. Cinergy argues that, even if the cost-benefit analysis were factually supported, the Commission cannot lawfully permit one group of customers to benefit from the Midwest ISO market without also requiring them to pay the costs of achieving those benefits. Nor can the Commission conversely require one group of utilities and their customers to shoulder the costs required to obtain the benefits for all market participants because that constitutes undue prejudice. Cinergy asserts that the net benefit rationale fails because benefits would increase even more absent the unduly discriminatory carve-out and Option B treatments and requiring the carved out and Option B GFAs to participate in the market would increase the market's reliability and efficiency, which is in the public interest. Further, Cinergy argues that the carve-out and Option B treatment are contrary to the Commission's RTO policy, which was intended to optimize efficiency and reliability and cure undue discrimination.

76. Moreover, Cinergy asserts that the Commission's net benefit analysis is flawed because: (1) the record evidence submitted in this proceeding does not establish a lower bound beneath which the impacts of the carve-out and Option B treatment become acceptable; (2) the analysis considers the impact of the carve-out and the impact of Option B separately, but fails to consider the impact of the two together; and (3) the analysis fails to consider that the magnitude of the load under the carved out and Option

⁹⁹ *Id.* at 37.

B GFAs is not evenly dispersed over the region and will have greater impacts in certain areas than is reflected in the aggregate analysis. Cinergy argues that these flaws in the Commission's analysis were preordained by the procedural posture of this case, because the Commission first invited comments on the impact of the carve-out and then invited comments on the magnitude of the carve-out.

77. PSEG argues that the Commission failed to fully examine the impact of carving out 9.6 percent of total energy load from the Midwest ISO Energy Markets. PSEG states that the Commission's summary review of the GFAs fails to adequately apply the *Mobile-Sierra* standard of review so as to justify the treatment of any of the GFAs and states that such an analysis might appropriately result in modification of the GFAs. It asserts that in order to identify whether any GFA should be modified, the Commission should have carefully scrutinized each GFA, on a case-by-case basis, to determine whether the public interest standard dictates abrogating any of those contracts.¹⁰⁰ PSEG argues that the Commission's simple decision that the *Mobile-Sierra* rule applies to a GFA does not satisfy the public interest standard of review required under *Mobile-Sierra*. PSEG also points out that the Commission has provided no analysis regarding the cost of carved-out status, possible benefits, the reliability impacts depending upon where a particular carved-out GFA is located, or how the markets will operate with carve-outs.

78. Further, PSEG argues that the *Mobile-Sierra* public interest standard of review should not be applied to those GFAs that are silent with respect to the standard of review. It states that there is no basis in case law or Commission policy to permit the heightened deference under a *Mobile-Sierra* standard of review to those GFAs that do not contain explicit language providing the parties with unilateral filing rights. PSEG asserts that the appropriate standard to apply to those GFAs that are silent as to the standard of review is the just and reasonable standard, as opposed to applying an automatic carve-out.

79. Xcel argues that the Commission erred by failing to acknowledge that the public interest standard of review can be limited to the filing of changes to specific rate schedule attachments to each GFA, when no such limitation is included in the underlying GFA agreement. Xcel asserts that the Commission's failure to reflect this limited applicability of the public interest standard to only specific aspects of the GFAs could preclude Northern States Power Company (NSP) from filing to recover the new Midwest ISO TEMT costs from these GFA customers. As a result, Xcel asks the Commission on

¹⁰⁰ PSEG GFA Rehearing Request at 5.

rehearing to modify Appendix B to indicate the full range of settlements on the standard of review, acknowledging the distinction between a limitation on modification to a rate schedule attachment, and an express limitation on any modifications to the GFA in the underlying agreement, for each of NSP's GFAs.

80. First Energy argues that the Commission had a sufficient evidentiary basis to make the necessary public interest finding under *Mobile-Sierra* to modify all of the GFAs to ensure a reliable, dependable wholesale energy market.

2. Commission Determination

81. We disagree with Cinergy that the Commission is treating the *Mobile-Sierra* standard of review, silent, and non-jurisdictional GFAs inappropriately. Cinergy is correct that, in accordance with Opinion Nos. 453 and 453-A, transmission owners and ITC participants take transmission service under the Midwest ISO Tariff to meet their obligations under the GFAs. While in the Formation Order the Commission initially accepted provisions in the Midwest ISO Agreement and Midwest ISO Tariff that provided that transactions under GFAs would not be placed under the Midwest ISO Tariff for the initial six-year transition period,¹⁰¹ in Opinion Nos. 453 and 453-A the Commission ultimately required that the Midwest ISO Agreement and the Midwest ISO Tariff be revised to require that transmission owners take transmission service under the Midwest ISO Tariff in order that the Midwest ISO satisfy Order No. 2000's requirement that it be the sole provider of transmission service over facilities under its control.¹⁰² However, because the existing agreements already provide for recovery of the costs of serving GFA customers, the transmission owners would be exempt from the rates under the Midwest ISO Tariff, including the energy loss provisions of Attachment M, for service provided pursuant to the existing agreements -- except for Schedule 10, the ISO Cost Adder, which reimburses the Midwest ISO for services it performs to administer GFA transmission service.¹⁰³ Thus, while the transmission owners take transmission service under the Midwest ISO Tariff for their GFA obligations in order to ensure that the Midwest ISO is the sole provider of transmission service over its system, the Commission has not subjected the service fully to the tariff rates. Rather, in order to balance Order No. 2000's requirements against its desire to preserve the bargain that many of the transmission owners relied upon in creating the Midwest ISO, the

¹⁰¹ Formation Order at 62,169-70.

¹⁰² See Opinion No. 453 at 61,169-70; *accord* 18 C.F.R. § 35.34(k)(1)(i) (2000).

¹⁰³ See Opinion No. 453-A at 61,413-14.

Commission has put the GFA service under the Midwest ISO Tariff only to the extent necessary to meet Order No. 2000's requirement that the Midwest ISO be the sole provider of transmission service.

82. In this proceeding, the Commission faced a similar situation to the one it faced in Opinion Nos. 453 and 453-A. There will be new rules for scheduling and settlement for transmission service with the advent of the Midwest ISO's Energy Markets, which are necessary for an efficient Day 2 congestion management system.¹⁰⁴ In the Midwest ISO's March 31 Filing, it stated that its preliminary estimates indicated that approximately 300 GFAs, representing 40,000 megawatts of transmission service (or 40 percent of total Midwest ISO load) would need to be modified in order to integrate them into its Energy Markets, or else the viability of the Energy Markets would be threatened. Thus, the Commission was confronted with the need to balance: (1) the high priority that we have established for initiation of the Midwest ISO's Energy Markets; and (2) our desire both to respect existing contractual relationships between parties in the course of regional market restructuring and to preserve the bargain that many of the transmission owners and their customers relied upon in creating the Midwest ISO.

83. In order to enable the Commission to address this critical threshold issue of how to treat the GFAs in the Energy Markets, the Commission initiated an investigation pursuant to section 206 of the FPA in order to allow the Commission to assess the impacts that the GFAs would have on the Energy Markets if the transactions under the GFAs were not integrated with the Energy Markets, but were instead carved out of the markets, and to decide, based on those potential impacts, how the GFAs would be incorporated in the Energy Markets without threatening the reliability and efficiency of those markets.

84. In evaluating the outcome of the three-step fact finding investigation, the Commission carefully reviewed each of the individual GFA filings and considered all of the evidence together as a whole. The Commission recognized that approximately 25,000 megawatts of transmission service (23 percent of total Midwest ISO load) is provided under 229 GFAs that would remain in effect when the Midwest ISO commences operation of its Energy Markets.

85. The Commission first quantified the results for those GFAs where the parties' voluntarily elected one of the Midwest ISO's three proposed options for scheduling and financially settling GFA transactions or voluntarily converted their service to the TEMT.

¹⁰⁴ 18 C.F.R. § 35.34(k)(2) (2000).

From these settlements, the Commission found that 52 GFAs, representing approximately 9,700 megawatts (9 percent of total Midwest ISO load) would participate in the Midwest ISO's Energy Markets.

86. Next, the Commission reviewed the remaining GFA filings, which included GFAs representing 15,378 megawatts, or 14.3 percent of the Midwest ISO's peak load, to determine the appropriate treatment of these GFAs in the Energy Markets. The Commission categorized these GFAs according to which standard of review applied to modifications to the GFAs. The Commission found that 50 GFAs (5,000 megawatts, or 4.5 percent of total Midwest ISO load) clearly reflected that the parties had agreed that their contracts were subject to the just and reasonable standard of review. The Commission also found that 77 GFAs, representing 6,914.4 megawatts, clearly reflected that the parties explicitly provided that the *Mobile-Sierra* public interest standard of review applies to modifications to the contracts. The Commission found that the remaining GFAs included: (1) 20 GFAs, representing 1,272.9 megawatts, for which the parties did not agree on what standard of review applies, and that the presiding judges' found are silent on the standard of review; and (2) 30 GFAs, representing 2,198 megawatts, for which the transmission provider is not a public utility as defined in section 201 of the FPA.

87. The Commission viewed these categories of GFAs together as a whole, along with the 52 settled GFAs that would participate in the Energy Markets. In doing so, the Commission's goal was to ensure that the GFAs are accommodated in the Midwest ISO's Energy Markets in a way that will not harm reliability or otherwise prevent the realization of net benefits from the market, yet preserves the commercial bargain between the parties. The Commission recognized that, while the TEMT does not rewrite the GFAs, it would impose significant changes in the manner in which transmission service is provided for transactions under the GFAs that could result in cost shifts between the parties to the individual GFAs and thus affect the bargain between the parties to the individual GFAs.

88. The Commission next recognized that, for the "just and reasonable" category of GFAs, the Commission and the parties are able to modify these contracts based on the just and reasonable standard of review. By explicitly reserving their rights to seek modifications to their contracts, these parties specifically negotiated and contemplated that their contracts could be modified during the term of the contract based on the just and reasonable standard of review. To the extent that costs are shifted between parties to GFAs in this category, the terms and conditions of the GFAs would allow the parties to propose appropriate modifications to reflect such new costs. Since these contracts specifically contemplated modifications to reflect a realignment in costs and benefits among the parties to the GFAs, the Commission found that:

in order to balance the Midwest ISO TOs' concerns that the Midwest ISO's proposed treatment of GFAs will lead to trapped costs with the Midwest ISO's concern that leaving GFAs intact will negatively impact reliability, the Commission finds that it is unjust and unreasonable to allow GFAs that are subject to a just and reasonable standard of review to remain outside the Midwest ISO Energy Markets.¹⁰⁵

89. With 102 GFAs that either settled or are subject to the just and reasonable standard of review, representing 14,700 megawatts, participating in the Energy Markets, the Commission then considered the number and size of the remaining 127 GFAs (representing 10,385.2 megawatts).¹⁰⁶ The Commission concluded that the Midwest ISO's Energy Markets could be operated reliably and with net benefits to the public even with a carve-out of these remaining 127 GFAs.

90. The Commission understood that, for the 77 GFAs where the parties explicitly provided that they are subject to the *Mobile-Sierra* public interest standard of review, these parties specifically contemplated and negotiated that their contracts would require the higher public interest showing before their contracts could be modified. Thus, in an effort to respect the parties stated wishes to not have these contracts modified absent a public interest showing, the Commission reviewed these GFAs separately. In the GFA Order, the Commission determined that, since the Midwest ISO could operate its Energy Markets reliably and with net benefits to the public without requiring the conversion of these GFAs, the Commission, at that time, could not make the public interest finding that these 77 GFAs should be modified.¹⁰⁷

91. The Commission's next concern was the 20 GFAs, representing 1,272.9 megawatts, which did not include either a just and reasonable or *Mobile-Sierra* public interest standard of review clause and, therefore, were found to be silent as to the parties' desired standard of review. Since the megawatts associated with this group were relatively insignificant in the Midwest ISO's operation of the Day 2 Energy Markets, the Commission determined that it was not necessary to make a determination as to which standard of review would apply to these contracts in order to decide the appropriate treatment for the GFAs under the TEMT. Consequently, neither the just and reasonable standard nor the *Mobile-Sierra* public interest standard of review was applied to these

¹⁰⁵ GFA Order at P 137.

¹⁰⁶ *Id.* at P 141.

¹⁰⁷ *Id.* at P 142-43.

contracts; it was not necessary to do so. Rather, these 20 GFAs were included in the carved-out group. The Midwest ISO could operate the Energy Markets reliably and with net benefits without requiring the conversion of these 20 GFAs.

92. Finally, the Commission acknowledged that it has no authority to make any modifications to the 30 GFAs, representing 2,198 megawatts, for which the transmission provider is not a public utility as defined in section 201 of the FPA. Accordingly, the Commission also required the Midwest ISO to carve these 30 GFAs out of the Energy Markets.¹⁰⁸

93. In sum, having found that the Midwest ISO could operate its Energy Markets reliably and with net benefits to the public with the integration into the Energy Markets of just the settling GFAs and the just and reasonable standard of review GFAs, the Commission did not need to pursue the conversion of the GFAs in the *Mobile-Sierra* public interest, silent, and non-jurisdictional categories.

94. In determining the appropriate treatment of GFAs that did not settle, the Commission reasonably considered whether the treatment of the GFAs would disrupt the existing contractual relationships between the parties to the GFAs and the transition period arrangements for the GFAs that many of the transmission owners relied upon in creating the Midwest ISO. In this latter regard, in their comments on the Midwest ISO's proposed treatment of GFAs, the Midwest ISO TOs stated that, by subjecting the GFAs to the Energy Markets during the transition period, the Midwest ISO's proposal is contrary to the Midwest ISO Agreement approved by the Commission in the Formation Order, upon which individual transmission owners relied in deciding to join the Midwest ISO.¹⁰⁹ We took, and we take, seriously the importance of these concerns. To this end, those GFAs which, at this juncture, the Commission could not find grounds to modify,¹¹⁰ were to be carved out of the markets (*i.e.*, the Midwest ISO was required to continue to

¹⁰⁸ *Id.* at P 150.

¹⁰⁹ See Comments of the Midwest ISO TOs on Step 1 Issues, Docket Nos. ER04-691-000 and EL04-104-000 at 5-8 (June 25, 2004).

¹¹⁰ While the Commission, in the GFA Order, also could have modified the GFAs found to be subject to the just and reasonable standard of review to reflect the realignment in costs and benefits among the parties to the GFAs due to the TEMT, it chose not to do so in this proceeding because the GFA parties themselves retained the right under the FPA to seek changes to their contracts based on changes expected or actual costs due to the TEMT.

provide physical transmission service for such transactions in the same manner in which service was provided to all customers before the commencement of the Energy Markets.)¹¹¹

95. We believe that we struck a reasonable balance between ensuring that the GFAs do not threaten the reliability and efficiency of the Midwest ISO's Energy Markets while ensuring that the initiation of the Energy Markets does not unnecessarily result in trapped costs for the transmission owners inconsistent with the transition period arrangement that we accepted in the original Midwest ISO Agreement. While Cinergy is correct that additional market efficiencies could have been achieved by subjecting all GFAs to Options A or C, those benefits would have come at the expense of other important objectives, as we have discussed here. What we have done reflects our balancing of these competing concerns.

96. We disagree with Cinergy and PSEG that the record in this proceeding is inadequate to support our finding that the Midwest ISO's Energy Markets will operate reliably and efficiently with the carve-out and Option B treatments approved in the GFA Order. As an initial matter, we wish to make clear that, while we discussed the impact of the carve-out and Option B treatments separately in the GFA Order, our assessment of the overall benefits of the Energy Markets considered both the carve-out and Option B treatments together.

97. The Commission also considered the increased scope of the redispatch capability that will be available in the Midwest ISO's centralized dispatch, the measures that the Midwest ISO will take on a day-ahead and real-time basis to anticipate and respond to security constraints and reliability requirements, and the incentives that LMP markets provide market participants to manage their sales, purchases and transmission use more efficiently in a way that supports reliability.¹¹² The Commission also considered the measures it adopted in the GFA Order to provide the Midwest ISO with better estimates of schedules for carved-out GFAs. The Commission found that, with these measures, the Midwest ISO's Energy Markets should operate reliably and efficiently. As an added

¹¹¹ While the transmission owners will be able to continue to take physical transmission service under the Midwest ISO Tariff to meet their transmission service obligations under these GFAs, the Commission found in the GFA Order that transactions under such GFAs should be assessed Schedule 17 charges because even transactions pursuant to this physical transmission service will benefit from reliability and efficiency improvements emanating from the Midwest ISO's Energy Markets.

¹¹² GFA Order at P 92-94.

measure to ensure that it addressed potential reliability impacts, the Commission directed the Midwest ISO to report any reliability problems it anticipated with the carve-out within 30 days of date of the GFA Order.¹¹³ As discussed below, the Midwest ISO reported that, as long as the GFA parties provide timely and accurate information necessary for the Midwest ISO to implement the carve-out, the Energy Markets should operate reliably. The Midwest ISO has also put forth in its filings in compliance with the GFA Order its plans to ensure that it has the information necessary to effectively manage the carve out. Based on the Midwest ISO's response to the requirements of the GFA Order, we find that the Midwest ISO is taking the measures necessary to reliably operate with the carve-out.

98. The Commission recognized in the GFA Order that certain geographic areas will be more heavily impacted by a larger proportion of transactions under carved-out and Option B GFAs. A larger proportion of carved-out GFAs may require greater reliance on TLRs after the start of the Energy Markets than compared to other geographic areas.¹¹⁴ However, the Commission believes that, with the scheduling information for carved-out GFAs required by the GFA Order, the increased dispatch options that will be available to the Midwest ISO compared to before market start, and the measures that the Midwest ISO indicates in its compliance filings that it is taking to reliably operate with the carve out, the Energy Markets will operate more reliably even in geographic areas with more carved-out and Option B GFAs.

99. With respect to the economic impacts of the carve-out, we also recognize that a larger proportion of carved-out and Option B GFAs in a particular geographic area might in theory result in a disproportionate impact on non-GFA transactions in the area compared to the region as a whole. However, at this point, we find such concerns to be speculative. In the GFA Order, the Commission required that transactions under carved-out GFAs be scheduled in good faith on a day-ahead basis, which will help ensure efficient prices in the Energy Markets. The Commission also instituted reporting requirements to allow it to monitor scheduling behavior under carved-out and Option B GFAs to determine the impacts on market efficiency.¹¹⁵ Below, we address concerns about disproportionate impacts on certain parties in the FTR allocation process by directing the Midwest ISO to report any instances of pro rata FTR reductions that were significantly impacted by carved-out GFAs. Similarly, here, in order to allow us to

¹¹³ *Id.* at P 97.

¹¹⁴ *Id.* at P 96.

¹¹⁵ *Id.* at P 101, 144.

monitor whether any areas are significantly impacted by inefficient prices due to the scheduling of carved-out and Option B GFAs, we will direct the Midwest ISO to identify, in its quarterly informational filings on the accuracy of carve-out schedules, any instances where it finds inefficient market prices resulting from inaccurate schedules associated with carved-out and Option B GFAs.

100. Finally, Cinergy is correct that additional market efficiencies could have been achieved by subjecting all GFAs to Options A or C. However, as discussed above, there were and are competing concerns that the Commission must weigh against such additional efficiencies. With respect to Cinergy's argument that the carve-out is contrary to the Commission's RTO policy, we disagree. Order No. 2000 did not direct abrogation of existing transmission contracts. Rather, in Order No. 2000, the Commission recognized that existing contracts represent negotiated agreements and found that transition plans for contract reform should be addressed on an RTO-by-RTO basis,¹¹⁶ and, as discussed above, in the GFA Order, the Commission endeavored to respect the transition plan that it initially approved for the Midwest ISO.

101. Xcel requests that the Commission modify Appendix B to indicate the full range of settlements and findings on the standard of review because Appendix B fails to acknowledge the distinction between a limitation on modifications to a portion of a contract and a limitation on modifications to any element of the contract. We will deny Xcel's request, but provide clarification. In the GFA Order, we found that, if parties agreed that the contract is subject to a mixed standard of review, *i.e.*, some parts of the contract are subject to a just and reasonable standard and other parts subject to a *Mobile-Sierra* public interest standard, the contract would be considered subject to a *Mobile-Sierra* public interest standard of review *for purposes of classifying it for this proceeding*. Appendix B merely indicates the classification of individual GFAs for the purpose of GFA treatment, based on the findings regarding standard of review in the GFA Order. It does not supplant the full range of findings in the GFA Order.

E. Non-Jurisdictional GFAs – Other Issues

1. Request for Rehearing

102. Rural Electric Cooperatives argue that the Commission erred by failing to exclude facilities from the TEMT that have not been transferred to the Midwest ISO's control. Rural Electric Cooperatives are concerned that the Midwest ISO intends to impose charges for service under the TEMT on transmission facilities of non-Midwest ISO

¹¹⁶ Order No. 2000 at 31,205.

members despite the fact that it has no jurisdiction to do so. As a result, Rural Electric Cooperatives ask the Commission to state that the Midwest ISO cannot place transmission service over the facilities of non-members of the Midwest ISO under the TEMT.

2. Commission Determination

103. We note that Rural Electric Cooperatives do not reference or object to any language in the Midwest ISO's GFA proposal, any language in the GFA Order, or any specific GFA. Conspicuously, Rural Electric Cooperatives' request for rehearing of the GFA Order on this topic refers almost exclusively to TEMT provisions not related specifically to GFAs, to pleadings not filed as part of the GFA Order proceeding, and to language in the TEMT II Order.¹¹⁷ The only tie to the GFA Order in their discussion of this issue is to cite to language concerning GFAs with Transmission Owning members of the Midwest ISO that are not public utilities. In contrast, Rural Electric Cooperatives concern deals with non-Midwest ISO members and facilities not transferred to the Midwest ISO. Rural Electric Cooperatives state that the TEMT II Order recognized, but did not address, its concern on this issue. Therefore, as an issue that deals with the TEMT applicability to a set of transmission owners generally, and not to any GFA specific concerns, the proper avenue for them to pursue this issue would have been through a request for rehearing of the TEMT II Order, and not as a request for rehearing of the GFA Order.

F. Option A, B, and C Treatment

104. In the GFA Order, the Commission accepted the Midwest ISO's proposal for Option A treatment for GFAs as filed in section 38.8.3(a) of the TEMT and its proposal for Option C treatment for GFAs as filed in section 38.8.3(c) of the TEMT and found them both to be just and reasonable.¹¹⁸ Further, the Commission found Option B to be just and reasonable for those parties that voluntarily settled prior to July 28, 2004, in accordance with the Procedural Order, but that Option B would no longer be available for parties that did not settle by that date.¹¹⁹ The Commission stated that "Option B was an

¹¹⁷ See, e.g., *id.* at 34 (referring to the definition of "Transmission Provider Region" in the TEMT); *id.* at 35-36 (referring to the TEMT II Order and to pleadings filed as part of the TEMT II proceeding).

¹¹⁸ GFA Order at P 262-63.

¹¹⁹ Procedural Order at P 80; GFA Order at P 264.

incentive to settle and receive a hedge against congestion and marginal losses charges [and that it] would be unfair to allow this option to those that did not settle first and waited (and even litigated) the outcome of this proceeding.”¹²⁰

105. The Commission also held that GFA parties that settled prior to July 28, 2004, could pick among the three options on an annual basis as specified in section 38.2.5(j)¹²¹ and directed the Midwest ISO to revise section 38.2.5(j) to state that only parties that settled may request a change in treatment of such agreements annually from among the three options as described in section 38.8.3. Market participants that did not voluntarily settle were allowed to request a change of treatment annually between Options A and C, but not Option B. Non-settling GFA parties could choose between Options A and C, or convert their agreements to service under the TEMT prior to commencement of FTR nominations.¹²²

106. Finally, the Commission allowed the Option B treatment to continue until February 1, 2008 for parties that settled prior to July 28, 2004.¹²³ The Commission also accepted the provision that the Midwest ISO will evaluate the impact that the optional treatments for GFAs have on the Energy Markets, 24 months prior to February 1, 2008, and that it will make a section 205 filing 12 months prior to February 1, 2008 (*i.e.*, due on or before February 1, 2007), that details a new proposal for the treatment of GFAs after the transition period concludes.¹²⁴ At that time the Commission will evaluate any proposals to extend the availability of Option B beyond February 1, 2008.¹²⁵

¹²⁰ GFA Order at P 264.

¹²¹ *See* Module C, Original Sheet No. 400.

¹²² GFA Order at P 266.

¹²³ *Id.* at P 268.

¹²⁴ *See* Module C, section 38.8.4, Original Sheet No. 454.

¹²⁵ *Id.* The Commission further directed that the 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.

1. Requests for Rehearing

107. FirstEnergy asserts that it is unjust and unreasonable to preclude those parties that were unable to settle their GFAs from choosing Option B, which the Commission has determined is a just and reasonable mechanism for accommodating GFAs. FirstEnergy argues that this amounts to a punishment for those who did not settle, and that it is arbitrary and capricious for the Commission to initiate a proceeding and then punish those parties for utilizing their full due process rights.

108. Ameren, Associated, Cinergy, and EKPC request clarification, or in the alternative rehearing, that those parties who submitted joint filings prior to the July 28, 2004 deadline are not now precluded from selecting Option B. Ameren and Associated state that by submitting a joint filing prior to July 28, 2004, they each settled, although they did not select Option B at that time. They state that since they voluntarily settled all issues pertaining to GFAs prior to waiting for the outcome of the proceedings, they therefore should now be allowed to choose Option B. Ameren states that given the uncertainty surrounding the proposed TEMT, the GFAs and the Commission's decision, it was reasonable for it to wait before selecting between Options A, B, or C.

109. Ameren, Associated and EKPC also assert that the Commission failed to provide any notice that parties would be prohibited from choosing Option B at a later date and only stated after the fact in the GFA Order that Option B was an incentive to settle. EKPC argues that prior to the July 28, 2004 deadline, it stated that, if forced to make a selection, it would choose Option B. EKPC argues that it was unable to settle prior to the July 28, 2004 deadline due to LG&E's unwillingness to be designated as the Responsible Entity, which the GFA Order later found it should be. EKPC argues that it is now being punished for failing to settle through no fault of its own.

110. Ameren also argues that similarly situated parties should be treated the same, and that it is unjust and unfair to now foreclose Ameren from choosing Option B without just cause. It also argues that the Midwest ISO's Energy Markets will not be adversely affected by allowing the parties to now select Option B. Associated argues that the Procedural Order only required that the parties settle the 6 issues before July 28, 2004, but did not require that the parties select Option B by that date.

111. Ameren also explains that the Midwest ISO intends to complete FTR entitlement definitions by November 5, 2004, and it and other parties will need to know whether they can elect Option B before this date in order to meaningfully submit FTR nominations on

November 22, 2004.¹²⁶ Ameren argues that an expedited response from the Commission will also benefit the Midwest ISO because it will enable the Midwest ISO to know the extent to which it will have to allocate FTRs in connection with GFAs. Finally, Ameren asserts that the Commission has granted similar relief in connection with Midwest ISO-start-up issues in other proceedings.¹²⁷

112. Montana-Dakota asks the Commission to allow it to select Option B. It argues that the Commission's decision to make Option B available only to those parties that settled prior to July 28, 2004 is unduly discriminatory because there is nothing in the record to show that Option B is unjust and unreasonable after July 28, 2004.

113. Rural Electric Cooperatives also argue that the rejection of Option B for those parties that did not settle is arbitrary, capricious, inconsistent with prior Commission precedent and guidance, and unduly discriminatory. They argue that allowing parties that did not settle prior to July 28, 2004 to choose Option B will not cause harm to others and should be allowed.

114. Xcel argues that the Commission erred by restricting newly designated Responsible Entities' ability to choose the protection offered under Option B. It argues that the Commission's limitation on the "open season" for Option B is discriminatory to those parties that had legitimate disagreements and could not reach settlement prior to the conclusion of the Step 2 hearing. Moreover, Xcel argues that Option B must be available to the party determined to be the GFA Responsible Entity after the Commission reviewed the GFA in the Step 2 and 3 hearing process. As a result, Xcel asks that the Commission allow newly appointed GFA Responsible Entities to select Option B for GFAs resolved in the GFA Order or the order on rehearing.

115. Xcel requests clarification that where parties submitted settlement agreements, but the Commission carved out the GFA anyway, the parties may in the future elect Option B under the annual process set forth in the TEMT for these GFAs.

¹²⁶ Ameren GFA Rehearing Request at 14. As discussed more fully below, Ameren also states that it needs to know whether its GFA No. 406 is to be carved-out of the market.

¹²⁷ *Id.* (citing *Midwest Independent Transmission System Operator, Inc.*, 85 FERC ¶ 61,250, at 62,036 (1998); see also *Allegheny Power System Operating Cos.*, 106 FERC ¶ 61,016 at P 4 (2004); *Open Access Same-Time Information System and Standards of Conduct*, 88 FERC ¶ 61,305 at 61,940-41 (1999)).

116. Southern Indiana argues that it and Alcoa adopted Option B for GFA No. 343 based on the terms that the Midwest ISO had proposed for that option, which did not include liability for Schedule 16 and 17 charges, and based on the expectation that the Commission would not carve-out contracts that are silent as to the standard of review. It asserts that the GFA Order made Option B substantially less attractive, while making a carve-out available to contracts that are silent as to the standard of review. Southern Indiana states that the Commission should grant rehearing of the GFA Order and allow Southern Indiana and Alcoa, as well as other parties to contracts that either explicitly incorporate the public interest standard of review or that are silent as to the standard of review, to choose the “carve-out” option instead of Options A, B or C.

117. To the extent that the Commission is requiring Southern Indiana and Alcoa to retain Option B for GFA No. 343, Southern Indiana states that the Commission is imposing a modification of GFA No. 343 on it and Alcoa without having made a finding that the modification is required by the public interest. Doing so, Southern Indiana states, is contrary to the law. Moreover, it argues that since the Commission cannot force Southern Indiana and Alcoa to adopt Option B absent a finding that modification of their contract is required by the public interest, the Commission should hold that Southern Indiana and Alcoa should be permitted to make a new choice as to whether to adopt one of the three settlement options or to have their contract carved out of the TEMT, now that the Commission has fully explained the options that are available.

118. Midwest TDUs state that because future iterations of Attachment P may add new GFAs, the Commission should clarify that the GFAs added to Attachment P after the GFA hearing remain eligible for Options A, B and C. They state that GFAs that meet the substantive criteria for inclusion on Attachment P, but which were not listed in the version whose entries were addressed at hearing should remain eligible for any GFA treatment that they could have obtained had they been listed on Attachment P during the hearing.¹²⁸ In particular, Midwest TDUs argue that such GFAs should remain eligible for carve-out if they meet the substantive criteria for carve-out established in the GFA Order, and should remain eligible to settle on Option B if they do not meet those criteria. Further, they state that it is unreasonable to make eligibility for a GFA related treatment based on whether or not an agreement was listed in a superseded version of Attachment P.

¹²⁸ Midwest TDUs GFA Rehearing Request at 10.

119. Midwest TDUs ask that the Commission clarify that the February 1, 2007 Midwest ISO filing, directed by the Commission in the GFA Order,¹²⁹ be required to include a proposal for the post-transition-period status and treatment of carved-out GFAs, but that the GFA Order did not rule on what status and treatment carved-out GFAs should receive. More specifically, Midwest TDUs ask that the Commission clarify that it has made no determination that precludes the continuance of the carve-out beyond 2008, and that parties currently carved out are not precluded from choosing Option B when their carve-out ends.

120. Michigan Agencies ask the Commission to clarify that parties that have been carved out will continue to have the option of selecting among the TEMT Options for GFA treatment, including Option B. Should the Commission decline to clarify, Michigan Agencies submit that the Commission erred in determining that parties with carved-out GFAs may not select among the TEMT options for GFA treatment. Moreover, Michigan Agencies state that a Commission decision to eliminate Option B for GFA parties that did not “settle” as of July 28, 2004 is arbitrary and discriminatory.

121. Alliant requests that all options continue to remain available for carved out agreements, including carve-out, Options A, B, C, or conversion to TEMT service. Alliant states that the parties to carved-out GFAs should have appropriate alternatives to the carve-out if the parties find the Midwest ISO’s rules for implementing the carve-out are not suitable.

122. WPS Resources requests clarification that it has the right to select Option A treatment for those of its GFAs (GFA Nos. 101-107, 111 and 112) that the Commission identified in the Appendix B as carved-out. Specifically, it asks the Commission to provide the requested clarification expeditiously because the Midwest ISO has adopted October 1, 2004, as the deadline date for providing Option A contract information, which it will then use in the allocation of FTRs to GFAs.¹³⁰ WPS Resources states that, unless it promptly informs the Midwest ISO of its selection of Option A status, it faces the risk that it will not be allowed to receive FTRs in connection with the affected transactions, which could result in severe financial harm to WPS Resources or render it impossible for it to serve the affected loads on a reliable basis. Further, WPS Resources argues that the Commission should clarify that, after initially selecting Option A status, it should be allowed a one-time right to switch back its *Mobile-Sierra* contracts to carved-out status once the Midwest ISO promulgates its procedures and rules pertaining to the treatment of

¹²⁹ GFA Order at P 268.

¹³⁰ WPS Resources GFA Rehearing Request at 2-3.

carved-out contracts.¹³¹ It asserts that, given the lack of information about how Midwest ISO will implement the carve-out, requiring WPS Resources to make a definitive choice between carve-out and Option A status at this time would be unfair, arbitrary and unreasonable. In the alternative, WPS Resources requests rehearing of the GFA Order.

2. Commission Determination

123. In the Procedural Order, all GFA holders were given the same opportunity to settle on the Midwest ISO's proposed Options A, B, or C treatment, or conversion to the TEMT. As stated in the Procedural Order, and reiterated in the GFA Order, the Commission "strongly encourage[d] GFA settlements" and stated that it would be receptive to GFA parties settling on one of the Midwest ISO's proposed options, including Option B, for treatment of GFA transactions, or to convert their contracts to TEMT service, prior to the conclusion of Step 2 of the three step analysis, or by July 28, 2004.¹³² In the Procedural Order, the Commission provided this settlement opportunity, including the opportunity to settle on Option B, "to avoid the expensive and time-consuming hearing process that would otherwise be necessary."¹³³ The Commission stated that the Midwest ISO's proposed Options A, B, and C provided "a fair basis for GFA holders to settle."¹³⁴

124. Some parties state that they agreed on all six GFA informational points and submitted joint filings, but that the Commission failed to recognize their filings as "settlements." A parties' joint filing submittal agreeing to all six GFA informational points by June 25, 2004 (and thus not set for the hearing in Step 2),¹³⁵ was not the same as the parties also making "a simple statement in their joint filings to indicate [that they were] willing to voluntarily convert their contract to TEMT service or settle their GFA by

¹³¹ *Id.* at 3.

¹³² Procedural Order at P 80, 82; GFA Order at P 274. The parties were directed to notify the Commission of their selection no later than July 27, 2004, because Step 2 concluded with the presiding judges' announcement of their findings on July 28, 2004.

¹³³ Procedural Order at P 80.

¹³⁴ *Id.* at P 81.

¹³⁵ *Id.* at P 68.

accepting the Midwest ISO's proposed treatment of GFAs."¹³⁶ The parties that submitted joint filings agreeing to the answers to all six questions in Step 1 (by June 25, 2004) were not included in the hearing ordered in Step 2; that did not mean that they had settled on, as relevant here, Option B. Parties that submitted joint filings agreeing to the answers to all six questions, without settling on one of the Midwest ISO's proposed treatment options still had until the conclusion of Step 2, or July 28, 2004, to settle on one of those options. In sum, in order to qualify as a settling party entitled to, as relevant here, Option B treatment, the GFA holders must have submitted a joint filing agreeing to the answers to all six questions *and* indicated which GFA treatment option they chose, as relevant here, Option B.¹³⁷ Those parties that submitted joint filings, agreeing on the six issues, but who did *not* specify a GFA option in that filing, do not qualify as settling parties entitled to Option B treatment.

125. Further, in order for an option to be an effective incentive to encourage parties to settle by a specific date, that option must not be available after the settlement deadline has passed. The fact that some GFA holders decided to wait before selecting an option is not a reasonable basis to allow them now, in hindsight, to choose Option B. To allow those parties to now choose Option B would provide the non-settling GFA parties an unfair advantage over those parties that settled on an option by the prescribed deadline. Furthermore, in the Procedural Order, the parties were explicitly forewarned that the Commission would not revisit the approved settlements when it addressed non-settling GFA issues.¹³⁸ Conversely, it would be discriminatory to allow those non-settling parties to now select Option B. The parties were given notice that the proposed options were provided as an incentive to settle on a GFA treatment, and consequently, the parties that intentionally passed up the opportunity to settle did so at the risk that not all of the options would be available at a later date. Therefore, as we stated in the GFA Order, Option B is just and reasonable for those GFA holders who took advantage of the Commission's incentive and settled on Option B prior to July 28, 2004, but is not just and reasonable for those parties that did not but instead waited until after July 28, 2004.

126. For the same reasons, it would be unduly discriminatory to allow transmission owners or ITC participants that join the Midwest ISO after the issuance of the GFA Order to choose Option B for their GFAs. Instead, GFAs that were not yet considered GFAs when we issued the GFA Order but are subsequently added to Attachment P should be

¹³⁶ *Id.* at P 69.

¹³⁷ *Id.* at P 82.

¹³⁸ *Id.* at P 80.

categorized by the Midwest ISO pursuant to the criteria we outlined in the GFA Order. That is, GFAs subject to a just and reasonable standard of review must choose Option A, Option C, or full conversion to the TEMT. The remainder get carved-out of the Energy Markets, subject to the conditions laid out in the GFA Order, such as submitting non-binding day-ahead schedules. We will direct the Midwest ISO to file revisions to the TEMT in a compliance filing, within 30 days of the date of issuance of this order, establishing the criteria for GFAs added to Attachment P after the issuance of the GFA Order, consistent with the discussion in this paragraph.

127. In addition, in response to EKPC's concerns that it is now being punished for failing to settle due to LG&E's unwillingness to be designated as the Responsible Entity prior to the July 28, 2004 deadline, EKPC is not being punished. EKPC was free to agree to be the Responsible Entity and begin a proceeding under section 206 of the FPA, if necessary, to seek adjustment to its rates accordingly. Similarly, in response to Xcel's concerns, the Commission did not err by restricting Option B treatment from parties determined to be the GFA Responsible Entity after the Commission reviewed the GFA in the Step 2 and 3 hearing process. Either of the parties to the GFA could have agreed to be designated as the Responsible Entity and then settled on the appropriate treatment.

128. In response to Southern Indiana's argument that the Commission is requiring Southern Indiana and Alcoa to retain Option B for its GFA without having made a finding that the modification is required by the public interest, we note that Southern Indiana chose to settle on that option; it was not required to do so. Further, as a settling party, Southern Indiana is privy to the selection of Option B, an option that is unavailable to parties that did not settle prior to July 28, 2004. Accordingly, Southern Indiana's request for rehearing to allow it and other parties to choose the "carve-out" option instead of Options A, B or C is denied.

129. As explained above, those GFAs that were carved-out in the GFA Order did not select a GFA treatment option and are non-settling GFAs. Therefore, Option B is not available to carved-out GFAs. In its October Compliance Filing, the Midwest ISO proposes, and the Commission accepts below, that carved-out GFAs will be given the opportunity to choose between Option A, Option C, or to convert to service under the TEMT.¹³⁹ However, once a carved-out GFA makes such a selection it will not be allowed to convert back to carved-out status. Thus, carved-out GFAs will be allowed to

¹³⁹ October Compliance Filing at 6; Midwest ISO Tariff, section 38.8.3.

convert to Option A, C or TEMT treatment, but once converted, carved-out GFAs will not be allowed to switch back to carved-out status. As discussed below, the Commission accepts the Midwest ISO's proposal because it would be unduly discriminatory to allow those who did not settle to switch back and forth while those who previously settled can not.

130. Finally, we grant the Midwest TDU's request and clarify that the section 205 filing the Midwest ISO will make 12 months prior to February 1, 2008 (*i.e.*, due on or before February 1, 2007), that details a new proposal for the treatment of GFAs after the transition period concludes, must also include a proposal for the post-transition-period status and treatment of carved-out GFAs.¹⁴⁰ We also reiterate that the Commission, in the GFA Order, made no determination that either would preclude or would allow the continuance of the carve-out beyond 2008 or otherwise predetermines the treatment of GFAs that are currently carved out when their carve-out ends in 2008.

G. Concerns Regarding Implementation of Carve-Out

1. Requests for Rehearing

131. Midwest TDUs argue that because the Midwest ISO creates and keeps FTRs for its own account to cover carved-out GFAs, the costs could fall disproportionately on non-grandfathered existing rights holders that share the same paths. They state that the Flowgate Rights (FGRs) mechanism required in the TEMT II Order may provide a satisfactory solution, but they are concerned about the Midwest ISO's seeming reluctance to implement this mechanism. As a result, Midwest TDUs ask for clarification and rehearing regarding the effect of the GFA carve-out on other market participants who seek FTRs for their non-grandfathered deliveries or Option A GFAs.

132. Xcel argues that the entities that have been carved out lack sufficient guidance, such as which entity is responsible for scheduling. Xcel argues that the Commission failed to address many implementation issues of how carved-out GFA transmission service can be performed in the context of the Midwest ISO TEMT markets.

2. Commission Determination

133. Midwest TDUs' concern about the possible disproportionate effect of the carve-out on certain parties is speculative. We also are not aware of any allegation of harm since the finalization of the FTR allocations was filed by the Midwest ISO with the

¹⁴⁰ See GFA Order at P 268.

Commission on January 31, 2005.¹⁴¹ In addition, the Midwest ISO is working to implement the FGRs, which the Midwest ISO TDUs acknowledge may mitigate any potential harm.¹⁴² However, we wish to remain informed about the impact of the carved-out GFAs on the Energy Markets, and we direct the Midwest ISO to report to the Commission, in its quarterly informational filing on the accuracy of carve-out schedules,¹⁴³ instances where a pro-rata reduction of FTRs was significantly impacted by carved-out GFAs. This report should include information on the effect of specific carved-out GFAs on the pro-rata FTR reduction, as well as the parties who realized a reduction and the amount of that reduction.

134. As for Xcel's concern, we note that the Midwest ISO has since filed its proposal to implement the carve-out, and we address the specifics of the proposal later in this order.¹⁴⁴

H. GFAs Subject to the Just and Reasonable Standard of Review

135. In the GFA Order, the Commission found that:

[i]n order to balance the Midwest ISO TOs' concerns that the Midwest ISO's proposed treatment of GFAs will lead to trapped costs with the Midwest ISO's concern that leaving GFAs intact will negatively impact

¹⁴¹ See Midwest ISO report describing the process and results of the Midwest ISO's FTR allocation process, Docket Nos. ER04-691-000 and EL04-104-000 (January 31, 2005).

¹⁴² See, e.g., Compliance Order I at P 78. In Compliance Order I, the Commission urged "OMS and the Midwest ISO to continue to examine the specification and implementation of counterflow FGRs and any other financial transmission right concept that serves the goal of improving hedging against congestion charges and file any workable proposals with us at the soonest possible date." *Id.*

¹⁴³ See GFA Order at P 144 (directing "the Midwest ISO to file, on an informational basis, quarterly reports on the accuracy of the day-ahead schedules submitted for these GFAs within 30 days after the end of each calendar quarter.").

¹⁴⁴ In the January Compliance Filing, the Midwest ISO filed its proposal to implement the carve-out and we address the specifics of that proposal later in this order.

reliability, the Commission finds that it is unjust and unreasonable to allow GFAs that are subject to a just and reasonable standard of review to remain outside the Midwest ISO Energy Markets.¹⁴⁵

136. Thus, the Commission held that it was just and reasonable to accept the Midwest ISO's proposed treatment of GFAs for those GFAs that did not settle and that are subject to a just and reasonable standard of review. Further, the Commission found that including transactions under these contracts in the Energy Markets "will better enable the Midwest ISO to operate those markets reliably and will not contravene the contractual rights of the parties to the GFAs."¹⁴⁶

137. Accordingly, that Commission required the transmission owners and ITC participants providing service under these GFAs to choose between the scheduling and settlement provisions of Option A or Option C, and to notify the Midwest ISO of their selection, in accordance with the TEMT, before the commencement of FTR nominations.¹⁴⁷

1. Requests for Rehearing

138. EKPC argues that, for those GFAs found to be subject to the just and reasonable standard, the Commission directed the transmission owners to select Option A, Option C or to convert to full TEMT service without regard to costs to or consent from the customer. Since the customer could potentially be liable for the costs caused by a unilateral choice by the transmission owners, EKPC requests that the Commission clarify that the transmission owner must bear the financial risk for any elections made without the customer's consent.

139. AMP-Ohio argues that the Commission failed to address the contractual rights of parties to GFAs that are used to provide services such as imbalance, reactive power and spinning reserves. AMP-Ohio seeks clarification as to whether GFAs that are subject to the just and reasonable standard are to be modified in their entirety, or modified only with respect to those portions applicable to transmission capacity.

¹⁴⁵ GFA Order at P 137.

¹⁴⁶ *Id.* at P 137.

¹⁴⁷ *Id.* at P 139.

2. Commission Determination

140. EKPC's concerns are premature. As explained in the GFA Order, the transmission owner or ITC participant is the Responsible Entity and will be billed for the costs related to the just and reasonable GFAs unless otherwise agreed to by the parties to the GFAs.¹⁴⁸ While we expect that transmission owners or ITC participants will consult with and get the consent of the GFA customers before choosing between Option A or Option C treatment, or conversion to TEMT service, the customers are currently protected from additional costs and obligations because they are not the Responsible Entity unless they have already given their consent.¹⁴⁹ In any event, the concern about a unilateral choice is largely mitigated because the proposed TEMT language (which we address below as part of the November Compliance Filing) allows the GFAs subject to a just and reasonable standard of review to switch between Option A and Option C or to convert to TEMT service during the period designated by the Midwest ISO for the annual redistribution of FTRs.¹⁵⁰ In addition, a customer that is not consulted by the transmission owner or ITC participant when this choice was made, and that believes a different choice was more appropriate, may raise that issue if the transmission owner or ITC participant files with the Commission to pass any costs through to the customer. Thus, the customer's rights to be consulted or to raise concerns about not being consulted are protected, and we deny rehearing on this issue.

141. AMP-Ohio made the same request for clarification on contractual rights in its request for rehearing of the Procedural Order, and we address that request above. For the reasons explained there, AMP-Ohio's request for clarification is denied.

I. Responsible Entity, Billing Entity, and Pass-Through of Costs

142. In the GFA Order, the Commission found that, to the extent that parties to a GFA agreed upon the designation of GFA Responsible Entity, "we will adopt that designation to establish financial responsibility for GFAs that are subject to Options A, B or C, pursuant to settlements or the requirements of this order."¹⁵¹ To the extent that parties to

¹⁴⁸ *Id.* at P 161.

¹⁴⁹ We note that EKPC does not allege that the transmission owner under its GFAs has made a choice without its consent.

¹⁵⁰ See Midwest ISO TEMT, section 38.2.5.j.

¹⁵¹ GFA Order at P 160.

the GFA had not agreed upon the designation of GFA Responsible Entity, the Commission found that the GFA Responsible Entity should be the transmission owner or ITC participant responsible for providing transmission service under the GFA. The Commission found this decision to be consistent with more recent precedent concerning the pass through of costs incurred under regional transmission provider tariffs to meet obligations under GFAs, stating that:

[w]hile in Opinion Nos. 463 and 463-A¹⁵² the Commission found that grid management services performed by a regional transmission provider constitute new services presumed to not be provided for in GFAs (unless the GFAs expressly contemplate responsibility for the cost of such services), the costs at issue for GFAs choosing Options A, B, or C or converting to TEMT service are more extensive than grid management services performed by a regional transmission provider. Transmission usage charges, FTR debits and credits, and uplift costs are essentially redispatch costs, substantially similar to the redispatch costs associated with the reliability services at issue in Opinion Nos. 459 and 459-A.¹⁵³ There, the Commission rejected PG&E's proposal to pass through to customers under existing firm transmission service contracts, as a new service, the reliability service costs that it incurs under the CAISO tariff to meet its obligations under the existing contracts. Rather, the Commission found that redispatch service must be presumed to be included in the firm transmission service provided in the contracts and thus does not constitute a new service.¹⁵⁴

Similarly, the Commission found that it would not allow such costs to be charged directly to the customers under the GFAs, unless the GFA parties had specifically agreed otherwise in their joint filings. Instead, the Commission required the transmission owner or ITC participant to be designated as GFA Responsible Entity. In addition, the

¹⁵² *California Independent Transmission System Operator, Inc.*, Opinion No. 463, 103 FERC ¶ 61,114 (2003), *order on reh'g and clarification*, Opinion No. 463-A, 106 FERC ¶ 61,032 (2004).

¹⁵³ *Pacific Gas and Electric Co.*, Opinion No. 459, 100 FERC ¶ 61,160 (2002), *reh'g denied*, Opinion No. 459-A, 101 FERC ¶ 61,139 (2002).

¹⁵⁴ GFA Order at P 162.

Commission found that the billing entity for carved out GFAs is the transmission owner or ITC participant taking transmission service pursuant to the Midwest ISO tariff to meet its obligations under the GFA.

1. Requests for Rehearing

143. International Transmission argues that it is not a transmission owner, as defined in the Midwest ISO Tariff, and requests that the Commission clarify that references to entities that must be Responsible Entities in the GFA order do not apply to an ITC, and that the inclusion of International Transmission as a transmission owner in Appendix B is in error. International Transmission argues that it cannot be a Responsible Entity because, as an independent transmission company, it cannot be a market participant as is required under the TEMT.

144. FirstEnergy argues the Commission erred in finding that the transmission owners are the Responsible Entity and that the Commission provided no reasonable explanation for ignoring the Findings of Fact, which stated that the transmission customer or load-serving entity (LSE) would be responsible for the charges.¹⁵⁵ FirstEnergy argues that the GFA Order requires the transmission owner to pay for services that the transmission customer receives without adequately providing a mechanism for the transmission owner to pass through these costs to the transmission customer. FirstEnergy argues that it is unduly discriminatory and preferential to have the transmission owners subsidize the market activities of GFA transmission customers. FirstEnergy argues that the Commission erred by failing to find that GFA customers should be ultimately responsible for TEMT costs, and for not providing for a specific mechanism or compliance filing for those GFAs that do not explicitly provide for a pass-through. FirstEnergy argues that all the Commission provided is an uncertain possibility for transmission owners to recover costs, which is unjust and unreasonable. FirstEnergy argues that, at a minimum, the Commission should clarify that all GFAs that are subject to the just and reasonable standard of review are subject to modification initiated by either the Commission or one of the parties to the agreement to ensure that transmission owners can modify their agreements to recover the TEMT costs.

145. LG&E and Xcel similarly argue that the Commission erred by failing to ensure that the GFA customers causing the TEMT costs to be incurred or benefiting from the TEMT implementation be responsible for those costs. Xcel points out that the Commission has routinely found that the entity receiving the service should pay for the service and seeks the Commission's application of the same reasoning with regard to

¹⁵⁵ Cinergy GFA Rehearing Request at 7 (*citing* GFA Order at P 38).

Schedule 17. LG&E argues that the Commission failed to allow LG&E to recover costs from its wholesale customers, thereby forcing LG&E and its bundled retail customers to absorb such costs.

146. Midwest ISO TOs argue that the Commission erred in imposing Schedule 17 costs on transmission owners for carved-out GFAs without also providing for recovery of those costs from GFA customers. They point out that the customer under the GFAs will receive the benefits, not the transmission owner. As a result, Midwest ISO TOs argue that, in line with Commission precedent, they should be allowed to pass-through Schedule 17 costs to those customers who will be the beneficiaries.

147. Midwest TDUs ask the Commission to clarify that it has not predetermined the outcome of future proceedings involving proposals to pass TEMT related costs through to customers under particular GFAs. Midwest TDUs seek clarification that any seller seeking to alter its Commission filed GFA must do so through a section 205 rate change filing. Midwest TDUs ask that where existing rates are over-recovering current revenue requirements, no adders be permitted to be charged. In addition, no pass through should be permitted where the costs are imprudently incurred. For example, if the GFA customer stated during the hearing that it preferred Option B, but the GFA Transmission Provider failed to settle on that basis, then the GFA Transmission Provider should have to demonstrate in any pass through proceeding that the costs it seeks to flow through would not have been avoided under Option B. Should the Commission decline to clarify, Midwest TDUs ask that the Commission re-open Option B for those GFA parties that attempted to bargain for Option B but failed because of the GFA Transmission Provider's reluctance to settle on that basis.

2. Commission Determination

148. We reaffirm that transmission owners and ITC participants are Responsible Entities unless the parties have agreed otherwise. As we found in the GFA Order, this is consistent with Opinion Nos. 453 and 453-A, which require that the transmission owner or ITC participant take transmission service under the Midwest ISO Tariff in order to satisfy its obligations under the GFA.¹⁵⁶ Similarly, consistent with Opinion Nos. 453 and 453-A, the transmission owner or ITC participant taking transmission service pursuant to the Midwest ISO Tariff to meet its obligations under a carved out GFA should be the billing entity for the GFA. The transmission owners and ITC participants take service under the TEMT to meet their obligations to the GFAs and, therefore, must be responsible for paying the costs of TEMT service.

¹⁵⁶ See GFA Order at P 160, 300 (*citing* Opinion No. 453 at 61,173).

149. The Commission has made clear that it will consider allowing the transmission owners or ITC participants to pass through these costs. However, a concrete proposal for such pass through has not been made in this proceeding. Thus, the proposal is not ripe for consideration and concerns regarding any decision not to allow costs to be passed through are premature.¹⁵⁷

150. We grant International Transmission's request for clarification. Contrary to International Transmission's assertion, the Commission did not designate a Responsible Entity for its GFAs. Rather, since we found that the Midwest ISO should carve out the transactions under these GFAs, there is no need to designate a Responsible Entity. We found that the billing entity for carved-out GFAs, the entity responsible for payment of TEMT charges for the GFA, is the transmission owner or ITC participant taking transmission service pursuant to the Midwest ISO Tariff to meet its obligations under the GFA. However, as discussed below regarding the GFAs involving the Ludington Plant (GFA Nos. 205, 206, 207, 267, 268, and 269), we clarify that although International Transmission and METC are listed as transmission owners in Appendix B of the GFA Order, they are not transmission owners for the purpose of designation of a billing entity for the carved-out Ludington GFAs. Similarly, we clarify here that International Transmission and METC are not transmission owner for the purpose of designation of a billing entity for their other GFAs, all of which are carved out. For each of these GFAs, the parties filed joint templates agreeing that the GFA customers should be responsible

¹⁵⁷ We note that two such proposals have been filed. On January 3, 2005, Otter Tail filed to amend 12 GFAs to pass through to the GFA customers Otter Tail's share of the costs associated with: (1) planning and operation of the Midwest ISO's transmission grid; and (2) establishing and operating the Midwest ISO's Energy Markets. On March 3, 2005, the Commission issued an order accepting and suspending the proposed amendments and established hearing and settlement judge procedures. *Otter Tail Power Co.*, 110 FERC ¶ 61,220 (2005). The Commission also conditionally accepted a proposed Schedule 23 to the TEMT submitted by the transmission owners of the Midwest ISO to recover Midwest ISO Schedule 10 and Schedule 17 costs from customers under specified GFAs. *Transmission Owners of the Midwest Independent Transmission System Operator, Inc.*, 110 FERC ¶ 61,339 (2005).

for TEMT costs. We find that designation of these GFA customers as the billing entities for their GFAs best meets the parties' expressed intentions as to the allocation of cost responsibilities and best respects the status of International Transmission and METC as independent transmission companies.¹⁵⁸

151. We will grant Midwest TDUs request for clarification that, in the GFA Order, the Commission did not predetermine the outcome of future proceedings involving proposals to pass TEMT related costs through to customers under particular GFAs. To that end, we will deny Midwest TDUs' request for clarification that any seller seeking to alter its Commission filed GFA must do so through a section 205 rate change filing, and that where existing rates are over-recovering current revenue requirements, no adders will be permitted to be charged. Such arguments are more appropriately considered when proposals to pass through TEMT costs are made, as are arguments as to whether or not TEMT costs were imprudently incurred.

J. Schedule 16

152. In the GFA Order, the Commission explained that, as stated in the Schedule 16/17 Order,¹⁵⁹ all FTR-holders benefit from FTR Service and should pay the Schedule 16 charge for the benefits provided by the FTRs.¹⁶⁰ The Commission found that GFAs choosing either Option A or Option B benefit from the FTR Service provided by the Midwest ISO and that these GFAs are subject to congestion costs and the FTRs act as a

¹⁵⁸ Thus, the billing entities for each of these GFAs are as follows: GFA Nos. 209 - 210, MPPA; GFA No. 211, Michigan South Central Power Agency; GFA No. 212, City of Wyandotte; GFA No. 213, Detroit Edison; GFA Nos. 254 - 255, Wolverine; GFA Nos. 256 - 257, MPPA; GFA No. 266, Michigan South Central Public Agency.

¹⁵⁹ *Midwest Independent Transmission System Operator, Inc.*, 108 FERC ¶ 61,235 (2004) (Schedule 16/17 Order).

¹⁶⁰ GFA Order at P 294

hedge against those congestion costs.¹⁶¹ Thus, because the Option A and Option B GFAs benefit from the hedge provided by the FTRs, the Commission held that these GFAs should be assessed the Schedule 16 charge.¹⁶²

153. Likewise, the Commission found that carved-out GFAs should not be assessed the Schedule 16 charge because carved out GFAs have retained their physical transmission rights and are not subject to congestion costs in the first instance. The Commission explained that:

[s]ince the carved out GFAs are not subject to congestion costs in the Midwest ISO Energy Markets, they have no need for FTRs as a hedge against congestion costs; therefore, these GFAs do not benefit from the FTR Service as the Option A and Option B GFAs do nor do these GFAs benefit like the FTR-holding, bilateral transactions and self-scheduling transactions.¹⁶³

1. Requests for Rehearing

154. Alcoa argues that the Commission inappropriately imposed significant additional administrative costs, (*i.e.*, Schedule 16 costs), on parties to GFAs who settled on Option B treatment even though the purpose of Option B was to “make GFA parties financially indifferent to the LMP-based charges for congestion and marginal losses in the Day-Ahead Energy Market.”¹⁶⁴

¹⁶¹ *Id.* at P 294. GFAs that choose Option A hold the FTRs and GFAs that choose Option B have the Midwest ISO hold the FTRs for them.

¹⁶² By contrast, Option C GFAs do not receive FTRs as a hedge. These GFAs should not be assessed Schedule 16 charges because they don’t receive the benefit that Option A and Option B GFAs receive.

¹⁶³ GFA Order at P 295. The Commission also stated that since Detroit Edison’s GFA involving the Ludington pumped storage unit is a carved out GFA, it is not subject to the Schedule 16 charge. Likewise, since Manitoba Hydro’s sales into the United States were carved out, Manitoba Hydro’s sales into the United States are exempt from the Schedule 16 charge. *Id.* at P 296.

¹⁶⁴ Alcoa GFA Rehearing Request at 6 (*citing* GFA Order at P 232).

155. Alcoa also asserts that Schedule 16 charges should not be assessed on the full allocation of megawatts listed in Appendix B. Alcoa argues that its GFA deserves special consideration because most of its load is served by generating facilities located adjacent to its manufacturing plant and only 10 percent of Alcoa's load will be purchased via the Energy Markets. Consequently, Alcoa believes that it should not be assessed Schedule 16 charges because the costs would not be at all proportional to the benefits provided by the carved-out GFA service, especially since Option B provides it with no rights to resell the FTR options when unused. Accordingly, Alcoa argues that this design violates the concept that properly designed rates should produce revenues from each class of customers, "which match, as closely as practicable, the costs to serve each class or individual customer."¹⁶⁵ Alcoa also argues that the Schedule 16 costs modify the economic balance of its GFA without providing evidence that the preexisting contract adversely affects the public interest.

156. Midwest TDUs argue that Schedule 16 costs should not be assessed to Option B GFAs. They state that contrary to the Commission's logic, Option B GFAs do not benefit from their treatment under the TEMT, but, rather, the Option B treatment serves to hold the parties harmless. Moreover, they point out that requiring Option B GFAs to share in the costs of holding themselves harmless from market changes initiated by others results in holding them less than fully harmless. Midwest TDUs assert that, because the FTRs held back by the Midwest ISO are used by the Transmission Provider as an accounting mechanism to determine revenue adequacy of any congestion cost refunds to Option B GFAs, those who would bear any revenue adequacy shortfall are the ones to benefit. Midwest TDUs also express concern that the Midwest ISO will hold back too many FTRs for which the Option B GFA parties will be assessed the Schedule 16 charge.

157. Cinergy, on the other hand, believes that the carved-out GFAs should be charged the Schedule 16 charge like the Option B GFAs. Cinergy states that carved-out GFAs are not granted FTRs because none are necessary as the carve-out itself serves as the hedge. Cinergy continues that since Option B GFAs and carved-out GFAs both receive the same perfect hedge, they both benefit from the FTR Service. Cinergy claims that the Midwest ISO performs just as much work administering the hedge for Option B GFAs and the

¹⁶⁵ Alcoa GFA Rehearing Request at 8 (*citing Alabama Elec. Coop., Inc. v. FERC*, 684 F.2d. 20, 21 (D.C. Cir. 1982)).

carved-out GFAs as it does for FTR holders so they should all be assessed the Schedule 16 charge. Cinergy states that the Midwest ISO will need to expend considerable effort to affect the hybrid physical/financial market the GFA Order mandates, including revisions to the tariff and process changes.

2. Commission Determination

158. We deny requests for rehearing of our decision that Option B GFAs are responsible for Schedule 16 charges. The terms of that option, as stated in section 38.8.3(b) of the TEMT, included the assessment of Schedule 16 charges. The Commission did not change the terms of Option B with respect to Schedule 16 charges nor will we allow the parties to change the terms on which they have settled. While Alcoa is correct that GFA Option B was intended to make GFA parties financially indifferent to the LMP-based charges for congestion and marginal losses, the TEMT never contemplated that selecting Option B would exempt GFAs from the administrative charges associated with the hedge that they have received. The TEMT clearly states in section 38.8.3(b) that Responsible Entities for Option B GFAs will be subject to the charges in Schedule 16.¹⁶⁶ Therefore, Alcoa and Southern Indiana had sufficient notice of the potential liability for Schedule 16 charges when evaluating the best GFA option for them. We note that the Option B GFAs settled on the terms of that option, which were available to any of the GFAs willing to settle on that option.

159. Alcoa's interpretation of Schedule 16 is correct in that its entire allocation of FTR-equivalent rights associated with its Option B GFA serves as the basis for the calculation of the charges under Schedule 16. Given Alcoa's peculiar operating characteristics (*i.e.*, most of its load is served by adjacent generating facilities), Southern Indiana can, after the first six-month FTR allocation period, register fewer megawatts for its GFA with

¹⁶⁶ In the Schedule 16/17 Order, the Commission directed the Midwest ISO to clarify the language in Schedule 16 of the TEMT to reflect the inclusion of Option B GFAs in the billing determinants consistent with the approach it had proposed in section 38.8.3 of the TEMT. Some parties incorrectly interpret that directive to suggest that the Midwest ISO did not propose to charge Schedule 16 to Option B GFAs but that we directed the Midwest ISO to modify its proposal. Our directive to clarify the language of Schedule 16 was merely an attempt to avoid potential disputes regarding the unclear language of Schedule 16.

Alcoa to better match the need for a hedge.¹⁶⁷ This reduction in registered megawatts reduces the amount of the Schedule 16 charge assessed to Southern Indiana for the GFA.¹⁶⁸ Nonetheless, Alcoa and Southern Indiana settled on Option B. If they did not believe Option B was the most beneficial option, they could and should have chosen a different option as opposed to now attempting to change Option B.

160. Regarding Alcoa's claim that assessing the Schedule 16 charges on its GFA with Southern Indiana constitutes modification to the GFA without making the necessary public interest findings, we find that the Alcoa's concern is premature. Southern Indiana is the entity responsible for such charges and has not yet filed to modify the GFA to pass through such costs to Alcoa. If Southern Indiana does make such a filing, Alcoa may raise its concerns at that time.

161. We disagree with Midwest TDUs and Cinergy that carved-out GFAs should be treated the same as Option B GFAs. Option B GFAs settled on a treatment that included Schedule 16 costs as well as uplift charges. Carved-out GFAs have retained their physical transmission rights and are not subject to congestion costs, so carved-out GFAs have no need for a financial hedge. Thus, carved-out GFAs do not benefit from the Midwest ISO's FTR market and should not be allocated any costs of that market.

K. Schedule 17

162. In the GFA Order, the Commission references the Schedule 16/17 Order, where it found that entities engaged in self-scheduling transactions and bilateral transactions should pay the Schedule 17 charge because they "benefit through their use of the transmission grid which is made more reliable as a result of the security-constrained economic dispatch that the Midwest ISO will operate in its Energy Markets."¹⁶⁹ In

¹⁶⁷ *Southern Indiana Gas and Electric Company*, 110 FERC ¶ 61,109 (2005) (Southern Indiana Order). In the Southern Indiana Order, the Commission denied Southern Indiana's request that it be allowed to nominate fewer FTRs than had been registered for GFA No. 343, between Southern Indiana and Alcoa. However, the Commission noted that Southern Indiana may register fewer FTRs for GFA No. 343 in the next FTR allocation period. *Id.* at P 18-22.

¹⁶⁸ Other parties, such as Midwest TDUs, can also protect themselves from potential excessive withholding of FTRs by the Midwest ISO by adjusting the level of megawatts they register for their GFA.

¹⁶⁹ GFA Order at P 297.

addition, with respect to Energy Market Service, the Commission found that all GFA transactions should be assessed the charge for Energy Market Service in Schedule 17 regardless of whether or not they are carved out of the Midwest ISO Energy Markets. The Commission stated that GFAs should pay for the benefits they receive and that non-GFA transactions should not subsidize GFA transactions.

163. Further, the Commission found that Detroit Edison should be assessed the Schedule 17 charge only on its pumped storage facility's injections into the transmission system.¹⁷⁰ The Commission also found that Manitoba Hydro's sales into the United States should be subject to the Schedule 17 charge just as the other GFAs, including other carved-out GFAs, are subject to the Schedule 17 charge, because they will benefit from the Energy Markets in a manner similar to any other power sales transaction.¹⁷¹

1. Requests for Rehearing

164. Alcoa raises the same concerns with respect to Schedule 17 charges that it did for Schedule 16 charges.¹⁷² Specifically, Alcoa is concerned that it might have to pay significantly more than expected since Option B is supposed to keep it financially indifferent from LMP-based congestion costs and marginal losses. The potential impact of these administrative charges in Schedules 10, 16 and 17, if Southern Indiana passes them through, is significant and may hurt Alcoa's ability to compete with other international aluminum manufacturers.

¹⁷⁰ A pumped storage project is designed to meet the system's need for electricity during periods of peak demand. Such a project operates by means of two reservoirs at different elevations in close proximity to one another. During times of low demand water is pumped from the lower reservoir to the upper reservoir. At times of peak demand, the water is dropped back to the lower reservoir, through generating facilities, to produce power.

¹⁷¹ GFA Order at P 299.

¹⁷² See Alcoa GFA Rehearing Request at 6 n.2.

165. The GFA Order carved-out and made subject to Schedule 17 charges, those Manitoba Hydro GFAs that provided for service *into the United States*.¹⁷³ Manitoba Hydro seeks clarification, or in the alternative rehearing, that its sales from Canada to the United States occurring at the United States-Canadian border are exempt from the Schedule 17 charge if the energy is not delivered inside the United States. Manitoba Hydro argues that the Commission does not have jurisdiction over the transmission of energy within Canada or over energy generated in Canada and sold at the United States-Canada border. Further, Manitoba Hydro argues that its agreements also include jurisdictional transactions from the United States to Canada, so the Commission has jurisdiction over one aspect of these agreements but not the other, and neither the just and reasonable standard of review nor the *Mobile-Sierra* public interest standard of review applies. It submits that the Commission cannot modify the jurisdictional portions of these agreements without affecting the non-jurisdictional aspects of the agreement or undoing the bargain as a whole.

166. Rural Electric Cooperatives state that the Commission bases the GFA Order, without proof, on the assumption that the implementation of the proposed TEMT will provide benefits to customers, even though no economic or reliability benefit has been demonstrated.¹⁷⁴ As a result of this assumption and lack of supporting evidence, Rural Electric Cooperatives challenge the Commission's determination that Schedule 17 charges should apply to all GFA transactions on the same basis that they apply to non-GFA transactions.

167. Rural Electric Cooperatives also state that the GFA Order contains no independent findings relating to purported benefits of the TEMT to GFA parties and imports findings from the Schedule 16/17 Order to assert that GFAs will receive benefits. However, Rural Electric Cooperatives state that no evidence was submitted or considered in the paper hearing addressed in the Schedule 16/17 Order regarding the treatment of GFAs within the context of the Midwest ISO's TEMT. They state that no evidence could have been presented since the paper hearing in Docket No. ER02-2595-000 began almost a year and a half prior to the Midwest ISO's filing of the TEMT.

¹⁷³ GFA Order at P 299. The GFA Order did not address transactions from the United States to Canada.

¹⁷⁴ Hoosier and Dairyland join in Rural Electric Cooperatives GFA Rehearing Request.

168. Rural Electric Cooperatives continue that, in the Schedule 16/17 Order, the Commission identified a variety of generic and undifferentiated benefits across all classes of market participants including self-scheduling entities, parties to bilateral transactions and GFA parties. However, they state that cost causation principles require more than an amorphous finding of generic and undifferentiated benefits to support a conclusion that a rate is just and reasonable as applied to a particular class of customers.¹⁷⁵ Moreover, they fault the Commission for dismissing, in the Schedule 16/17 Order, the arguments raised by Wisconsin Electric Power Company (WEPCO) and certain state commissions that some parties will not benefit as much from the establishment of the Energy Markets based on a Midwest ISO study entitled “The Benefits and Costs of Wisconsin Utilities Participating in Midwest ISO Energy Markets – Initial Results (March 2004)” that was not filed as part of the record in either the paper hearing or the instant proceedings.¹⁷⁶

169. Rural Electric Cooperatives also state that the Commission’s citation of *Entergy Services, Inc. v. FERC*¹⁷⁷ is incorrect because the economic and reliability benefits have not been demonstrated.¹⁷⁸ Rural Electric Cooperatives state that in the May 26 Order, the Commission found that the Midwest ISO did not provide sufficient information demonstrating the benefits of the proposed TEMT.¹⁷⁹ Expert testimony was submitted in the GFA paper hearing opened by the May 26 Order that explains why the Midwest ISO’s calculation of benefits is questionable. Moreover, the Midwest ISO addressed possible benefits flowing in the aggregate across the entire Midwest ISO instead of presenting evidence that demonstrates particular customers (or even GFAs generally) will receive benefits exceeding the costs even though participation in the Energy Markets is, according to Rural Electric Cooperatives, essentially mandatory.¹⁸⁰

¹⁷⁵ Rural Electric Cooperatives GFA Rehearing Request at 8 (*citing, e.g., Sithe/Independence Power Partners, L.P. v. FERC*, 285 F.3d 1, 5 (D.C. Cir. 2002)).

¹⁷⁶ Schedule 16/17 Order at P 44 n.52.

¹⁷⁷ 319 F. 3d 536 (D.C. Cir. 2003) (*Entergy*).

¹⁷⁸ See GFA Order at P 298 (*citing Entergy*, 319 F. 3d at 543 (*citing Western Massachusetts Electric Co. v. FERC*, 165 F.3d 922, 923, 927 (D.C. Cir. 1999))).

¹⁷⁹ For example, Rural Electric Cooperatives state that Midwest ISO’s testimony and the Market Monitor’s conclusions relate not to reliability, but to purported efficiencies that might be achieved by replacing TLRs with LMP markets.

¹⁸⁰ Rural Electric Cooperatives also complain that they did not get notice or an opportunity to rebut evidence concerning the alleged benefit of energy markets to GFA parties.

170. Hoosier argues that it is arbitrary and capricious to require the carved out GFAs to pay the Schedule 17 costs for implementing and administering the markets, when the carved out GFAs will not receive the benefits of the Energy Markets. Hoosier further argues that since the parties did not know which GFAs would be carved out until the issuance of the GFA Order, they did not have sufficient opportunity to refute the Midwest ISO's claim that all GFAs will benefit from the Energy Markets.¹⁸¹

2. Commission Determination

171. As the Commission stated with respect to Schedule 16, Option B was intended to keep parties to GFAs financially indifferent to congestion costs and marginal losses but Option B was not intended to preclude the recovery of the Midwest ISO's administrative costs for establishing and administering the energy markets. The proposed TEMT was clear that, under Schedule 17, all injections and extractions from the transmission system would be assessed and no exemption was provided for GFAs of any type;¹⁸² therefore, Alcoa and Southern Indiana were well aware of the potential liability for Schedule 17 charges when they settled on Option B for their GFA.

172. Regarding Manitoba Hydro's concerns about our jurisdiction, we reiterate our statement in the TEMT II Rehearing Order that our rulings on the TEMT and GFAs apply only to jurisdictional services in interstate commerce, not to services provided within Canada.¹⁸³ Moreover, with respect to Manitoba Hydro's sales under its GFAs, we clarify that such sales are also exempt from the Schedule 17 charges to the extent they occur at the United States-Canada border. However, once there is service in interstate commerce, the market participant or GFA billing entity responsible for such injections into the Midwest ISO transmission system will be responsible for Schedule 17 charges for such injections. As we stated in the GFA Order, market participants using the Midwest ISO transmission system will benefit from the Energy Markets and should be assessed the Schedule 17 charge for those benefits.¹⁸⁴

¹⁸¹ Hoosier also states that if carved-out GFAs benefit at all, they will derive far fewer benefits than customers taking OATT service. Hoosier states that carved-out GFAs should not have to pay the Schedule 17 charge if they will receive, at best, a reduced level of benefits.

¹⁸² In addition, Schedule 17 is also assessed on virtual trades which do not involve injections and withdrawals from the transmission system.

¹⁸³ TEMT II Rehearing Order at P 47.

¹⁸⁴ GFA Order at P 298-99.

173. The Commission has jurisdiction over the Midwest ISO and the Midwest ISO's Tariff, and over the transmission service that transmission owner and ITC participants take under the Midwest ISO Tariff -- even for transmission service that they take under the Midwest ISO Tariff to, in turn, meet their obligations under the GFAs. Therefore, the Commission may assess Schedule 17 charges to transmission owners and ITC participants that happen to be parties to a GFA (even one containing both jurisdictional and non-jurisdictional transactions, and even if it might alter the bargain between the parties to the agreement). To the extent that Manitoba Hydro's GFAs provide for reciprocal service with Midwest ISO transmission owners, Schedule 17 charges will be assessed for transactions taking place on the transmission owners' transmission system in recognition of the benefits of the Energy Markets to the transactions. Because the Schedule 17 charges are assessed commensurate with the benefits of the Energy Markets to the transactions taking place over the Midwest ISO transmission system, we disagree that the Schedule 17 charges adversely alter the bargain of the GFA.

174. We will also deny rehearing of the Commission's findings that the Midwest ISO's Energy Markets will provide benefits to all customers, including parties to GFA transactions, and that Schedule 17 charges should, therefore, apply to all GFA transactions on the same basis that they apply to non-GFA transactions. As an initial matter, we reject the notion that parties were not given adequate notice that allocation of Schedule 17 costs to transactions under GFAs, whether or not ultimately subject to the carve out, would be addressed in this proceeding. The Midwest ISO's March 31 Filing addressed the treatment of GFAs in the Energy Markets, including scheduling and settlement rules, FTR nominations, and, as relevant here, the applicability of the Schedule 16 and 17 administrative cost adders.¹⁸⁵ Thus, GFA parties had notice in this proceeding that application of each of these elements to GFAs was at issue, including, as relevant here, the applicability of the Schedule 16 and 17 adders, even if the GFAs were not subject to all of the Energy Markets' scheduling and settlement rules.

175. We also find that the record in this proceeding is adequate for the purpose of deciding the appropriate allocation of Schedule 17 costs to GFA transactions, including transactions under carved-out GFAs. The Commission's ultimate findings on the allocation of Schedule 17 costs in the GFA Order were based on the record concerning

¹⁸⁵ The proposed billing determinants for the charges in Schedule 17, in both the Midwest ISO's initial Schedule 17 filing made in September 2002 and the subsequent March 31 Filing, included all injections into and extractions from the transmission system, which would equally apply to all GFA injections into and extractions from the transmission system.

the design of Midwest ISO's TEMT as ultimately modified and approved in this proceeding. Those findings were not based solely on the quantitative cost-benefit analysis filed by the Midwest ISO in response to the Procedural Order. The Midwest ISO's analysis quantified only a subset of near-term benefits associated with more efficient market dispatch. Rather, the findings in the GFA Order were based on consideration of a broader range of economic and reliability benefits that the Midwest ISO's market is designed to achieve, as enumerated in the GFA Order, and discussed further, below. Further proceedings at this point to quantify benefits of the Midwest ISO's markets for GFA customers generally, or individual GFA customers, would not be worthwhile or necessary to arrive at a reasonable basis for allocating Schedule 17 costs for the commencement of the Midwest ISO's Energy Markets.¹⁸⁶

176. Schedule 17 is designed to recover the Midwest ISO's costs of providing Energy Market Services, including market modeling and scheduling, market bidding support, LMP support, market settlements and billing, and market monitoring.¹⁸⁷ The Midwest ISO's Energy Markets are designed to produce global benefits to all those transacting over the Midwest ISO grid, including a more reliable and efficiently-used transmission grid, clear price signals for better infrastructure siting, better opportunities for demand response to participate in the markets, and price transparency, which benefits even bilateral contract formation.

177. Under the TEMT, the Midwest ISO centrally coordinates unit commitment day-ahead on a regional basis to ensure adequate resources to serve load given anticipated security constraints on the system.¹⁸⁸ In addition, in real-time, the Midwest ISO centrally dispatches generation as needed to account for security constraints. The Midwest ISO's centralized security-constrained unit commitment and dispatch allows the Midwest ISO to take timely action to avoid anticipated security violations, and to cure such violations in the event that they occur, and largely replaces the practice of *pro rata* curtailment under the North American Electric Reliability

¹⁸⁶ The courts do not require ratemaking agencies to allocate costs with exacting precision. Rather, it is enough that the cost allocation mechanism not be "arbitrary and capricious" in light of the burdens imposed and benefits received. *See Midwest ISO Transmission Owners, et al. v. FERC*, 373 F.3d 1361, 1371 (D.C. Cir. 2004) (Midwest ISO TO Order).

¹⁸⁷ *See* TEMT, Original Sheet No. 1000.

¹⁸⁸ *See* Exhibit No. MISO-4 at 22-23.

Council (NERC) Transmission Line-Loading Relief (TLR) process in the region.¹⁸⁹ The centralized security-constrained dispatch allows the Midwest ISO to respond to and relieve security violations more quickly and precisely than the TLR process and results in more efficient utilization of the transmission system, increasing the supply of competing generation available to serve load and contributing to more reliable service to all those who transact over the Midwest ISO system.¹⁹⁰ The Midwest ISO has confirmed that all transactions, even transactions under carved-out GFAs, will be subject to fewer TLRs under the Energy Markets than prior to market start.¹⁹¹ As we noted in the Procedural Order, the Final Report on the August 14, 2003 Blackout finds that “the TLR procedure is cumbersome, perhaps unnecessarily so, and not fast and predictable enough for use [in] situations in which an Operating Security Limit is close to or actually being violated.”¹⁹² The Blackout Report recommends that TLRs should not be used in situations involving actual violation of an Operating Security Limit.¹⁹³ We note that the Midwest ISO states that, “no TLR mechanism could have prevented the events of August 14, 2003.”¹⁹⁴ Thus, by allowing the Midwest ISO to respond to and relieve security violations more quickly and precisely, Midwest ISO’s Energy Markets represent a significant improvement over current reliability practices and will produce reliability benefits to all using the Midwest ISO’s transmission system.

¹⁸⁹ *Id.* at 19-22.

¹⁹⁰ *Id.*

¹⁹¹ November Compliance Filing at 5.

¹⁹² Procedural Order at P 56 (*citing* U.S.-Canada Power System Outage Task Force, Final Report on the August 14, 2003 Blackout in the United States and Canada: Causes and Recommendations 163 (2004) (Blackout Report)).

¹⁹³ *Id.*

¹⁹⁴ *See* Exhibit No. MISO-4 at 20.

178. The Midwest ISO's markets also provide price signals that will facilitate identification of cost-effective transmission system improvements that will reduce congestion and the potential for curtailments.¹⁹⁵ In addition, the TEMT will facilitate the participation of demand response in the regional electricity market, which will also reduce the potential for curtailments, system emergencies or price spikes, due to shortages.¹⁹⁶

179. In addition, parties transacting under GFAs, including parties transacting under carved-out GFAs, can benefit from the Midwest ISO's Energy Markets by participating in the spot markets when it is economic to do so, either directly, or through bilateral transactions with price formation aided by transparent market prices produced by the markets that the Midwest ISO will operate and monitor. Also, the Midwest ISO will use its spot market to provide energy imbalance service to GFAs, including carved-out GFAs.

180. We believe that the situation here regarding allocation of Schedule 17 costs to GFA transactions is similar to the situation we faced with respect to application of the Schedule 10 ISO Cost Adder to bundled retail and grandfathered wholesale transactions in Opinion Nos. 453 and 453-A. In upholding our decision in those orders that Schedule 10 charges should apply to bundled retail and grandfathered wholesale transactions, the Court of Appeals likened the issue to the court system which is largely funded by taxpayers, at great expense, even though the vast majority of taxpayers will have no contact with that system in any given year. The public nevertheless benefits from having a system for the prompt adjudication of criminal offenses and the resolution of civil cases.¹⁹⁷ It found that the Schedule 10 ISO Cost Adder covers the administrative costs of having an ISO, and, even if bundled and grandfathered wholesale loads are not in some sense using the ISO, they still get some benefit from having an ISO. The same is true with respect to the Energy Markets and the reliability and economic benefits that will emanate from those markets to all transacting over the Midwest ISO system.

181. Based on the forgoing, we reiterate our findings in the GFA Order that the Midwest ISO's Energy Markets will have both economic and reliability benefits for customers in the Midwest ISO region. Moreover, these benefits will be experienced by

¹⁹⁵ *Id.* at 38-39.

¹⁹⁶ *Id.* at 29-31.

¹⁹⁷ *See* Midwest ISO TO Order at 1371.

all transacting over the Midwest ISO grid, including parties transacting under GFAs. Accordingly, we reaffirm that Schedule 17 charges should be assessed on all transactions over the Midwest ISO grid, including transactions under GFAs.

L. Maximum Megawatts Transmitted Under GFAs – Three-Year Historical Data

182. In the Procedural Order, in order to fully analyze the proposed TEMT, the Commission stated that “it is imperative that we know the number and location of megawatts represented under GFAs, and how the GFAs are used in practice.”¹⁹⁸ Thus, the Commission asked GFA parties to submit in their joint filings to the Commission the maximum number of megawatts transmitted pursuant to the GFA for each set of source and sink points. For GFAs that did not contain language specifying a maximum number of megawatts, the parties to the GFA were required to submit at least three years’ worth of historical data, to demonstrate what transactions they have made pursuant to the GFA.

183. In the GFA Order, as to the finding required for the maximum number of megawatts transmitted pursuant to each GFA, the Commission adopted a generic approach if the GFA had no stated megawatt amount.¹⁹⁹ For contracts for which three years of historical data was available, the Commission found that the largest capacity figure in the three-year period was the correct number to use for the maximum megawatts transmitted. The Commission believed that “this finding errs on the side of conservative treatment of the GFAs and best preserves the bargain inherent in GFAs that do not contain stated capacity.”²⁰⁰ Thus, the Commission directed the Midwest ISO to use the “Maximum MWs Transmitted Under GFA” stated in Appendix B, along with the source and sink information provided in the Findings of Fact and the jointly filed templates, to account for these GFAs in its model developed for the initial FTR allocation.

1. Requests for Rehearing of Procedural Order

184. Midwest Parties object to the Commission’s request for information on the maximum number of megawatts transmitted pursuant to the GFA for each set of source and sink points as a violation of the long-standing principle of sanctity of contracts and a violation of the GFA parties’ due process rights. They state that there is no basis for

¹⁹⁸ Procedural Order at P 68.

¹⁹⁹ GFA Order at P 220.

²⁰⁰ *Id.*

depriving the GFA parties of the maximum capacity permissible under the GFA, since the maximum capacity rights are a real and significant economic benefit to the GFA parties, regardless of the amount that has been used historically. Midwest Parties add that in some cases the capacity contracted for under the GFA is to serve future load growth.

2. Requests for Rehearing of GFA Order

185. For several reasons, Dairyland states that the GFA Order classified its four GFAs²⁰¹ as carved out, not subject to the TEMT, and also established a maximum megawatt amount based on the highest amount transmitted in the past three years for each GFA. Dairyland states that Midwest ISO is now requiring that any transmission that exceeds this maximum is not service under the GFA and must be taken under the TEMT.²⁰²

186. Dairyland asserts that its GFAs do not contain a maximum number of megawatts that may be transmitted under that GFA and that the Commission erred in assigning a maximum number based on the historical data. Dairyland argues that it has the contractual right to utilize all necessary capacity required to serve its loads under its agreements. It asserts that the Commission effectively modified each of Dairyland's agreements and limited its contractual rights by assigning a maximum number of megawatts Dairyland can transmit under its GFA. Dairyland argues that as to GFA No. 293, which contains a *Mobile-Sierra* clause, the Commission modified the contract without making the required public interest finding to necessitate the modification. Dairyland recognizes that the historical data is necessary for allocating FTRs, but asserts that the Commission cannot arbitrarily nor capriciously dismiss that Dairyland's GFAs provide it with the contractual right to serve its load regardless of the megawatts transmitted. Dairyland also argues that the Commission failed to consider the Open-Access Same-Time Information System (OASIS) reservations as an addition to the megawatts associated with the source and sink points.

187. Rural Electric Cooperatives argue that the Commission unreasonably restrained GFA parties that did not specify maximum megawatts by limiting those parties to the highest megawatts transmitted per year over the three-year historical test period. They assert that this method of choosing the maximum megawatts arbitrarily governs its ability to service its existing load and future load. More specifically, because parties were not allowed to demonstrate what the maximum megawatts for their contracts should be,

²⁰¹ GFA Nos. 20, 41, 293, and 377.

²⁰² Dairyland GFA Rehearing Request at 7.

Rural Electric Cooperatives argues that the maximum megawatts adopted in the GFA Order violates the procedural requirements of section 206 of the FPA, the Administrative Procedure Act, due process, *Mobile-Sierra* and the just and reasonable standard.

3. Commission Determination

188. We agree that GFAs that do not list a maximum megawatt value should not necessarily be limited by the maximum amount of megawatts used during the last three years if the GFA under which service was taken is intended to cover load growth of the customer. Therefore, for GFAs with no stated maximum megawatts, where the GFA was designed to cover load growth of the customer, we clarify that a transmission owner or ITC participant taking service pursuant to the Midwest ISO Tariff to meet its obligations under the GFA must notify the Midwest ISO during each FTR registration period if the parties to the GFA expect that the highest three-year historic megawatt usage, as listed in Appendix B of the GFA Order, will not cover the customer's expected needs for the upcoming year. The transmission owner or ITC participant must tell the Midwest ISO the maximum number of megawatts that it anticipates will cover service that will be taken pursuant to the GFA. We direct the Midwest ISO to use this new higher number as the appropriate megawatt value associated with that GFA for the period requested. However, service above that listed in Appendix B for a GFA must be load that is covered by the terms and conditions of the GFA.

189. We note that the Commission took the conservative approach of using the highest usage in the past three years as the maximum megawatts associated with GFAs that do not have a stated megawatt amount. Therefore, during the transition period, we anticipate that there will be few requests for increases in megawatts for the carved-out GFAs. In order to remain informed on this issue, we direct the Midwest ISO to separately list, in its quarterly report to the Commission on the accuracy of the day-ahead schedules submitted by carved-out GFAs,²⁰³ each GFA for which an increase in megawatts over the highest megawatts from the past three years was requested, the amount of the increase, and the actual service in megawatts taken pursuant to each GFA with such an increase. The Midwest ISO should list in its quarterly reports all GFAs that have requested an increase above what was listed in Appendix B, along with the actual service taken, until such time

²⁰³ See GFA Order at P 144.

as the transmission owner or ITC participant notifies the Midwest ISO that it no longer needs the increased megawatts to cover service under the GFA. While we understand that predicting the maximum usage for the upcoming year is not an exact science, we intend to scrutinize the information in these reports to see if the increases are indeed necessary.

M. Standard of Conduct Issues

1. Requests for Rehearing

190. Xcel argues that, in the GFA Order, the Commission has ordered NSP's wholesale merchant function²⁰⁴ to have access to certain information prohibited under Order No. 2004²⁰⁵ to fulfill its role as a Responsible/Scheduling Entity. Xcel explains that, in compliance with Commission's directives, NSP has separated its wholesale merchant function from its transmission function. The wholesale merchant function of NSP will be the market participant in the Midwest ISO Energy Markets, and will perform functions such as nominating FTRs and scheduling, while the transmission function will not be a market participant and will perform only transmission functions. Xcel argues that the NSP merchant function must have access to certain GFA customer transmission information in order to fulfill its role as the Responsible and/or Scheduling entity for these GFAs but that this information is restricted under Order No. 2004. To remedy this, Xcel suggests that the Commission clarify that if the wholesale merchant function of a vertically integrated utility is the market participant in the Midwest ISO markets and the Responsible Entity, and the merchant function obtains customer consent from affected GFA customers as outlined in Order No. 2004,²⁰⁶ then the wholesale merchant function may receive access to any information concerning that customer's GFA transactions necessary to fulfill its roles as Responsible Entity and/or Scheduling Entity.

²⁰⁴ NSP is an affiliate of Xcel.

²⁰⁵ *Standards of Conduct for Transmission Providers*, Order No. 2004, 68 Fed. Reg. 69,134 (Dec. 11, 2003), FERC Stats. & Regs. ¶ 31,155 (2003), *order on reh'g*, Order No. 2004-A, 69 Fed. Reg. 23,562 (Apr. 29, 2004), FERC Stats. & Regs. ¶ 31,161 (2004), *order on reh'g*, Order No. 2004-B, 69 Fed. Reg. 48,371 (Aug. 10, 2004), FERC Stats. & Regs. ¶ 31,166 (2004), *order on reh'g*, Order No. 2004-C, 70 Fed. Reg. 284 (Jan. 4, 2005), FERC Stats. & Regs. ¶ 31,172 (2005), *reh'g pending* (Standards of Conduct).

²⁰⁶ Xcel GFA Rehearing Request at 20 (*citing* 18 C.F.R. § 358.5(b)(4) (2004)).

191. LG&E requests the Commission to clarify that its wholesale merchant function employees can continue to administer GFA bundled sales and transmission agreements, provided that such merchant function employees do not receive any preferential treatment or preferential information from LG&E transmission function employees and provided that all transmission is scheduled on the Midwest ISO OASIS. LG&E explains that under certain bundled GFAs with EKPC, its merchant function sells power and reserves transmission service on the Midwest ISO OASIS. LG&E asks the Commission to clarify that having its merchant function administer such bundled arrangements does not violate Order No. 2004 requirements as long as LG&E's merchant function does not engage in any off-Open Access Same-Time Information System (OASIS) communications and is not treated differently from non-affiliated entities.

192. LG&E also requests clarification for those GFAs where it acts purely as a transmission owner of transmission facilities used to provide transmission of EKPC power to EKPC load. As a Responsible Entity under these GFAs, the transmission function will need to obtain FTRs, but to do so the transmission function will have to serve as a market participant. Therefore, LG&E asks that the Commission clarify that LG&E's transmission function will not violate Order No. 2004 if its transmission function registers with Midwest ISO as a market participant, which is a requirement to receiving FTRs, for hedging against congestion associated with EKPC's grid usage or, alternatively, to grant LG&E the necessary waivers to do so.

193. Finally, LG&E seeks clarification that it cannot be accused of market manipulation as long as its forecasts are reasonable.

2. Commission Determination

194. We grant Xcel's request and clarify that if the wholesale merchant function of a vertically integrated utility follows the Standards of Conduct non-discrimination requirements²⁰⁷ and receives voluntary consent in writing from a non-affiliated transmission customer, and posts that information on its OASIS, then it may obtain from its affiliated transmission function the information needed for the wholesale merchant function to fulfill its role as a Responsible and or Scheduling Entity for an Option A, B, or C GFA or as a transmission owner or ITC participant for a carved-out GFA.

195. We also grant LG&E's request and clarify that its wholesale merchant function will not be in violation of the Standards of Conduct if, as LG&E describes, the wholesale merchant function does not receive any preferential treatment or preferential information

²⁰⁷ 18 C.F.R. § 358.5(b)(4) (2004).

from LG&E transmission function employees, does not engage in any off-OASIS communications, schedules all transmission on the Midwest ISO OASIS, and is not treated differently from any non-affiliated entity.

196. We address LG&E's concern about its transmission function having to register as a market participant for the sole purpose of fulfilling the role of Responsible and Scheduling Entity for certain GFAs later in this order where we address the Midwest ISO's requirement for all GFA Responsible and Scheduling Entities to become market participants. Finally, in response to LG&E's request for clarification that it cannot be accused of market manipulation as long as its forecasts are reasonable, we note that the Commission will be looking at such conduct in the Midwest ISO's quarterly filings on the accuracy of GFA schedules and in reports from the IMM, and that is the appropriate forum to address such concerns.

N. Ludington Plant - GFA Nos. 267, 268, and 269

197. GFA Nos. 205, 206, 207, 267, 268, and 269 (hereafter, Ludington GFAs) are all contracts, including some repeats of the same contract, that pertain to the operation of the Ludington Plant, a pumped storage facility located on the METC transmission system. In the GFA Order, the Commission found that Midwest ISO should carve out capacity represented in the Ludington GFAs from the Midwest ISO's FTR model.²⁰⁸ Also, the GFA Order provided that transactions under Detroit Edison's GFAs that pertain to the Ludington Plant are not subject to the Schedule 16 charge,²⁰⁹ and that Detroit Edison would be assessed Schedule 17 charges only on its pumped storage facility's injections into the transmission system and not on energy used to refill the storage facility's upper reservoir.²¹⁰

1. Requests for Rehearing

198. Consumers requests clarification that Consumers is treated the same as Detroit Edison with regard to payment of Schedule 16 and 17 charges for the Ludington GFAs.

199. Consumers asserts that the Commission found that METC, as the owner of the transmission system that serves the Ludington Plant, should be the Responsible Entity and the Scheduling Entity for the Ludington GFAs. Consumers restates its position that

²⁰⁸ GFA Order at P 187.

²⁰⁹ *Id.* at P 296.

²¹⁰ *Id.* at P 299.

it does not object to designation as the Responsible Entity and Scheduling Entity for its use of the METC system. International Transmission requests that the Commission clarify that Detroit Edison's responsibility for Schedule 17 costs related to the Ludington Plant controls other contrary language in the GFA Order. METC asks the Commission to clarify that it will not be responsible for Schedule 17 charges under the Ludington GFAs. METC argues that because the language used in the GFA Order could be interpreted to hold METC responsible for the Schedule 17 charges, METC requests rehearing as necessary to confirm that it bears no responsibility for any Schedule 17 charges.

200. Detroit Edison seeks clarification that due to the unique aspects of the Ludington Plant, the rights created in the carved-out agreements continue beyond the transition period. Alternately, Detroit Edison seeks rehearing if the Commission intended to include automatically the Ludington GFAs in the Day 2 Markets as of 2008.

2. Commission Determination

201. We grant Consumers' request for clarification on Schedule 16 and 17 charges as they apply to transactions under the Ludington GFAs. Consumers' transactions that are provided for under the Ludington GFAs are not subject to Schedule 16 charges and should only be assessed the Schedule 17 charge for injections of the pumped storage facilities into the transmission system.

202. Contrary to Consumer's assertion, the Commission did not designate a Responsible Entity or Scheduling Entity for the Ludington GFAs. Since we found that the Midwest ISO should carve out the transactions under the Ludington GFAs, there was no need to designate a Responsible Entity or Scheduling Entity.²¹¹ However, the Commission did direct Consumers and Detroit Edison to provide information to the Midwest ISO on schedules for their respective transactions under the Ludington GFAs, as well as provide additional information on the restrictions on the Ludington Plant's use and any daily and hourly contingencies the units face.²¹² We expect that both Consumers and Detroit Edison will use their best efforts in providing this information to the Midwest ISO.

203. We grant International Transmission and METC's request for clarification. In the GFA Order, we found that the billing entity for carved-out GFAs, the entity responsible for payment of Schedule 17 charges, is the transmission owner or ITC participant taking transmission service pursuant to the Midwest ISO Tariff to meet its obligations under the

²¹¹ *Id.* at P 197; Appendix B at 4, 5.

²¹² GFA Order at P 186.

GFA.²¹³ We also found that “Detroit Edison should be assessed the Schedule 17 charge only on *its* pumped storage facility’s injections into the transmission system.”²¹⁴ As we explained above, International Transmission and METC are not transmission owners for the purpose of designation of a billing entity for the carved-out Ludington GFAs. In their joint filing, Detroit Edison, Consumers, METC, and International Transmission agreed that neither METC nor International Transmission is a “market participant” and neither should be responsible for the transactions under the Ludington GFAs.²¹⁵ We find that designation of Detroit Edison and Consumers as the billing entities for the Ludington GFAs best meets the parties’ expressed intentions as to the allocation of cost responsibilities. Since the Ludington Plant is located on METC’s system, the Ludington GFAs provide for service to Detroit Edison across both METC’s system and International Transmission’s system. We clarify that the Midwest ISO should apply Schedule 17 charges to Detroit Edison for injections onto METC’s system from the Ludington Plant and withdrawals from International Transmission’s system to serve Detroit Edison’s load. We further clarify that Consumers is the billing entity for its transactions pursuant to the Ludington GFAs when the Ludington Plant is in generating mode.

204. Finally, we reject Detroit Edison’s request that the Commission affirm that the carve-out of the Ludington GFAs, granted in the GFA Order, will continue beyond the transition period. The Commission, in the GFA Order, made no determination regarding, *i.e.*, either precluding or continuing, the carve-out beyond 2008. In the GFA Order, the Commission accepted the provision that the Midwest ISO will evaluate the impact that the optional treatments for GFAs have on the Energy Markets 24 months prior to February 1, 2008, and that it will make a section 205 filing 12 months prior to February 1, 2008 (*i.e.*, due on or before February 1, 2007) that details a new proposal for the treatment of GFAs after the transition period concludes.²¹⁶ In this order, the Commission requires the Midwest ISO to include in its February 2007 filing a proposal for the post-transition-period status and treatment of carved-out GFAs. Once the Midwest ISO’s proposal is filed, the Commission will evaluate any proposals to extend the carve-out for the Ludington GFAs and any other GFAs beyond February 1, 2008.

²¹³ *Id.* at P 300.

²¹⁴ *Id.* at P 299 (emphasis added, footnote omitted).

²¹⁵ See Consumers, Detroit Edison, METC, and International Transmission joint filing, Docket Nos. ER04-691-000 and EL04-104-000 (June 25, 2004).

²¹⁶ GFA Order at P 268.

O. GFA Nos. 142 and 144

205. In the GFA Order, the Commission explained that the parties to GFA Nos. 142 and 144, PSI Energy, Inc. (a franchised public utility affiliate of Cinergy) and Wabash Valley Power Association, Inc. (Wabash), indicated that they selected Option A treatment for certain transactions (representing 70 megawatts) and Option B for other transactions (representing 326 megawatts). However, the Commission found that it was unclear whether the transactions for each option were associated with one GFA, or whether the parties selected different options for separate transactions under the same GFA.²¹⁷ Thus, because the TEMT requires that parties to a GFA select just one option for its treatment, the Commission approved the settlement for GFA Nos. 142 and 144, but required the parties to choose one option for the transactions under each GFA.

1. Request for Rehearing

206. Wabash states that it and Cinergy inadvertently omitted some of the load being served under the GFAs, and that the actual amount relating to GFA Nos. 142 and 144 is 791 megawatts.²¹⁸ Specifically, Wabash asks that the amount shown for GFA No. 142 be 326 megawatts of Option B service and that GFA No. 144 be shown as 465 megawatts of Option A service. Should the Commission disagree, Wabash asks that the entire 791 megawatts be carved-out, as these agreements are subject to the *Mobile-Sierra* public interest standard of review.

2. Commission Determination

207. Wabash satisfied the Commission's directive to select one option for the transactions under each GFA by indicating that GFA No. 142 is subject to Option B of the Midwest ISO TEMT, while GFA No. 144 is subject to Option A of the Midwest ISO TEMT. The Commission accepts Wabash's specification and will amend Appendix B to recognize its selections.²¹⁹

²¹⁷ *Id.* at P 281.

²¹⁸ Wabash GFA Rehearing Request at 4.

²¹⁹ Revisions to Appendix B are attached to this order.

208. However, Wabash has not supported its request to increase the total maximum megawatts to 791 for GFA Nos. 142 and 144. Wabash supplies information sufficient to support 326 megawatts under GFA No. 142²²⁰ and 120 megawatts for GFA No. 144,²²¹ for a total of 446 megawatts. This new total includes an additional 50 megawatts of service for the Henry County Cadiz facility, which was not included in Appendix B to the GFA Order. This total does not include the additional 345 megawatts that Wabash states it inadvertently omitted, because Wabash did not substantiate its request for this 77 percent increase.²²² Wabash states that it omitted the 345 megawatts because it did not intend to use up the FTR capability for the entire FTR pool and that the total does not include Wabash's entire grandfathered load,²²³ but does not provide sufficient information for us to determine if the increase is appropriate. Accordingly, the Commission will amend Appendix B to read that GFA No. 142 is allotted a maximum of 326 megawatts under Option B, while GFA No. 144 is allotted a maximum of 120 megawatts under Option A. If Wabash wishes to increase its maximum megawatt usage above these amounts, and that increase is allowed under the terms of its GFAs, Wabash must submit supporting source and sink information to the Midwest ISO. We direct the Midwest ISO to make and file any revisions to Attachment P if it receives information sufficient for it to verify the request for an increase in the megawatts for these GFAs.

²²⁰ 170 megawatts (source is Hoosier Energy/PSI interface and sink is the PSI/NIPSCO interface) plus 156 megawatts (source is Gibson Generating Station and sink is the PSI/AEP interface).

²²¹ 70 megawatts (source is multiple generation stations and sink is PSI Load Zone) plus 50 MW (source is Henry County Facility and sink is the PSI Load Zone).

²²² For example, Wabash simply states that the additional 345 megawatts is required because its initial joint filing with Cinergy did not incorporate its entire load under GFA Nos. 142 and 144. However, Wabash offers no supporting historical source or sink data and only references a tentative agreement struck between itself and PSI Energy as support for the increased megawatts. *See* Wabash GFA Rehearing Request at 4-5.

²²³ *Id.* at 4.

209. We deny Wabash's request that the Commission carve out GFA Nos. 142 and 144 in the event that the Commission does not increase the maximum GFA load to 791 megawatts. In its June 24, 2004 Agreement in Principle, Wabash and PSI Energy selected a combination of Option A and B for GFA Nos. 142 and 144. Under that agreement, Wabash and PSI Energy bound themselves to operate under one of the three options offered by the Midwest ISO. The Commission's goal in allowing settling parties to select one of the Midwest ISO options, prior to July 28, 2004, was to spur settlement. Allowing parties after the fact to renege on their settlement undermines the settlement process.

P. GFA Nos. 179 and 185

1. Request for Rehearing

210. Hoosier argues that, as a transmission owner providing transmission service under carved-out GFAs, it should not be responsible for the Schedule 17 charges that are assessed to these GFAs. Hoosier explains that it did not indicate the GFA Responsible Entity in its informational filing but that it did indicate that the customers for both GFA Nos. 179 and 185, PECO Energy Company (PECO) and Wabash, respectively, were the financially responsible parties.²²⁴ Therefore, Hoosier asserts that PECO and Wabash should be the parties responsible for the Schedule 17 charges.

2. Commission Determination

211. In the GFA Order, the Commission found that the billing entity for carved out GFAs is the transmission owner.²²⁵ As the transmission owner, Hoosier will be subject to Schedule 17 charges unless the transmission customers under the carved-out GFAs agree otherwise. In the event that Wabash and PECO agree to serve as the billing entities for their respective GFAs, Hoosier should notify the Midwest ISO.

²²⁴ Hoosier GFA Rehearing Request at 3.

²²⁵ GFA Order at P 300.

Q. GFA Nos. 186 and 199**1. Request for Rehearing**

212. In its protest filed in Docket No. ER04-106-005,²²⁶ Hoosier explains that Appendix B correctly lists that 40 megawatts of transmission service is provided under GFA No. 186, and as being carved-out. However, Hoosier argues that Appendix B should be modified to show that the portion of service provided by Indianapolis Power and Light Company (Indianapolis Power) under GFA No. 186 as Option B because Hoosier and Indianapolis Power chose Option B in an “Agreement in Principle” that was filed with the Commission on June 25, 2004.

2. Commission Determination

213. The Agreement in Principle filed by Hoosier and Indianapolis Power fails to reference the specific GFA(s) covered by that agreement.²²⁷ As a result, the Commission did not recognize that, as now explained by Hoosier in its protest, the Agreement in Principle was meant to apply to GFA No. 186, which is an interconnection agreement dated December 1, 1981, between Hoosier and Indianapolis Power (1981 Agreement). Accordingly, the Commission lists GFA No. 186 as carved-out due to Hoosier’s non-jurisdictional status as determined in the GFA Order.²²⁸

214. While Hoosier requests that service it provides under the 1981 Agreement remain carved-out, it also asks that service Indianapolis Power provides to Hoosier under the 1981 Agreement be designated as Option B. However, GFA No. 186 covers only service Hoosier provides to Indianapolis Power under the 1981 Agreement; service Indianapolis Power provides to Hoosier under the 1981 Agreement is designated separately, as explained below. Therefore, we deny Hoosier’s request that Appendix B be changed to list GFA No. 186 as Option B for service provided by Indianapolis Power.

²²⁶ On November 15, 2004, the Midwest ISO filed its revised Attachment P in Docket No. ER04-106-005, in compliance with the GFA Order. In this order, the Commission addresses issues raised by Hoosier in its protest filed in Docket No. ER04-106-005, to the extent that they that pertain to Appendix B.

²²⁷ Specifically, the parties did not submit the Agreement in Principle with any specific GFA template.

²²⁸ GFA Order at P 150.

215. Our review indicates that service Indianapolis Power provides to Hoosier under the 1981 Agreement was originally listed as GFA No. 199 in Attachment P. However, the Midwest ISO deleted GFA No. 199 from Attachment P prior to issuance of the GFA Order. Therefore, as an initial matter, if GFA No. 199 was incorrectly deleted, Hoosier and Indianapolis Power should request that the Midwest ISO file with the Commission a revised Attachment P that includes GFA No. 199.

216. Hoosier states that service provided to it by Indianapolis Power under the 1981 Agreement (GFA No. 199, if it is reinstated) should be Option B because it was chosen in the Agreement in Principle. However, the Agreement in Principle states that:

[i]n the event that, in the opinion of either Party, there is hereinafter a material change in the treatment of GFAs under the EMT as a result of proceedings in FERC Docket Nos. ER04-691-000 or EL04-104-000 ... either party may terminate this Agreement upon sixty (60) days' advance written notice to the other Party stating an intention to terminate this Agreement at the end of such sixty (60)-day period.²²⁹

217. Because the parties did not unconditionally select a GFA treatment option, the Commission finds that the above clause does not satisfy the Procedural Order's requirement that entities' choosing to select one of the Midwest ISO's proposed treatment options, or convert to TEMT service, make a simple statement indicating such choice.²³⁰ Therefore, the selection of Option B does not apply if GFA No. 199 is reinstated. Instead, since the Agreement in Principle states that service Indianapolis Provides to Hoosier under the 1981 Agreement is subject to the just and reasonable standard of review, GFA No. 199 would have to be Option A, Option C or be converted to TEMT service if it was incorrectly deleted from Attachment P.

R. GFA Nos. 220 and 221

218. In the GFA Order, the Commission found that the historical source points provided for in GFA Nos. 220 and 221 were sufficient to determine the proper treatment of the GFAs under the TEMT. While EKPC argued that the source points under these

²²⁹ Agreement in Principle between Hoosier and Indianapolis Power, section 5.0 (June 25, 2004).

²³⁰ Procedural Order at P 69.

GFAs is unlimited, the GFA Order found that any dispute regarding source points in these contracts in the future is a contract interpretation issue that is outside the scope of this proceeding. Thus, the Commission held that the Midwest ISO “will use the historical information provided in incorporating transactions under these GFAs into the Energy Markets, depending on the standard of review.”²³¹

1. Request for Rehearing

219. EKPC states that the GFA Order found that the applicable source points under these agreements to be beyond the scope of this proceeding despite evidence that the GFAs provide for unlimited source points. EKPC argues that the Midwest ISO should not be allowed to use historical information to limit the source points, thereby limiting the parties’ rights under the GFAs. EKPC requests that the Commission clarify that the source points under GFA Nos. 220 and 221 are unlimited.

2. Commission Determination

220. We discuss below the issue of how the Midwest ISO should handle changes to source points for GFAs that allow for such changes where we address the November Compliance Filing and the scheduling of carved-out GFAs. However, we continue to find, as we did in the GFA Order,²³² that whether specific GFAs (*e.g.*, GFA Nos. 220 and 221) allow for unlimited source points is a contract interpretation issue that is beyond the scope of this proceeding.

S. GFA Nos. 286, 289, and 291

221. GFA Nos. 286, 289, and 291, all three of which Minnesota Power is the transmission owner for, are all listed on Appendix B as “carve-outs.”

²³¹ GFA Order at P 202. The Commission explained that GFA No. 221 and the service applicable to loads in excess of base load amounts under GFA No. 220 are subject to a just and reasonable standard of review. Service applicable to base load amounts under GFA No. 220, the parties have explicitly provided, are subject to the *Mobile-Sierra* public interest standard of review. *Id.* at P 202 n.167.

²³² GFA Order at P 202.

1. Requests for Rehearing

222. Minnesota Power seeks rehearing and argues that the Commission incorrectly disregarded the settlement filed for GFA Nos. 286 and 291. It argues that the parties agreed to the six informational data points required by the Procedural Order, including the designation of the Responsible Entity and Scheduling Entity for the GFAs.²³³ It seeks rehearing of the Commission's designation of GFA Nos. 286 and 291 as carve-outs because the parties' agreement on the six data points should have been interpreted to mean that the parties to the GFAs wanted the GFAs to be included in the Midwest ISO Energy Markets.

223. Minnesota Power and MRES also seek correction or rehearing of the Commission's categorization of GFA No. 289 as a carve-out in Appendix B to the GFA Order. They point out that the parties to GFA No. 289 chose Option B in the joint filing they made on June 25, 2004. Additionally, they state that the parties have agreed that MRES would be the Scheduling Entity for GFA No. 289 and that the Cities of Wadena and Staples would be the Responsible Entities.

2. Commission Determination

224. The Commission will deny the requests for rehearing of the Commission's designation of GFA Nos. 286 and 291 as carved-out. In the Procedural Order, the Commission set forth the guidelines for GFAs to follow to opt into the TEMT, requiring parties to make a simple statement in their joint filings, before July 28, 2004, indicating whether or not they were willing to convert their contract to TEMT service or settle their GFA by accepting one of the Midwest ISO's proposed treatment options.²³⁴ The parties to GFA Nos. 286 and 291 did not provide this information. Since unilateral modification of these GFAs is not subject to the just and reasonable standard of review, the Commission designated these as carved-out in the GFA Order. However, if the parties to these GFAs wish to convert to TEMT service or to Options A or C, we encourage them to do so, following the procedures proposed by the Midwest ISO in its November Compliance Filing and discussed later in this order.

²³³ Minnesota Power GFA Rehearing Request at 3.

²³⁴ Procedural Order at P 69.

225. Further, as a result of GFA Nos. 286 and 291's carved-out status, the parties' jointly filed templates designating the Responsible and Scheduling Entities for each GFA are immaterial. The designation of the Responsible Entity and Scheduling Entity only pertain to GFAs that will operate in the Midwest ISO Energy Markets. Consequently, Appendix B only lists the Responsible and Scheduling Entities for those GFAs included in the Midwest ISO Energy Markets, which GFA Nos. 286 and 291, as carved-out GFAs, are not. Therefore, the requests for rehearing regarding the appropriate Scheduling and Responsible Entity designations for GFA Nos. 286 and 291 are denied.

226. We will grant the request to change the designation for GFA No. 289 from carved-out to Option B. We note that the June 25, 2004 joint filing for GFA No. 289 states that MRES and Minnesota Power "intend" to select Option B, but it was not clear if the parties had indeed chosen Option B.²³⁵ However, with both parties' clarification that Option B was the choice they intended, we will modify Appendix B accordingly.

227. Separately, the GFA Order found that the billing entity for carved out GFAs would be the transmission owner.²³⁶ However, in the event that parties agree to an alternative billing entity for their respective GFAs, those entities should notify Midwest ISO of such agreement.

T. GFA Nos. 297, 306, 309, 311, 313, 314, and 317

228. In the GFA Order, the Commission found that it did not have sufficient information in the record to determine whether transmission service under the above-listed GFAs was provided over Midwest ISO facilities or whether these contracts should be excluded from this proceeding and not be considered GFAs for purposes of the Energy Markets.²³⁷ The Commission explained that input from the Midwest ISO on whether control of the facilities in question was transferred to the Midwest ISO (as Transmission Provider) was lacking. Therefore, the Commission set them for further hearing and settlement judge procedures, and discussed the issues to be addressed:

²³⁵ See Minnesota Power and MRES joint filing concerning GFA No. 289, Docket Nos. ER04-691-000 and EL04-104-000 at 2 (June 25, 2004).

²³⁶ GFA Order at P 300.

²³⁷ *Id.* at P 196.

In this further proceeding, the parties can address the threshold issue of whether the service provided under these contracts will impact operation of the Energy Markets. In addition to this issue, parties should also address which facilities have been transferred to the control of the Midwest ISO and the six pieces of information the Commission asked for in Step 1, as described in the Procedural Order. This information is important in order to determine if these contracts should be excluded and, if not, how they should be treated under the TEMT.²³⁸

229. However, while the Commission set these matters for a further trial-type evidentiary hearing, the Commission encouraged the parties to make every effort to settle their dispute before hearing procedures were commenced.

1. Requests for Rehearing

230. Otter Tail asserts that the Commission should have imposed a specific refund obligation with respect to the assessment of Schedule 17 for the contracts it set for hearing and settlement judge procedures.²³⁹ It requests that the Commission clarify that, in the event that these GFAs proceed to hearing and the Commission finds that transmission service under these GFAs is not provided over Midwest ISO facilities, the Midwest ISO will be required to refund any Schedule 17 costs assessed in the interim period before such Commission determination.²⁴⁰

231. Basin Cooperatives argue that the Commission's order requiring a second hearing on the issue of whether transmission service to Central Power Electric Cooperative, Inc. (Central Power) under GFA No. 297 is subject to the Midwest ISO's control, after already having held a hearing in Step 2 of the GFA proceeding, violated the Commission's long-standing policy of requiring the parties to a proceeding to fully litigate matters that are set for hearing at that hearing, and that a second hearing will be

²³⁸ *Id.*

²³⁹ Otter Tail specifically refers to GFAs Nos. 297, 306, 309, 311, 313, 314, and 317.

²⁴⁰ Otter Tail GFA Rehearing Request at 7 (*citing generally Allegheny Power System Operating Cos.*, 106 FERC ¶ 61,003 at P 30 (2004); *Midwest Independent Transmission System Operator, Inc.*, 99 FERC ¶ 61,117 at 61,503 (2002)).

ordered only in extraordinary circumstances.²⁴¹ Basin Cooperatives argue that the Midwest ISO's failure to submit contrary testimony or briefs is not sufficient reason to require a second hearing, which gives the Midwest ISO a second opportunity to litigate this issue.

232. Basin Cooperatives also state that the testimony and arguments presented during Step 2 provide a clear basis for the Commission to determine that Basin Cooperatives did not transfer rights over the facilities used to serve Central Power under GFA No. 297 to the Midwest ISO. Basin Cooperatives explain both Otter Tail and Basin Cooperatives provide service under GFA No. 297 over completely-integrated, jointly-owned transmission facilities (integrated facilities). Basin Cooperatives state that Otter Tail transferred Otter Tail's rights on the integrated facilities to the Midwest ISO, but did not and could not transfer the portion of the integrated facilities that is used to serve Central Power load under GFA 297.

233. In addition, Basin Cooperatives state that the record evidence indicates that finding that service to Central Power is not over Midwest ISO facilities will have minimal impact on the Midwest ISO since generators in the Midwest ISO are extremely unlikely to respond to congestion on the integrated facilities. Basin Cooperatives further argue that the Midwest ISO has not challenged this evidence, and that the record demonstrates that the Midwest ISO Energy Markets will not benefit from nor be harmed by service provided under GFA No. 297.

2. Commission Determination

234. We grant Otter Tail's request for clarification with respect to these GFAs (which have been already set for hearing), with refunds from April 1, 2005, for service provided under these GFAs. To the extent that the Midwest ISO assesses charges for transactions under GFA Nos. 297, 306, 309, 311, 313, 314 and 317, the Commission will require that the Midwest ISO refund those charges with interest,²⁴² in the event that the service provided under these GFAs is ultimately determined to not be over Midwest ISO facilities.

²⁴¹ Basin Cooperatives GFA Rehearing Request at 14 (*citing Public Service Company of New Mexico*, 20 FERC ¶ 61,290 (1982); *East Texas Electric Cooperative, Inv. v. Central and South West Services, Inc.*, 94 FERC ¶ 61,218 (2001); *Detroit Edison Company*, 105 FERC ¶ 61,209 (2003)).

²⁴² 18 C.F.R. § 35.19a (2004).

235. We disagree with Basin Cooperatives' claim that we are violating our policy by providing a hearing on the issue of whether specific facilities were transferred to the Midwest ISO. We note that the Step 2 hearing was "narrowly focused and expedited"²⁴³ and addressed the six specific data points and, not the discreet issue we set for hearing in the GFA Order. In addition, briefs opposing exceptions were not allowed.²⁴⁴ We continue to believe that the most appropriate way to determine the merits of Basin Cooperatives' arguments is either through a hearing or preferably through settlement and we therefore deny Basin Cooperatives' request for rehearing on this issue.

U. GFA Nos. 273/311 and 274/320

1. Request for Rehearing

236. Otter Tail requests that the Commission clarify that GFA Nos. 311 and 320 (as well as all other carved out GFAs) will continue to be grandfathered agreements with respect to Otter Tail's portion of the transmission lines and service to its own load, and thus be afforded grandfathered treatment pursuant to the Midwest ISO OATT.

237. Montana-Dakota is concerned that the only carved-out loads identified in Appendix B for GFA Nos. 273/311 and 274/320 were those of Minnkota Power Cooperative and NorthWestern Public Service Company, neither of which is a Midwest ISO participant. Montana-Dakota further asserts that because its GFAs were silent on the standard of review, the GFAs should be fully carved-out of the Midwest ISO Energy Markets. As a result, Montana-Dakota asks the Commission to clarify that each of these agreements be treated as a GFA, and any transmission of energy for Montana-Dakota pursuant to those agreements will not be subject to the TEMT.

2. Commission Determination

238. It is unclear what Otter Tail is requesting when it asks the Commission to clarify that carved-out GFAs should still be considered "Grandfathered Agreements" for the purpose of service under the Midwest ISO OATT. Carved-out GFAs retain their physical transmission rights and the customers under carved-out GFAs continue to receive service pursuant to the terms and conditions of the carved-out GFAs. To the extent that Otter Tail had "priority" over certain transmission lines under its GFAs before the start of the Energy Markets, as it argues it did, the carve-out of its GFAs should not affect that

²⁴³ Procedural Order at P 76.

²⁴⁴ *Id.*

“priority.” The capacity needed to serve carved-out GFA load is not made available to others in the FTR allocation process and carved-out GFAs are not subject to congestion or loss charges. If part of Otter Tail’s load was served previously under a carved-out GFA, and not under its network integration transmission service agreement (NITSA) under the TEMT, then it will continue to be served under the carved-out GFA. However, we note that the carve-out of certain Otter Tail GFAs does not mean that Otter Tail load served pursuant to its NITSA is now carved out.

239. The Commission also clarifies that Appendix B will be amended to reflect Montana-Dakota’s carved-out status for GFA Nos. 273/311 and 274/320. However, we note that these GFAs are currently in hearing to determine whether or not transmission service is being provided over Midwest ISO facilities. Accordingly, the finding in the instant proceeding is subject to the outcome of those hearing procedures

V. GFA No. 316

240. Appendix B lists Otter Tail as the transmission owner under GFA No. 316.

1. Request for Rehearing

241. Otter Tail argues that Minnesota Power should be listed as the transmission owner for GFA No. 316. Otter Tail states that it is not a party to GFA No. 316, should not be listed as a transmission owner, and Otter Tail’s GFAs should not be relevant to the answers to the Commission’s six questions with respect to GFA No. 316.

2. Commission Determination

242. On July 13, 2004 the presiding judges ordered GFA No. 316 to be added to the list of Minnesota Power contracts.²⁴⁵ As a result, GFA No. 316 should have been added to the list of Minnesota Power contracts, not Otter Tail’s. Accordingly, the Commission will amend Appendix B to list Minnesota Power as the transmission owner for GFA No. 316 and will delete references to any Otter Tail GFAs in the description of GFA No. 316.

²⁴⁵ See Order Confirming Rulings, Adding GFA Nos. 446-450, and Reinserting GFA No. 316, Docket Nos. ER04-691-000 and EL04-104-000 at P 6 (July 13, 2004).

W. GFA Nos. 318, 355, 358, and 359

243. The Commission found that GFA No. 318 was subject to the just and reasonable standard of review and that the parties to GFA Nos. 355, 358, and 359 settled on Option B treatment.

1. Requests for Rehearing

244. MRES and Otter Tail seek correction or rehearing of the Commission's designation of Otter Tail as the Responsible Entity and Scheduling Entity for GFA No. 318. They request that the Commission correct Appendix B and clarify that Otter Tail is the Responsible Entity and Scheduling Entity for Otter Tail load under GFA No. 318 and that MRES is the Responsible Entity and Scheduling Entity for MRES load under GFA No. 318. Furthermore, in Otter Tail and MRES' June 25, 2004 joint response regarding GFA No. 318, the parties indicated that MRES "intends to select Option B for treatment for purposes of scheduling and settlement of this GFA."²⁴⁶ However, GFA No. 318 is listed under as subject to the just and reasonable standard in Appendix B, and therefore only Options A and C are available. As such, MRES and Otter Tail request that the Commission appropriately reflect in Appendix B, the parties' selection of Option B for GFA No. 318.

245. MRES and Xcel also seek correction or rehearing of the Commission's designation of NSP as the Responsible Entity and Scheduling Entity for GFA Nos. 355, 358 and 359.²⁴⁷ MRES and Xcel request that the Commission revise Appendix B relating to these GFAs to properly identify, in accordance with the joint filings: (1) MRES as the Scheduling Entity and the City of Hillsboro, North Dakota as the Responsible Entity for GFA No. 355; (2) MRES as the Scheduling Entity and the City of Sauk Centre, Minnesota as the Responsible Entity for GFA No. 358; and (3) MRES as the Scheduling Entity and the City of St. James, Minnesota as the Responsible Entity for GFA No. 359.

2. Commission Determination

246. In their July 16, 2004 joint filing for GFA No. 318, MRES and Otter Tail specified that each party will assume the roles of Responsible Entity and Scheduling Entity for their respective loads. In the GFA Order, the Commission found that, if parties agreed upon the designations of the Responsible Entity and/or Scheduling Entity, the

²⁴⁶ MRES GFA Rehearing Request at 4-5.

²⁴⁷ *Id.* at 5.

Commission would adopt that designation.²⁴⁸ MRES and Otter Tail fulfilled this requirement. Accordingly, the Commission will amend Appendix B to list MRES and Otter Tail as both the Responsible Entities and Scheduling Entities for their respective loads pursuant to GFA No. 318.

247. MRES' and Otter Tail's assertion that the Commission erred in failing to designate GFA No. 318 as an Option B GFA under the Midwest ISO TEMT is incorrect. We note that their June 26, 2004 filing states that MRES "intends" to select Option B, but also states, "[g]iven that the [C]ommission has not yet ruled on many of the major aspects of the TEMT, Otter Tail has not yet reached a decision on this issue."²⁴⁹ In the Procedural Order, the Commission stated, "[t]he parties should make a simple statement in their joint filings to indicate whether or not they are willing to voluntarily convert their contract to TEMT service or settle their GFA by accepting the Midwest ISO's proposed treatment of GFAs."²⁵⁰ Since both parties to GFA No. 318 did not concur in the selection of Option B by the deadline, the requests for rehearing of the designation of GFA No. 318 as "just and reasonable" are denied.²⁵¹

248. In their July 19, 2004, joint filing for GFA No. 355, MRES and Xcel designated the City of Hillsboro, North Dakota as the Responsible Entity and MRES as the Scheduling Entity. In the GFA Order, the Commission found that if parties agreed upon the designations of the Responsible Entity and/or Scheduling Entity, the Commission would adopt that designation.²⁵² MRES and Xcel fulfilled this requirement. Accordingly, the Commission will amend Appendix B to list the City of Hillsboro, North Dakota as the Responsible Entity and MRES as the Scheduling Entity for GFA No. 355.

²⁴⁸ GFA Order at P 160, 165.

²⁴⁹ See Otter Tail and MRES joint filing concerning GFA No. 318, Docket Nos. ER04-691-000 and EL04-104-000 at 3 (July 16, 2004).

²⁵⁰ Procedural Order at P 69.

²⁵¹ See Otter Tail and MRES joint filing concerning GFA No. 318, Docket Nos. ER04-691-000 and EL04-104-000 at 3 (July 16, 2004).

²⁵² GFA Order at P 160, 165.

249. In their joint filing for GFA No. 358, MRES and Xcel designated the City of Sauk Centre, Minnesota as the Responsible Entity and MRES as the Scheduling Entity. In the GFA Order, the Commission found that if parties agreed upon the designations of the Responsible Entity and/or Scheduling Entity, the Commission would adopt that designation.²⁵³ MRES and Xcel fulfilled this requirement. Accordingly, the Commission will amend Appendix B to list the City of Sauk Centre, Minnesota as the Responsible Entity and MRES as the Scheduling Entity for GFA No. 358.

250. In their June 24, 2004, joint filing for GFA No. 359, MRES and Xcel designated St. James, Minnesota as the Responsible Entity and MRES as the Scheduling Entity. In the GFA Order, the Commission found that if parties agreed upon the designations of the Responsible Entity and/or Scheduling Entity, the Commission would adopt that designation.²⁵⁴ MRES and Xcel fulfilled this requirement. Accordingly, the Commission will amend Appendix B to list St. James, Minnesota as the Responsible Entity and MRES as the Scheduling Entity for GFA No. 359.

X. GFA No. 374

1. Request for Rehearing

251. Xcel explains that GFA No. 374 is an agreement for the connection of the Arpin Substation to serve Wisconsin Public Service Corporation (WPS), Wisconsin Power and Light Company (WPL), and Marshfield Electric and Water District loads in the Central Wisconsin System. It states that the Commission should require WPS and WPL, as Midwest ISO members and market participants, to assume the Responsible Entity and Scheduling Entity roles under the Arpin Agreement.

2. Commission Determination

252. In the GFA Order, the Commission found that GFA No. 374 did not currently provide for transmission service that will impact the Energy Markets, but set GFA No. 374 for hearing to determine whether GFA No. 374 could be used in the future to provide transmission service that will impact the Midwest ISO Energy Markets.²⁵⁵ On

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.* at P 217.

November 10, 2004, in Docket Nos. ER04-691-013, ER04-106-006 and EL04- 104-012, WPS Resources on behalf of WPS, Alliant on behalf of WPL, and Xcel on behalf of NSP, submitted an offer of settlement addressing the Commission's concern. The outstanding issue regarding the future impact of GFA No. 374 on the Midwest ISO markets was settled with the following sentence: "[GFA No. 374] is not to be used in the future to provide transmission service that will impact Midwest ISO's Energy Markets."²⁵⁶ On December 13, 2004, the settlement judge certified the settlement to the Commission as an uncontested offer of partial settlement.²⁵⁷ On January 26, 2005, the Commission issued an order approving the settlement.²⁵⁸ Therefore, we direct Midwest ISO to remove GFA No. 374 from Attachment P, to reflect the settlement described above, and we dismiss Xcel's request for rehearing on GFA No. 374 as moot.

Y. GFA No. 377

1. Requests for Rehearing

253. Dairyland states that Appendix B lists incorrect megawatt data for GFA No. 377. Dairyland asserts that the maximum megawatts should be 285.88 rather than the 214.88. Dairyland argues that the Commission failed to consider the information it submitted on OASIS reservations as an addition to the megawatts associated with the source and sink points and that, under the GFA, it is entitled to create new OASIS reservations necessary to serve Dairyland's load.

254. Xcel also argues that the designation of NSP (an Xcel subsidiary) as the Responsible and Scheduling Entities for GFA No. 377 is erroneous. It states that Dairyland should be designated as both the Responsible and Scheduling Entity.

²⁵⁶ See Settlement Agreement filed by WPS Resources on behalf of WPS, Alliant on behalf of WPL, and Xcel on behalf of NSP, Docket Nos. ER04-691-013, *et al.*, at 2 (November 10, 2004).

²⁵⁷ *Midwest Independent Transmission System Operator, Inc.*, 109 FERC ¶ 63,046 at P 6 (2004).

²⁵⁸ *Midwest Independent Transmission System Operator, Inc.*, 110 FERC ¶ 61,066 (2005).

2. Commission Determination

255. In its June 26, 2004, summary filing for GFA No. 377, Dairyland submitted five “MISO OASIS Reservation No(s).,” with a total megawatt value of 71 megawatts, but did not specify the related source and sink for each reservation. As such, the Commission cannot determine the validity (uniqueness) of the additional 71 megawatts without verification that those megawatts are not already accounted for in Dairyland’s other reservations. Accordingly, the Commission directs Dairyland to submit supporting source and sink information to the Midwest ISO for each of the five OASIS reservations to the extent that Dairyland wishes to increase its maximum megawatt usage as defined in Appendix B. We direct the Midwest ISO to make and file any revisions to Attachment P if these OASIS reservations are properly included under GFA No. 377.

256. We disagree that Dairyland should be listed as the Responsible and Scheduling Entity for GFA No. 377. In their conflicting June 26, 2004 summary filings for GFA No. 377, Dairyland and Xcel each designate the other as the Responsible Entity and Scheduling Entity. The GFA Order found that the transmission owner would serve as the Responsible Entity when parties were in disagreement over which company is the Responsible Entity.²⁵⁹ The GFA Order also found that the party serving as the Responsible Entity would be the Scheduling Entity when parties disagreed over the designation of the Scheduling Entity.²⁶⁰ Therefore, Xcel (through its subsidiary NSP), as the transmission owner, is the correct Responsible and Scheduling Entity.

Z. GFA Nos. 324, 352, 354, 368, and 369

1. Request for Rehearing

257. Xcel points out that the Commission failed to correct an error in maximum megawatts for GFA No. 324 in its findings. As noted in the data listed in the joint template filed for GFA No. 324, Xcel states that the Otter Tail load listed is in the NSP Control Area, and that GFA No. 324 does not include Otter Tail’s entire load. It states that the Otter Tail load on the NSP transmission system is approximately one megawatt and that the Commission should grant rehearing on this issue to prevent inaccurate allocation of FTRs for this GFA.

²⁵⁹ GFA Order at P 161.

²⁶⁰ *Id.* at P 165.

258. For GFA Nos. 352 and 354, Xcel states that the Commission provides conflicting information in the GFA Order²⁶¹ and Appendix B. Xcel asserts that the information provided in Appendix B for these GFAs is correct, reflecting Western Area Power Administration (WAPA) as the Scheduling Entity for GFA Nos. 352 and 354, and that the Commission should grant rehearing of these agreements to correct the Scheduling Entity designation in the GFA Order.²⁶²

259. Xcel also asserts that the Commission ruled that GFA Nos. 368 and 369 should be carved out, even though the parties to those agreements submitted joint templates settling the six data issues. It states that the decision to carve out these agreements, based solely on the standard of review set forth in the GFA, could have significant negative consequences on NSP and must be reconsidered on rehearing.

260. Further, Xcel argues that Appendix B to the GFA Order incorrectly lists the maximum megawatt transmitted under GFA No. 369 as 300 megawatts. Xcel explains that this is incorrect and an oversimplification of the megawatts transmitted under this agreement. It states that the maximum megawatts for GFA No. 369 vary by year and by season and that the source and sink also vary by season. Thus, Xcel states that the Commission's simplified reflection of this agreement in Appendix B must be corrected so as not to limit the rights of the parties under this GFA.

2. Commission Determination

261. We will grant Xcel's request and clarify that the Commission made no finding in the GFA Order on whether Otter Tail's entire load is on the NSP system or whether Otter Tail's entire load is served under GFA No. 324.

262. While Xcel does not explain the discrepancy that it found in the GFA Order for GFA Nos. 352 and 354, Xcel may be referring to the finding in the GFA Order that, when parties disagree on the designations of the Responsible and Scheduling entities, the transmission owner would serve as both. On its face, Appendix B does not appear to adhere to this finding, as it lists WAPA as the Scheduling Entity and NSP as the Responsible Entity. Despite the appearance of a discrepancy, Appendix B is correct. In the Findings of Fact, parties to GFA Nos. 352 and 354 agreed that WAPA should be the Scheduling Entity for those GFAs.²⁶³ The GFA Order allows parties to come to

²⁶¹ *Id.* at P 213 and P 165-66.

²⁶² Xcel GFA Rehearing Request at 26.

²⁶³ Findings of Fact at P 113.

agreement on the Responsible and Scheduling Entities, and, accordingly, Appendix B accurately reflects the agreement between the parties to these GFAs and lists NSP as the Responsible Entity and WAPA as the Scheduling Entity.

263. We will grant Xcel's request for clarification on the megawatts listed for GFA No. 369. We clarify that GFA No. 369 covers a maximum of 150 megawatts at any one time, not the 300 megawatts listed in Appendix B. More specifically, this allocation provides for 150 megawatts sourcing in Manitoba Hydro and sinking in NSP from May to October, and 150 megawatts sourcing in NSP and sinking in Manitoba Hydro from November to April. This allocation allows for the reservation of 150 megawatts in one direction or the other, for mutually exclusive parts of the year. Accordingly, we will amend Appendix B to more accurately reflect the nature of the service as described above.

264. Finally, Xcel's concern regarding the carved-out status of GFAs Nos. 368 and 369 is addressed above where we discuss those GFA parties that submitted joint filings agreeing to the answers to all six questions, but who did not specify a GFA option in that filing, and thus do not qualify as a settling party entitled to, as relevant here, Option B treatment.

AA. Appendix B and GFA Nos. 323/390, 357, 363, and 378/392

1. Requests for Rehearing

265. With respect to GFA Nos. 378 and 392, Xcel states that on June 25, 2004, it and Southern Minnesota Municipal Power Agency (SMMPA) submitted a joint summary filing and a joint statement, explaining the parties' settlement of the six informational factors required by the Commission. Xcel argues that the Commission should correct Appendix B to show SMMPA as the Responsible Entity and Scheduling Entity for both GFA 378 and 392, as agreed by the parties.

266. With respect to GFA Nos. 323 and 390, Xcel states that on July 9, 2004, it, Great River and Otter Tail filed a settlement agreement. It explains that, contrary to the information in Appendix B, GFA Nos. 323 and 390 are not "related contracts." Rather, Xcel argues, GFA Nos. 323 and 390 are, in fact, the same multi-party agreement. In addition, Xcel states that the joint template, filed in conjunction with the settlement agreement for GFA No. 390, shows that the firm transmission service under this agreement is 188 megawatts and Appendix B should be corrected to reflect the correct information for this agreement.

267. Xcel asserts that, on June 25, 2004, it filed a joint summary template and joint interpretation of GFA No. 363 with the South Dakota State Penitentiary. It states that Appendix B does not accurately reflect the parties' agreement as filed and should be corrected to state that the Responsible Entity is the South Dakota State Penitentiary and the Scheduling Entity is WAPA.

268. Xcel also asserts that, on June 25, 2004, it filed a joint summary template and joint interpretation of GFA No. 357 with the City of Melrose, Minnesota. It states that Appendix B does not accurately reflect the parties' agreement as filed and should be corrected to state that the Responsible Entity is the City of Melrose and the Scheduling Entity is WAPA.

2. Commission Determination

269. In their June 25, 2004, joint template filings for GFA Nos. 378 and 392 Xcel and SMMPA designated SMMPA as both the Responsible Entity and Scheduling Entity. In the GFA Order, the Commission found that if parties agreed upon the designations of the Responsible Entity and/or Scheduling Entity, the Commission would adopt that designation.²⁶⁴ Xcel and SMMPA fulfilled this requirement. Accordingly, the Commission will amend Appendix B to list SMMPA as both the Responsible Entity and Scheduling Entity for GFA Nos. 378 and 392.

270. In its filing made on December 10, 2004 in Docket No. ER04-106-005, the Midwest ISO agreed to revise the contract comments in Attachment P to read "Duplicate of 323" for GFA No. 390 and "Duplicate of 390" for GFA No. 323.²⁶⁵ Accordingly, the Commission will revise Appendix B for both GFA Nos. 323 and 390 to explain that the GFAs are the same agreement.

271. In their June 24, 2004 joint template filing for GFA No. 363, Xcel and WAPA designated South Dakota Penitentiary as the Responsible Entity and WAPA as the Scheduling Entity.²⁶⁶ In the GFA Order, the Commission found that if parties agreed

²⁶⁴ GFA Order at P 160, 165.

²⁶⁵ See Midwest ISO answer, Docket No. ER04-106-005 at Attachment A (December 10, 2004).

²⁶⁶ The state of South Dakota, on behalf of the Penitentiary, is a party to the GFA and signed a letter concurring to the designations submitted by Xcel.

upon the designations of the Responsible Entity and/or Scheduling Entity, the Commission would adopt that designation.²⁶⁷ Xcel and WAPA fulfilled this requirement. Accordingly, the Commission will amend Appendix B to list South Dakota Penitentiary as the Responsible Entity and WAPA as the Scheduling Entity for GFA No. 363.

272. In their June 25, 2004, joint template filing for GFA No. 363, Xcel and WAPA, designated the City of Melrose, Minnesota as the Responsible Entity and WAPA as the Scheduling Entity. In the GFA Order, the Commission found that if parties agreed upon the designations of the Responsible Entity and/or Scheduling Entity, the Commission would adopt that designation.²⁶⁸ Xcel and WAPA fulfilled this requirement. Accordingly, the Commission will amend Appendix B to list the City of Melrose, Minnesota as the Responsible Entity and WAPA as the Scheduling Entity for GFA No. 357.

BB. GFA No. 379

1. Request for Rehearing

273. MMTG argues that Xcel and Central Minnesota Municipal Power Agency settled GFA No. 379 before hearing believing that the companies would receive Option B treatment. However, in Appendix B, the GFA is listed as just and reasonable. MMTG requests that this designation be changed because the parties selected Option B prior to July 28, 2004.

2. Commission Determination

274. MMTG's request for rehearing of the Commission's designation of GFA No. 379 as a "just and reasonable" GFA is denied. In the Procedural Order, the Commission stated, "[t]he parties should make a simple statement in their joint filings to indicate whether or not they are willing to voluntarily convert their contract to TEMT service or settle their GFA by accepting the Midwest ISO's proposed treatment of GFAs."²⁶⁹ However, MMTG's July 27, 2004 submittal was entitled "MMTG Selection of Option B" and was filed unilaterally; the other party to GFA No. 379 (Xcel) did not submit a similar

²⁶⁷ GFA Order at P 160, 165.

²⁶⁸ *Id.*

²⁶⁹ Procedural Order at P 69.

selection.²⁷⁰ Since the choice of Option B was not jointly filed, and Xcel did not concur in this selection by the deadline, MMTG's request for rehearing of the designation of GFA No. 379 as "just and reasonable" is denied.

CC. GFA No. 406

1. Request for Rehearing

275. Ameren requests the Commission to clarify that GFA No. 406 should be carved out. It explains that the Commission found GFA No. 406 to be subject to the TEMT, while finding that the same agreement was carved out for other parties. Ameren asserts that GFA No. 222 (LG&E/KU) and GFA No. 448 (Illinois Power), which are the same contract as GFA No. 406, have been carved out, but GFA No. 406 has not. Ameren argues that it is without cause and arbitrary to treat the same agreement as carved out for two parties (LG&E/KU and Illinois Power) but not the third (Ameren).

2. Commission Determination

276. The Commission recognizes that GFA Nos. 406, 448, and 222 are the same agreement. However, we find that the Commission correctly carved out GFA Nos. 222 and 448, while directing Option B treatment for GFA No. 406. The joint filing for each GFA requests different treatment for transmission service provided under the contract for different paths. For GFA No. 406 specifically, the joint filing on June 25, 2004 requests Option B treatment for the 405 megawatts associated with GFA No. 406 sourcing in Electric Energy, Inc. (EEI) and sinking in AmerenUE and the 203 megawatts associated with GFA No. 406 sourcing in EEI and sinking in AmerenCIPS. Because the joint filing for GFA No. 406 specifically selected Option B status for flows into Ameren, the Commission continues to believe that Option B is the correct status for GFA No. 406, and we deny rehearing on this issue.

²⁷⁰ MMTG and Xcel did jointly file a template and a letter agreeing to the six informational data points on June 25, 2004, but those filings did not address any choice of Option B.

DD. GFA Nos. 409, 410, 411, and 415**1. Request for Rehearing**

277. AMP-Ohio states that GFA Nos. 409, 410, and 415 should not be subject to the just and reasonable standard of review. Rather, AMP-Ohio argues that the judge erred in interpreting their silence as grounds for establishing the GFAs as subject to the just and reasonable standard of review. AMP-Ohio argues that the public interest standard applies to GFA Nos. 409 and 410 because both GFAs provide for a mixed standard of review. AMP-Ohio also argues that the services not involving transmission capacity were not addressed and that Appendix B has several errors. AMP-Ohio states that GFA No. 415 is a subsequent agreement that modified GFA No. 409, and is not, as listed in Appendix B, the same contract.

278. AMP-Ohio also argues that the maximum number of megawatts under GFA No. 411 is listed in Appendix B as 677.50, but should be zero since GFA No. 411 is used for energy imbalance and not transmission. AMP-Ohio states that even if GFA No. 411 were used for transmission, the customer's all time peak load is only 52 megawatts, well short of the 667.50 megawatts allocated in Appendix B. Regarding GFA No. 409, AMP-Ohio argues that the Commission failed to note the historical data submitted that demonstrated that the maximum number of megawatts delivered was 685.58 megawatt hours of emergency power.

2. Commission Determination

279. We will grant AMP-Ohio's request for rehearing on GFA Nos. 409, 410 and 415 and will carve them out of the Energy Markets. In the Findings of Fact, the presiding judges found GFA Nos. 409, 410 and 415 to be subject to the just and reasonable standard of review. The presiding judges found that the 1997 Merger Settlement Agreement between the City of Cleveland and FirstEnergy Operating Companies did not limit FirstEnergy's right to unilaterally seek changes in the rates and charges. The presiding judges also found that the Merger Settlement Agreement did not limit the Commission's authority to make modifications to the contract. However, the presiding judges acknowledged that the Merger Settlement Agreement imposes limitations on certain modifications, excluding rate changes or termination sought by FirstEnergy prior to June 11, 2007. This limitation creates a situation in which the just and reasonable standard would apply to changes to the rates and charges under GFA No. 410; however,

other changes not excluded by the Merger Settlement Agreement would be subject to the public interest standard of review since they cannot be altered prior to June 11, 2007.²⁷¹ Accordingly, these GFAs fall under the mixed GFA standard of review as defined in the GFA Order.

280. The GFA Order found that contracts that are subject to a mixed standard of review would be carved out.²⁷² Accordingly, we will modify Appendix B to list GFA Nos. 409, 410 and 415 as carved out of the Energy Markets. Further, in the GFA Order the Commission directed parties that provided historical data in megawatt hours to provide to the Midwest ISO the maximum integrated hourly megawatt value for power actually transmitted.²⁷³ We remind parties to these GFAs of this requirement and direct them to provide such information to the Midwest ISO if they have not already done so. Until the GFA parties do so, the Commission will revise Appendix B to read “To be determined in conjunction with Midwest ISO.”

281. GFA No. 411 falls into the same category as GFA No. 409. In the GFA Order, the Commission failed to identify GFA No. 411 as having had the usage data filed in megawatt hour form. Consequently, Appendix B mistakenly listed GFA Nos. 409 and 411 as having maximum megawatt values of 685.58 and 677.50, as opposed to the megawatt hours that those numbers represent. Accordingly, we will revise Appendix B to read “To be determined in conjunction with Midwest ISO” in accordance with the directive issued above.

282. In the “Explanation of Rationale for Finding” column in Appendix B for GFA No. 415, the Commission mistakenly indicated that GFA Nos. 410 and 415 are the same contract. Accordingly, we will revise the note to read, “GFA No. 415 is a subsequent agreement that modifies some of the terms of both GFA Nos. 409 and 410.”

²⁷¹ Findings of Fact at P 388-92.

²⁷² GFA Order at P 222.

²⁷³ *Id.* at P 220.

EE. GFA Nos. 444 and 445**1. Request for Rehearing**

283. Columbia states that the Commission erroneously lists Columbia as the transmission owner for GFA Nos. 444 and 445 (which are GridAmerica contracts) in Attachment B to the GFA Order.

2. Commission Determination

284. In Attachment A to the Midwest ISO's answer filed in Docket No. ER04-106-005, the Midwest ISO agreed to remove the City of Columbia from GFA No. 444. Accordingly, the Commission will delete Columbia as the transmission owner in Appendix B. The Midwest ISO also agreed in its answer to re-list GFA No. 445 to reflect the proper transmission owner. As a result, we will amend Appendix B to remove Columbia as the transmission owner.

FF. TVA's Concerns**1. Request for Rehearing**

285. TVA is concerned that its unique legal constraints, that limit its ability to sell power, are not accounted for in the Midwest ISO TEMT as it stands. Accordingly, TVA filed a proposed section 12B.5 which specifies the constraints under which TVA will function under the Midwest ISO TEMT. TVA asks the Commission to direct the Midwest ISO to add TVA's proposed section 12B.5 to the TEMT and to implement the TEMT so as to prevent any additional barriers to TVA's continuing ability to make bilateral sales to permissible Midwest ISO members.

286. TVA also asks the Commission to adopt its proposed revision to the Midwest ISO's "Load Serving Entity" definition. TVA is concerned that the Midwest ISO's current definition does not permit a state or federal agency to qualify as a Load Serving Entity.

2. Commission Determination

287. While the Commission understands TVA's concerns, both of the issues raised by TVA are beyond the scope of this proceeding. In the instant dockets, the Commission is addressing issues regarding specific GFAs or rehearing requests concerning findings in

the original GFA Order. As issues that were not addressed in the GFA Order, TVA's concerns do not meet the criteria for rehearing in this instance (the proper venue was a rehearing request of the TEMT II Order). As a result, TVA's request for rehearing on each issue is denied.

IV. The Midwest ISO's October Compliance Filing - Docket Nos. ER04-691-009 and EL04-104-008

288. In its October Compliance Filing, the Midwest ISO filed a report and proposed tariff revisions in compliance with the GFA Order's requirement that the Midwest ISO (1) identify reliability problems arising from the carve-out of GFAs, and (2) modify the TEMT to include additional provisions on the treatment of GFAs.²⁷⁴ The Midwest ISO also briefly describes the GFA data collection process and its intended process for implementing the GFA carve-out.²⁷⁵ Further, the Midwest ISO states that it intends to more fully describe the implementation and data collection processes in a subsequent compliance filing.²⁷⁶

A. Procedural Matters

289. Notice of the Midwest ISO's October Compliance Filing was published in the *Federal Register*, 69 Fed. Reg. 62,659 (2004), with protests and interventions due on or before October 27, 2004. The parties listed in Appendix A to this order filed comments or protests to the Midwest ISO's October Compliance Filing (October Compliance Filing Protests).²⁷⁷

²⁷⁴ See GFA Order at P 97, 223.

²⁷⁵ *Id.* at P 145.

²⁷⁶ October Compliance Filing at 5 (*citing* GFA Order at P 145). In response to the Midwest ISO's October Compliance Filing, several parties filed comments or protests concerning both the Midwest ISO's GFA data collection process and its preliminary summary of how the Midwest ISO plans to implement the GFA carve-out. These comments and protests are addressed in the November Compliance Filing section of this order.

²⁷⁷ As noted above, acronyms and short forms used for party names throughout the order can be found in Appendix A.

290. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2004), the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

B. Report on Reliability Related Issues Related to Carved-Out GFAs

291. In the GFA Order, to ensure that the Commission addressed any potential reliability impacts of GFAs on the Energy Markets, the Commission directed the Midwest ISO to:

report to us in 30 days if it identifies any reliability problems that would preclude successful operation of the Midwest ISO energy markets at start-up. This report must identify the problem, provide supporting schedules that document why the market can not operate reliably, identify specific contracts contributing to the problem and explain how it intends to resolve the problem.²⁷⁸

1. Compliance Filing Proposal

292. In its October Compliance Filing, the Midwest ISO advises the Commission that the carve-out requirements in the GFA Order will not necessarily prevent the reliable operation of the Day 2 Energy Markets as long as the parties to the carved-out GFAs provide timely and accurate information necessary for the Midwest ISO to effectively implement the GFA carve-out process. However, the Midwest ISO reiterates its previous concerns that the Energy Markets will be subject to continuing, and potentially significant, reliability issues resulting from the GFA carve-out required by the GFA Order.²⁷⁹ Such concerns, the Midwest ISO explains, will be further exacerbated if the Midwest ISO does not receive the GFA information, or is otherwise unable to implement the GFA carve-out process, in the manner it proposes.²⁸⁰ The Midwest ISO states that, although these considerations would not necessarily preclude reliable operation of the Day 2 Energy Markets upon startup, they necessitate sustained efforts and vigilance to ensure continued reliable operation of the markets.

²⁷⁸ GFA Order at P 97.

²⁷⁹ October Compliance Filing at 3.

²⁸⁰ *Id.*

2. Compliance Filing Protests

293. The Cooperatives assert that the Midwest ISO impermissibly reargues economic aspects of carving out the GFAs and, thus, the Midwest ISO exceeds the scope of a compliance filing.²⁸¹ They also argue that the Midwest ISO has incorrectly characterized the carved-out GFAs as shifting costs to other Midwest ISO participants. The Cooperatives explain that protection of the rights of parties to GFAs has been a basic principle of the Midwest ISO since its inception. They argue that asserting that the carved-out GFAs reduce the benefits of the Energy Market Markets, as if the carved-out GFAs post-date the creation of those markets, is inconsistent with the premise on which the Midwest ISO was formed.

294. WPS Resources states that the Midwest ISO's single page report on the potential reliability impacts of the GFA carve-out fails to comply with the requirements of the GFA Order and should be rejected by the Commission.²⁸² WPS Resources states that it is unclear whether the Midwest ISO's reliability concerns are for a reduction in grid reliability, transmission scheduling capability, the ability to provide and maintain firm transmission service for GFA parties or other unnamed reliability issues. It states that the Midwest ISO's report offers no assurance that the Midwest ISO is ready to reliably operate the market. WPS Resources requests that the Commission take into account the concerns repeatedly voiced by Midwest ISO and many other market participants.

3. Commission Determination

295. In our consideration of the October Compliance Filing, we will not entertain arguments by the Midwest ISO or the Cooperatives related to the economic impact of the GFAs on the Energy Market or reasons for sustaining the carve-out. We agree with the Cooperatives that issues of cost shifting and economic impacts are beyond the scope of this compliance filing. In the GFA Order, we directed the Midwest ISO to report solely on specific reliability issues related to the carve-out of the GFAs that would preclude successful operations of the market at start-up. We find that the Midwest ISO's filing complies with these reliability reporting requirements of the GFA Order. The Midwest ISO indicates that it can reliably start and operate the Energy Markets with the proposed carve-out of GFAs, while recognizing the challenges and potential impacts. The Midwest ISO also provides a brief summary of its plan to accommodate the carved-out GFAs into

²⁸¹ Cooperatives October Compliance Filing Protest at 5.

²⁸² WPS Resources October Compliance Filing Protest at 4.

the scheduling of the Energy Markets to ensure reliability is maintained. While it emphasizes the need for timely and accurate information, the Midwest ISO has put forward steps to ensure it has the information necessary to effectively manage the energy market in tandem with allowing carve-out of certain GFAs.

296. Since the Midwest ISO has not identified any reliability issues with specific carved-out GFAs, we are satisfied that the Midwest ISO can reliably start the market. However, we assure WPS Resources that we do not lightly dismiss reliability concerns and we reiterate here that “our evaluations to date indicate that the Midwest ISO is taking the necessary steps to manage reliability over its system, and we will continue to audit these reliability activities.”²⁸³

C. Revised Treatment of GFAs Under the TEMT

297. In paragraph 223 of the GFA Order, the Commission directed the Midwest ISO to file revised tariff sheets, within 30 days of the GFA Order, reflecting modifications to the Midwest ISO’s proposed treatment of GFAs, including the removal of expedited dispute resolution provisions, a June 7, 2004 proposed effective date, and a process for implementing the carve-out. Further, the Commission required that these revisions should:

clearly identify, for each GFA, the treatment adopted in this order (*i.e.*, either converted to TEMT service or subject to a choice among Options A, B, or C pursuant to a settlement of GFA treatment approved in this order, subject to a choice among Option A or Option C because the GFA is subject to the just and reasonable standard of review, subject to a carve-out from the Midwest ISO Markets, or excluded from this proceeding).²⁸⁴

²⁸³ TEMT II Rehearing Order at P 75.

²⁸⁴ GFA Order at P 223.

1. Compliance Filing Proposal

298. In its October Compliance Filing, the Midwest ISO states that, on October 5, 2004, in Docket Nos. ER04-691-007 and EL04-104-006, it filed revisions to comply with the Commission's directive to remove the expedited dispute resolution provisions and the June 7, 2004, proposed effective date from the TEMT GFA provisions. Further, the Midwest ISO states that it intends to submit detailed information on the treatment of each GFA when it updates Attachment P to the TEMT in its next compliance filing.²⁸⁵

2. Compliance Filing Protests

299. Hoosier and WPS Resources state that the Midwest ISO failed to comply with the Commission's directives in paragraph 223 of the GFA Order, merely relegating its response to a footnote, and explain that the October Compliance Filing contains no tariff revisions to implement the carve-out. They assert that, to the extent that the Midwest ISO's view of how a particular GFA was treated diverges from the view of the GFA parties themselves, the parties must have sufficient time to resolve that difference of opinion so that the continued provision of service pursuant to the GFA is not disrupted.²⁸⁶ Thus, Hoosier and WPS Resources state that it is critical that the Commission assure that the Midwest ISO provide this information as quickly as possible, and no later than November 15, 2004.

3. Commission Determination

300. On November 15, 2004, the Midwest ISO made a compliance filing, in Docket No. ER04-106-005, that includes specific information on the treatment of each GFA. That filing is addressed in a separate order issued concurrently with this order. The Midwest ISO also included specific information on its implementation of the carve-out in its November Compliance Filing, and filed revised tariff sheets to address the carve-out in its January Compliance Filing. Those filings are addressed later in this order. Therefore, Hoosier's and WPS Resources' concern that Midwest ISO failed to file the directed information is mooted by the three later compliance filings.

²⁸⁵ October Compliance Filing at 6-7 n.20.

²⁸⁶ Hoosier October Compliance Filing Protest at 3.

D. Stakeholder Process and Conversion of GFAs from Carved-Out Status

301. The Midwest ISO states that it held stakeholder discussions regarding its implementation of the GFA carve-out process on October 5 and 6, 2004. It explains that, on October 8, 2004, the Midwest ISO also provided GFA parties and other stakeholders with notice that carved-out GFAs will be given the opportunity to choose between Option A and Option C treatment, or to convert to service under the TEMT.²⁸⁷ Any such choice must be communicated in writing to the Midwest ISO no later than November 5, 2004 and carved-out GFAs making such a selection would not be allowed to convert back to carved-out status.

1. Compliance Filing Protests

302. The Cooperatives state that the Midwest ISO's proposal to allow carved-out GFAs to convert to Option A or Option C service or to convert to service under the TEMT, but not allow them to convert back to carved-out status, may impermissibly affect the rights of the customers under the GFAs.²⁸⁸ They assert that, if the GFA customer becomes the Responsible Entity (as opposed to the transmission owner), or otherwise becomes directly or indirectly responsible for the costs associated with that conversion, the transmission owner's election to convert the contract from carved-out status may impose costs and obligations on the GFA customer to which it did not agree. In such circumstances, the Cooperatives state that the GFA customer should have the right to re-convert to carved-out status; any other result would constitute a unilateral modification of the customer's rights under its contract.

303. WPS Resources argues that the Midwest ISO requirement that carved-out GFA parties who choose Option A or C, or who convert to TEMT service provide written notification no later than November 5, 2004, 10 days before the Midwest ISO files its comprehensive explanation of how carved-out GFAs will be treated in the TEMT, results in a lack of due process.²⁸⁹ In addition, WPS Resources states that the Midwest ISO has failed to clearly differentiate between Option A, Option C, and TEMT service in its Tariff and business practices.

²⁸⁷ October Compliance Filing at 6. The Midwest ISO states that it plans follow-up discussions of these and other issues on October 18 and 21, 2004.

²⁸⁸ Cooperatives October Compliance Filing Protest at 6.

²⁸⁹ WPS Resources October Compliance Filing Protest at 5.

2. Commission Determination

304. The Cooperatives' concerns are premature. As explained in the GFA Order, the transmission owner or ITC participant is the billing entity and will be billed for the costs related to the carved-out GFAs, unless otherwise agreed to by the parties to the carved-out GFAs.²⁹⁰ While we expect that transmission owners or ITC participants will consult with GFA customers before any conversion from carved-out GFA to Option A, Option C, or TEMT service, the customers are currently protected from additional costs and obligations arising from the conversion. If the transmission owner or ITC participant unilaterally converts to one of the options or TEMT service, that transmission owner or ITC participant will be responsible for any additional costs incurred by its actions, as it will continue to be responsible for Schedule 17 charges. Should the transmission owner or ITC participant file to pass these costs to a customer, the customer can oppose the pass-through on the basis of its initial opposition to the conversion from carved-out GFA.

305. We disagree with WPS Resources that it did not have enough information to make a decision on whether it wanted to convert a carved-out GFA. In any event, the Midwest ISO must set up a deadline prior to the annual FTR allocation for carved-out GFAs to convert to Option A, Option C, or to full TEMT service and GFAs that have not converted will have the opportunity to convert prior to future FTR allocations. We accept the Midwest ISO's proposed Tariff provisions that prohibit a carved-out GFA, that converts to Option A, Option C, or TEMT service, from switching back to carved-out treatment; as it would be unduly discriminatory to allow those who did not settle to switch back and forth while those who previously settled can not.

²⁹⁰ GFA Order at P 300.

E. Market Mitigation Measures and Carved Out GFAs

306. In the GFA Order, the Commission required the Midwest ISO's IMM to monitor GFA customers for gaming behavior and provide an informational report to the Commission prior to the second FTR allocation.²⁹¹ The Commission noted that the TEMT II Order required the Midwest ISO to add Market Behavior Rule 2 to the TEMT and stated that this rule, which applies to transactions that manipulate market prices, would apply to scheduling behavior of GFAs.²⁹²

1. Compliance Filing Proposal

307. In its October Compliance Filing, the Midwest ISO states that its IMM will monitor behavior that may arise as a result of the GFA carve-outs, and will report thereon to the Commission before the second FTR allocation. Further, the IMM will also apply the Commission's Market Behavior Rule 2, as proposed to be incorporated into the TEMT.²⁹³

2. Compliance Filing Protest

308. WPS Resources states it is unclear how the Midwest ISO market mitigation measures will be applied to non-Midwest ISO market participants and non-Midwest ISO members (*i.e.*, parties that do not take service under the TEMT). Further, it argues that the Midwest ISO has not explained how it will apply Market Behavior Rule 2 to those market participants that do not have market-based rate authority.

²⁹¹ *Id.* at P 101.

²⁹² *See* TEMT II Order at P 356. In the TEMT II Order, the Commission stated that, “[i]n exercising its discretion to determine the appropriate remedy for violations of Market Behavior Rule 2 ... the Commission will apply the policies and principles set forth in *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 105 FERC 61,218, *clarified*, 105 FERC ¶ 61,277 (2003), *order on reh'g*, 107 FERC ¶ 61,175 (2004), and subsequent relevant precedent.” *Id.* at P 356 n.222.

²⁹³ October Compliance Filing at 6.

3. Commission Determination

309. WPS Resources' concerns about application of the market mitigation measures and Market Behavior Rule 2 are premature. The service provided under all carved-out GFAs must be procured by the transmission owner or ITC participant under the TEMT, and, therefore, at least one party to all GFAs will be subject to the Midwest ISO market mitigation measures. Market Behavior Rule 2 provides fundamental guidance for the conduct of holders of market-based rate authority. Parties to GFAs that have market based rate authority will be subject to this rule in the TEMT to the same extent as all other parties with market based rate authority that take service under the TEMT.²⁹⁴ In any event, the IMM has been directed to monitor and report on GFA scheduling practices and associated impacts on the Energy Markets.

V. The Midwest ISO's November Compliance Filing – Docket Nos. ER04-691-010; ER04-106-004; ER04-106-005; and EL04-104-009

310. On November 15, 2004, the Midwest ISO filed to comply with paragraphs 145, 264, and 265 of the GFA Order. Specifically, the November Compliance Filing includes: (1) a description of its GFA data collection process; (2) a description of how it will administer the carve-out of GFAs; and (3) revisions to section 38.2.5(j) of the Midwest ISO's TEMT to clarify the eligibility criteria and the date for the annual switching of GFA treatment options. The provisions of the November Compliance Filing are discussed by issue below.

A. Procedural Matters

311. Notice of the Midwest ISO's November Compliance Filing was published in the *Federal Register*, 69 Fed. Reg. 68,139 (2004), with protests and interventions due on or before November 29, 2004. The parties listed in Appendix A to this order filed comments or protests to the November Compliance Filing (November Compliance Filing Protests).

312. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2004), the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

²⁹⁴ See, e.g., TEMT II Rehearing Order at P 264-66 (where the Commission explains why Market Behavior Rule 2 should be included as part of the TEMT).

B. Data Needed for Carved-Out GFAs

313. In the GFA Order, the Commission stated that, “as to the finding required for maximum number of MW transmitted pursuant to each GFA, we adopt a generic approach if the GFA has no stated MW amount.”²⁹⁵ The Commission directed the Midwest ISO to use the “Maximum MWs Transmitted Under GFA” stated in Appendix B, along with the source and sink information provided in the Findings of Fact and the jointly filed templates, to account for these GFAs in its model developed for the initial FTR allocation.²⁹⁶

314. However, the Commission noted that the Midwest ISO may require more detailed information regarding the capacity between nodes to be reserved for the GFAs given the level of detail in its system model and may also require historical capacity used on a seasonal basis in order to model the GFA usage on a seasonal basis. Therefore, the Commission directed:

parties to the GFAs working within the findings listed in Appendix B to this order, to timely provide more detailed data at the request of the Midwest ISO. Parties that do not comply with such a request risk having a smaller number of MW or inappropriate nodes set aside for their transactions under their GFAs when the Midwest ISO begins allocating FTRs this October.²⁹⁷

²⁹⁵ GFA Order at P 220.

²⁹⁶ The GFA Order noted that, “when accounting for GFAs in its FTR model, the Midwest ISO should use these capacity amounts: (1) as the upper limit for allocating FTRs to GFA parties whose contract has a just and reasonable standard of review and who select Option A; (2) as the upper limit for GFA transactions that are carved out of the Midwest ISO markets; and (3) as the capacity reserved under the three options for settling GFA parties.” *Id.*

²⁹⁷ *Id.*

1. Compliance Filing Proposal

315. In its October and November Compliance Filings, the Midwest ISO explains that, on October 11, 2004, it sent to all GFA parties a “Registration and Data Request” (Data Request) that, among other things, seeks historical scheduling and related information from carved-out GFAs.²⁹⁸ The Data Request provided to the GFA parties also included a template through which parties to carved-out GFAs were able to submit additional information regarding source, sink (including any contractual flexibility in designation thereof), and total capacity (further subdivided into maximum, seasonal, peak and off-peak categories). The template required each carved-out GFA representative to verify that the submitted information is correct and accurate.²⁹⁹

316. In its November Compliance Filing, the Midwest ISO states that the data collection process was specifically designed to obtain information to determine appropriate modeling of the carved-out GFAs in the FTR allocation consistent with the GFA Order. It then analyzed the data collected in preparation for the FTR allocation process. The Midwest ISO states that an additional step in the implementation of the provisions for carved-out GFAs will be a formal registration process, during which Responsible Entities, as defined in the GFA Order, will register their FTR entitlements. The Midwest ISO states that this process is necessary to determine valid scheduling sources and sinks for which the carved-out settlement treatment will apply. It explains that the collected data will be used to administer the GFA carve-outs in a manner that avoids or minimizes any adverse effect on the reliable operation of the Day 2 market.³⁰⁰

2. Compliance Filing Protests

317. The Midwest ISO TOs assert that the Data Request exceeds the scope of the GFA Order. Specifically, they point out that the Data Request requires parties to carved-out GFAs to identify a “Responsible Entity” in terms of a market participant. The Midwest ISO TOs also understand that Midwest ISO staff has required that entities to

²⁹⁸ October Compliance Filing at 4.

²⁹⁹ November Compliance Filing at 4. The Midwest ISO notes that the Data Request was further explained and discussed at a conference call with GFA parties and other interested stakeholders on October 13, 2004. October Compliance Filing at 4.

³⁰⁰ November Compliance Filing at 5.

carved-out GFAs register as market participants subsequent to the GFA Order.³⁰¹ They also argue that the Midwest ISO's attempt to require carved-out GFAs to have designated Responsible Entities does not make sense and violates the GFA Order (given that the Commission identified what was required of transmission owners and even included an "N/A" in the Responsible Entity column for carved-out GFAs listed in Appendix B to the GFA Order).³⁰²

318. The Midwest ISO TOs assert that, through the Data Requests, the Midwest ISO also demands that parties to carved-out GFAs furnish information corresponding to fourteen other fields, including extensive information related to the source and sink of transmission service. This information request, they argue, is also beyond the scope of the GFA Order, which simply requires more detailed information regarding capacity between nodes to be reserved for GFAs. The Midwest ISO TOs argue that, instead of simply asking for the capacity information, the Midwest ISO has sought detailed information that requires substantial knowledge as to the sources of power, the loads, and source and sink flexibility. In many instances, they state, the transmission owner simply will not have all of that information, as it may not be the party to the contract supplying the power.³⁰³

319. The Midwest ISO TOs further state that the Midwest ISO template asks for much more than simply having a representative verify that the submitted information is correct and accurate. They state that the template asks the GFA representative to also agree under signature of a company officer to be financially responsible for the Midwest ISO's reliance on the information submitted. The Midwest ISO TOs argue that this request is objectionable because, in many cases, the party submitting the information might not have access to all the information requested. Thus, they state that the Commission should order the Midwest ISO to limit the scope of its GFA certification and order the Midwest ISO to remove the "indemnification" requirement from its GFA template.

³⁰¹ Midwest ISO TOs October Compliance Filing Protest at 5 (*citing* October Compliance Filing, Tab A, Table 1).

³⁰² *Id.*; Midwest ISO TOs November Compliance Filing Protest at 7.

³⁰³ Midwest ISO TOs November Compliance Filing Protest at 8.

320. Finally, the Midwest ISO TOs state that, through its Data Requests, the Midwest ISO has also requested a significant amount of information from transmission owners regarding GFAs that could present Standards of Conduct concerns.³⁰⁴ They note that, in the GFA Order, the Commission required that transmission owners be the entities reporting information to the Midwest ISO with regard to these carved-out GFAs.³⁰⁵ The Midwest ISO TOs assert that the transmission function will need to obtain this information, if it can, from third parties. However, they argue that the Midwest ISO market and software is set up for market participants to report information, and the transmission function for some, if not many, transmission owners have not registered as a market participant because it is the wholesale merchant function of the utility that would act as the market participant. As a result, in order to report information and data to the Midwest ISO, the Midwest ISO TOs assert that transmission owners may need to send third party GFA information to their marketing functions, which then report the information to the Midwest ISO.

321. The Cooperatives state that the Commission should direct the Midwest ISO to remove any references to “market participants” in conjunction with the carved-out GFAs. They point out that Appendix B to the GFA Order designated “N/A” in the Responsible entity column for carved-out GFAs.³⁰⁶

322. The Michigan-Kentucky Parties argue that the Midwest ISO’s Data Requests seek information from parties who do not know the intended use of that information. They state that questions remain about Midwest ISO’s apparent need for certain types of information, and whether the Midwest ISO’s plan for administering the carve-out will result in restricting a party’s rights under the carved-out GFA. The Michigan-Kentucky Parties explain that they are cooperating with the Midwest ISO, but wish to clarify that providing the information does not mean they are waiving any arguments or rights in so providing the requested responses.³⁰⁷

³⁰⁴ Midwest ISO TOs October Compliance Filing Protest at 5; Midwest ISO TOs October Compliance Filing Protest at 9.

³⁰⁵ GFA Order at P 144.

³⁰⁶ The Cooperatives November Compliance Filing Protest at 9.

³⁰⁷ Michigan-Kentucky Parties October Compliance Filing Protest at 3; Michigan-Kentucky Parties November Compliance Filing Protest at 14.

323. Specifically, the Michigan-Kentucky Parties state that they provided total energy scheduled by season with the understanding that it will be used for modeling purposes; however, they are concerned that the Midwest ISO will use this data to limit their scheduling capability under the GFAs to the amounts of energy historically scheduled during time periods when no such limitation exists.³⁰⁸ They also argue that the Midwest ISO does not adequately explain how it will address GFAs with flexible source and sink points.

324. Basin Cooperatives state that the Midwest ISO has not explained the implications of the registration requirement, so the consequences of the requirement cannot be determined with certainty.³⁰⁹ If the Midwest ISO simply has concluded that the modeling of the transmission service provided under carved-out GFAs is best accomplished by allocating or assigning implicit FTRs held in the Midwest ISO's name to the carved-out contracts, they state that is completely unobjectionable.³¹⁰ However, they believe that the Midwest ISO's requirement that the carved-out GFA parties register the FTRs associated with their contracts implies that the registering parties have some responsibilities related to that registration or that the rights of the parties to the GFAs are limited by the FTR registrations.

325. In addition, Basin Cooperatives state that the Midwest ISO requires that the parties that register the FTRs must be market participants, which is not required by the Commission for non-Midwest ISO GFA entities that choose not to participate in the Energy Markets. Basin Cooperatives argue that there is no basis for the Midwest ISO to require transmission customers taking service under carved-out GFAs to become market participants or to comply with the other Energy Markets requirements that apply to GFAs that are not carved-out. They also argue that the Midwest ISO should eliminate the requirement that Responsible Entities under carved out-GFAs formally register FTRs.³¹¹

326. Marshfield states that the Midwest ISO's implication that a GFA whose parties fail to submit the necessary information would be removed from the carve-out is unsupported and finds no basis in the GFA Order.³¹² That order, according to Marshfield, did not give

³⁰⁸ Michigan-Kentucky Parties November Compliance Filing Protest at 14.

³⁰⁹ Basin Cooperatives November Compliance Filing Protest at 3.

³¹⁰ *Id.* at 3.

³¹¹ *Id.* at 4.

³¹² Marshfield November Compliance Filing Protest at 8.

the Midwest ISO any authority to determine which agreements are carved-out and which are not. Furthermore, this proposed consequence to fail to provide the requested data is fraught with risk, as there is no standard by which to determine when information has been registered, whether such information is adequate or sufficient, and whether information deemed inadequate or insufficient would be deemed not registered.

3. Commission Determination

327. Upon review of the Data Request, we find the detailed information requested by the Midwest ISO is appropriate. The information requested, such as whether the source or sink is flexible, the maximum energy scheduled, the season, the time period (full, peak, off-peak), and the physical source and sink location, is entirely reasonable. We note that no party that objected to the breadth of the Data Request has demonstrated why it believes any specific information is not needed. We will allow the Midwest ISO the leeway to request the information it deems necessary to effectively manage the transmission system and the carve-out unless the information requested is demonstrated to be unnecessary. However, we clarify that the information supplied in response to the Data Request may only be used by the Midwest ISO to implement and effectively manage the GFA carve-out. In addition, if a party receiving a Data Request does not have access to or cannot obtain the requested information, it should so state in its response and work with the Midwest ISO to find another source for the information.

328. In response to Marshfield's concern about the Midwest ISO's authority to remove a GFA from the carve-out if the transmission owner does not provide the requested information, we clarify that the Midwest ISO must first get approval from the Commission before removing a GFA from the carve-out for lack of information. We believe that such a situation is unlikely, and we expect that the parties to carved-out GFAs will provide all the information needed by the Midwest ISO.

329. The Midwest ISO should not have requested the designation of a Responsible Entity for the carved-out GFAs. Carved-out GFAs do not have a Responsible Entity as defined in the TEMT since they are carved out of the Energy Market. Instead, the Midwest ISO should have asked for the billing entity, which, as explained in the GFA Order, will be the entity billed by the Midwest ISO for charges related to the carved-out GFAs.³¹³ Unless otherwise agreed by the parties to a carved-out GFA, the billing entity is the transmission owner or ITC participant.³¹⁴

³¹³ GFA Order at P 300.

³¹⁴ *Id.*

330. We also find the registration process for carved-out GFAs is appropriate.³¹⁵ The Midwest ISO must have an administrative process to identify and keep track of the carved-out GFAs, and a requirement to register the carved-out GFAs is not unreasonable. However, we direct the Midwest ISO to eliminate the requirement that a party obligated to register under the carved-out procedures must become a market participant. If an entity that must register a carved-out GFA is not otherwise required and does not wish to become a market participant, it should not be forced to do so. However, the Midwest ISO must be provided all the information it needs to effectively manage the carved-out GFA, even if an entity providing the information does not become a market participant. In addition, an entity that does not want to become a market participant for purposes of a carved-out GFA can not avoid an obligation to become a market participant for transactions not related to a carved-out GFA.

331. Concerns regarding the Standard of Conduct are addressed in our discussion on this issue as part of requests for rehearing of the GFA Order. Concerns regarding the requirement to formally register FTRs for carved-out GFAs are addressed below where we discuss the Midwest ISO's FTR allocation proposal for carved-out GFAs.

332. If the Midwest ISO requires an indemnification provision in its Data Request, that provision must conform to the indemnification provisions in the TEMT. In practical terms, this means that the Midwest ISO may not subject the parties providing responses to the Data Requests to liability to which the Midwest ISO itself is not subject under the TEMT.

C. Midwest ISO Administration of GFA Carve-Out

333. In the GFA Order, the Commission directed the Midwest ISO to file, within 60 days of the date of the order, a detailed explanation of how it will administer the carve-out. The Commission stated that the Midwest ISO should include the following parameters in designing the carve-out:

- (1) the maximum MW capacity designated in this proceeding for each carved-out GFA should be removed from the model used for FTR allocation;
- (2) schedules submitted by the GFA parties in accordance with the TEMT day-ahead timelines should not be subject to congestion charges;
- (3) the Midwest ISO should incorporate the GFA parties' schedules into the Reliability

³¹⁵ Concerns about the number of megawatts registered for GFAs that do not have a stated megawatt amount are addressed earlier in this order.

Assessment Commitment procedures; and (4) the Midwest ISO should allow parties to carved-out GFAs to settle real-time imbalances through the provisions of their GFAs instead of requiring that such imbalances be procured through the Midwest ISO Real-Time Energy Market during the transition period.³¹⁶

334. The Commission also explained that the carved-out GFAs have retained their physical transmission rights and are not subject to congestion costs in the first instance. Since the carved out GFAs are not subject to congestion costs in the Midwest ISO Energy Markets, the Commission stated that they have no need for FTRs as a hedge against congestion costs, and “therefore, these GFAs do not benefit from the FTR Service as the Option A and Option B GFAs do nor do these GFAs benefit like the FTR-holding, bilateral transactions and self-scheduling transactions.”³¹⁷

335. With respect to scheduling, the Commission stated that, for those GFAs being carved-out, the Commission accepted the Midwest ISO TOs’ offer to provide non-binding day-ahead schedule information for GFAs to the Midwest ISO.³¹⁸ The Commission directed them, “to the extent that they take service under the Midwest ISO Tariff to meet their obligations under the GFAs in this category, to submit day-ahead and modified real-time schedules to the Midwest ISO in accordance with the timelines set forth in the TEMT.”³¹⁹ The Commission explained that this additional information should be as accurate as possible in order to allow the Midwest ISO to better accommodate the GFAs that are temporarily exempt from the responsibilities of the TEMT through the end of the transition period, and will further minimize the impact of the carve-out on the Day 2 markets.³²⁰

³¹⁶ GFA Order at P 145.

³¹⁷ *Id.* at P 295.

³¹⁸ *Id.* at P 144, 149.

³¹⁹ *Id.* See Midwest ISO TEMT, sections 39.1.1 and 40.1.1.

³²⁰ The Commission also directed the Midwest ISO to file, on an informational basis, quarterly reports on the accuracy of the day-ahead schedules submitted for these GFAs within 30 days after the end of each calendar quarter. GFA Order at P 144.

1. Compliance Filing Proposal - FTR Allocation

336. In its October and November Compliance Filings, the Midwest ISO explains how it plans to implement the GFA carve-out. The Midwest ISO states that it will identify the maximum capacity associated with each GFA based on the findings in Appendix B to the GFA Order and the templates filed by GFA parties in the settlement process, the Findings of Fact and responses to data requests submitted by participants.³²¹ It explains that information necessary to fully determine expected carve-out GFA system usage may not otherwise be available from either Appendix B or from other sources of information provided to it directly or developed during the course of the GFA proceedings. In these cases, the Midwest ISO will rely upon the data provided by the carved-out GFA entities, and particularly data regarding capacity between commercial nodes (CPNodes)³²² and historical capacity used on a seasonal basis.

337. The Midwest ISO further explains that the maximum capacity for each carved-out GFA shall be reflected in the FTR allocation model and will not be used as the basis for entitlements to actual FTR allocations or to actual FTR awards. For purposes of ensuring simultaneous feasibility, the Midwest ISO states that:

the capacity associated with carved-out GFAs shall be accounted for or represented in the model as “implicit” FTR allocations that will be accounted for by the Midwest ISO instead of being turned over to the relevant GFA parties (as would be the case under Option A). Revenue distributions attributed to such “implicit” FTRs shall be used as a mechanism for distributing the cost of exempting GFA transactions from congestion and loss charges.³²³

³²¹ November Compliance Filing at 5.

³²² A Commercial Node is defined as a Node in the Commercial Model used to schedule and settle Market Activities. *See* TEMT, Module A, section 1.32, First Revised Sheet No. 55.

³²³ November Compliance Filing at 5.

338. As a result of the Midwest ISO's newly proposed GFA implementation process, it advises the Commission that there will be an approximately one-month delay in the start of the first FTR allocation, and an approximately three-week delay in the completion of the initial FTR allocation process.³²⁴

(a) **Compliance Filing Protests**

339. Alcoa, Basin Cooperatives, and the Cooperatives argue that the Midwest ISO's FTR proposal for carved-out GFAs is not in compliance with the Commission's directive to remove the maximum megawatt capacity for carved-out GFAs from the model used for FTR allocation. They argue that the carved-out GFAs and the parties to those GFAs should not be affected by the FTR allocation process or congestion costs. They also raise concerns about the impact of the "implicit" FTR methodology with have on their rights to exercise the scheduling and energy management provisions of their GFAs in the same manner that they did before the Energy Markets started.

340. Alcoa states that the mechanism for allocating "implicit" FTRs to carved-out GFA capacity appears to be the same mechanism that will be used for allocating FTRs to Option B GFAs but without paying Schedule 16 charges. Thus, Alcoa argues that the Midwest ISO is treating the carved-out GFAs exactly the same as Option B GFAs in the FTR allocation process except that Option B GFAs would bear cost responsibility for the administration of FTR service under Schedule 16 while the carved-out GFAs will not. Alcoa claims that this disparity represents a negative reward, treating non-settling parties better than those who settled.

341. Hoosier states that for those GFAs that have no language specifying a maximum number of megawatts, it protests any attempt by the Midwest ISO to use the maximum historical usage over the past three years as the maximum number of megawatts permitted to be transmitted pursuant to them.

342. The Midwest ISO TOs state that if the Midwest ISO intends to include carved-out GFA loads in its congestion system and impose costs on the rest of Midwest ISO loads associated with those carved-out GFAs, then the Midwest ISO TOs ask the Commission to determine if that is consistent with its determination that the GFA loads should be carved-out.

³²⁴ *Id.* at 9.

343. The Michigan-Kentucky Parties state that FTR allocations should not be delayed because the new schedule leaves market participants with less than one month to assess the financial and operational impacts of the FTR process before the Energy Markets begin.

(b) Commission Determination

344. We find that the Midwest ISO's proposal to reflect the capacity associated with the carved-out GFAs in its FTR model is reasonable. The GFA Order states, "the maximum [megawatt] capacity designated in this proceeding for each carved-out GFA should be removed from the model used for the FTR allocation."³²⁵ However, we clarify that the intent of that directive was to make sure the capacity associated with the carved-out GFAs was not made available to non-GFA transmission customers as part of the normal FTR allocation process. We did not mean to prevent the Midwest ISO from using the FTR model as a tool to accomplish the overall requirement to carve the GFAs out of the Energy Markets. If the Midwest ISO determined the best way to account for the carved-out GFA capacity, so that the service under the carved-out GFAs can continue after the Energy Markets begin, is to include the capacity in the FTR model and hold "implicit" FTRs as an accounting method to accommodate the carve-out, we find no reason to direct otherwise. However, we clarify that this methodology does not make and should not imply that the carved-out GFAs have any particular responsibility associated with the "implicit" FTRs.

345. The remaining issues raised in this section are addressed elsewhere in this order. Specifically, the Midwest ISO TDUs raised the same concern about possible disproportionate effects of the Midwest ISO's proposal in its request for rehearing of the GFA Order, which we address above in the section entitled "Concerns Regarding Implementation of Carve-Out." We also address Hoosier's concern about the maximum number of megawatts above in the section entitled "Maximum Megawatts Transmitted Under GFAs – Three-Year Historical Data." Alcoa's protest on the issue of Schedule 16 charges and Option B GFAs is the same fundamental argument it raises in its request for rehearing of the GFA Order, and we address that issue above in the section on Schedule 16. In addition, the Michigan-Kentucky Parties' concern about the delay of the FTR process has been allayed by the one month delay of the start-up for the Energy Markets to April 1, 2005.

³²⁵ GFA Order at P 145.

2. Compliance Filing Proposal – Market Settlement

346. The Midwest ISO states that the schedule ID, hourly megawatt profile, and source and sink CPNodes of transactions involving carved-out GFAs shall be processed as financial schedules in the Market Settlement phase. These transactions shall be exempt from congestion and loss charges through a rebate mechanism. Further, the Midwest ISO explains that the “implicit” FTRs accounted for by the Midwest ISO shall, “to the extent possible,” offset the rebate to carved-out GFAs.³²⁶ Further, where rebates for day-ahead and real-time congestion and losses exceed the value of the “implicit” FTRs, the revenue deficiency shall be uplifted to all “physical load, including load served under carved-out GFA schedules, in the Midwest ISO Region based on load ratio share.”³²⁷

(a) Compliance Filing Protests

347. Basin Cooperatives, Hoosier, the Michigan-Kentucky Parties, the Midwest ISO TOs, and the Cooperatives argue that the Midwest ISO’s proposal to charge the parties to carved-out GFAs a share of the uplift that recovers the shortfall between “implicit” FTRs allocated to the carved-out GFAs and the congestion and marginal loss costs attributed to such contracts is inconsistent with the requirements of the GFA Order. They state that carved-out GFAs should not pay any congestion-related uplift costs since the GFA Order exempted carved-out GFAs from those costs. They also argue that the Midwest ISO’s proposal to uplift revenue deficiencies related to the “implicit” FTRs to customers served pursuant to carved-out GFAs represents an unauthorized attempt by the Midwest ISO to modify the terms and conditions of these contracts. In addition, the Cooperatives argue that the Midwest ISO has no basis to impose charges on parties to carved-out GFAs and then provide rebates equal to those charges.

348. WPS Resources asserts that the Commission should direct the Midwest ISO to provide a methodology that market participants can use to quantify the magnitude of uplift costs (either through computer modeling runs of the Midwest ISO markets with the carved-out GFAs’ capacity extracted or some other method) or provide its own estimate of the economic impact on non-GFA transactions.

³²⁶ November Compliance Filing at 7.

³²⁷ *Id.*

(b) **Commission Determination**

349. The Midwest ISO may not assess any uplift associated with congestion or loss charges on load served pursuant to the carved-out GFAs. The Commission directed, in the GFA Order, that the relatively small number of megawatts associated with certain GFAs be carved-out of the Energy Markets.³²⁸ Charging these GFAs uplift for congestion and losses is inconsistent with that directive. The Midwest ISO is therefore directed to file modifications to its proposal, within 30 days of the date of this order, to reflect that load served pursuant to carved-out GFAs does not pay the uplift charges. The Midwest ISO should also provide information on how it will calculate the uplift charges, as requested by WPS Resources.

350. We find the Cooperatives' concern about the rebate mechanism proposed by the Midwest ISO to be unsupported. We will allow the Midwest ISO to implement its rebate proposal as an appropriate method to exempt the carved-out GFAs from congestion and loss charges. We consider the charge-and-rebate plan to simply be a way for the Midwest ISO to keep account of costs, and it meets our requirement for the carved-out GFAs to be held harmless from congestion and loss charges, even if, on paper, they are charged and then rebated for those costs. This has the added advantage of allowing parties to carved-out GFAs to see the congestion costs and loss charges associated with their contracts, even though they are not required to pay those costs during the transition period.

3. Compliance Filing Proposal - Scheduling of Carved-Out GFAs

351. The November Compliance Filing states:

[o]n a daily basis, relevant data on transactions involving carved-out GFAs shall be tagged and entered into the Physical Scheduling System (PSS) and into the Interchange Distribution Calculator (IDC), referencing a transmission provider other than the Midwest ISO. Transactions to be tagged include wheel-in, wheel-out and internal schedules. Balancing Authority Operators are responsible for entering and checking the tags, and for determining that only parties to carved-out GFAs are allowed to create Carved-Out GFA schedules.³²⁹

³²⁸ See, e.g., GFA Order at P 143.

³²⁹ November Compliance Filing at 5 (footnotes omitted).

352. Further, the Midwest ISO explains that the volume entered before the close of the day-ahead market shall be the amount to be excluded from the day-ahead energy settlement of the associated generation or load. Market participants may modify the volume information up to twenty (20) minutes before the operating hour. However, after the initial daily tag is created, the specified source and sink may no longer be changed other than in cases of a generator outage.³³⁰

(a) **Compliance Filing Protests**

353. Basin Cooperatives state that the Midwest ISO's proposal for carved-out GFAs violates the GFA Order by: (1) limiting transmission service to the sources and sinks that are specified in the formally registered FTRs for those contracts; (2) prohibiting parties from modifying specific sources and sinks after the initial daily tag is created, other than in cases of a generator outage; and (3) prohibiting all modifications of schedules less than 20 minutes in advance of the hour.³³¹ Basin Cooperatives argue that the GFA Order provides that the carved-out GFAs will not be subject to the Midwest ISO's scheduling requirements and that the day-ahead schedules that the transmission owners volunteered to provide are non-binding and, as such, the Midwest ISO cannot prohibit parties for modifying them. They state that the Midwest ISO's scheduling restrictions also violate the terms of certain carved-out GFAs.

354. The Michigan-Kentucky Parties state that the Midwest ISO should accommodate schedules at the kW level, as was the case in the past.³³² They also state that the Midwest ISO does not adequately explain how the Midwest ISO will address GFAs with flexible source and sink points, pointing to the proposal to limit changes in source and sink other than in cases of generator outage, which they argue may conflict with the terms of certain GFAs. The Michigan-Kentucky Parties ask the Commission to require the Midwest ISO to submit a further compliance filing with a proposal to address flexible source and sink points in a way that will not require parties to undertake additional scheduling responsibilities not required by the carved-out GFAs.

³³⁰ *Id.* at 6.

³³¹ Basin Cooperatives November Compliance Filing Protest at 8.

³³² Michigan-Kentucky Parties November Compliance Filing Protest at 3-4.

355. The Michigan-Kentucky Parties also argue that the Midwest ISO fails to explain or define “generator outage” and fails to provide what procedures will be followed in the event of such outage. Instead, the Michigan-Kentucky Parties state that the Midwest ISO indicates that where GFAs rely on system power for back-up service, the GFA Responsible Entity must identify, during the registration process, all generating units that can supply such back-up power. They contend that this is problematic because the party responsible for supplying back-up power is not always the Responsible Entity or the Scheduling Entity for a given GFA. Therefore, the Michigan-Kentucky Parties request that the Midwest ISO be required to provide additional clarification on the use of the data collected, beyond modeling purposes. They also request that the Commission direct the Midwest ISO to make a compliance filing detailing how it will address GFAs with flexible source and sink points that will not require parties to undertake additional scheduling responsibilities not required by the carved-out GFAs.³³³

356. The Cooperatives state that the Midwest ISO’s proposal requires binding schedules for GFAs by prohibiting changes to the source and sink after the daily tag is created and to the volume after twenty minutes before the operating hour.³³⁴ They argue that this violates the GFA Order, which accepted the offer to submit non-binding schedules for carved-out GFAs. The Cooperatives also object to the Midwest ISO’s proposal to require daily tags, because NERC e-tag rules do not require intra-control area transactions to be tagged.

357. Detroit Edison requests clarification regarding how the Midwest ISO will determine the use of multiple sources by GFAs, specifically because Detroit Edison is a party to the Ludington Agreements, which the Commission recognized as unique for a variety of reasons.³³⁵ Detroit Edison also requests clarification regarding how the Midwest ISO will implement real-time scheduling of the Ludington Agreements.

(b) Commission Determination

358. The Commission directed the transmission owners and ITC participants, to the extent that they take service under the Midwest ISO Tariff to meet their obligations under the carved-out GFAs, to submit non-binding day-ahead and modified real-time schedules

³³³ *Id.* at 16.

³³⁴ The Cooperatives November Compliance Filing Protest at 7.

³³⁵ Detroit Edison November Compliance Filing Protest at 5 (*citing* GFA Order at P 185).

to the Midwest ISO in accordance with the timelines set forth in the TEMT.³³⁶ Therefore, the Midwest ISO may place the same restrictions on the carved-out GFA schedules as it does on other schedules under the TEMT, except that carved-out GFA schedules are non-binding. In practice, this means that the Midwest ISO can limit, for example, changes to the source and sink points on a daily schedule after the daily tag is created and can prohibit changes to a schedule after 20 minutes before the operating hour, but if the terms and conditions of a carved-out GFA allow for such changes, the carved-out GFA cannot be assessed any penalties or congestion charges associated with such a change.

359. We clarify that the Midwest ISO may create alternate scheduling requirements for carved-out GFAs that allow those GFAs to make changes that are consistent with the terms and conditions of a particular carved-out GFA if the Midwest ISO believes that would be helpful in its operation of the transmission system, including possible scheduling at the kilowatt level. The Midwest ISO may not be able to make formal changes to accommodate the particulars of all the carved-out GFAs, but parties to the carved-out GFAs must cooperate with the Midwest ISO to arrive at an acceptable procedure to accommodate the particulars of their agreements. Likewise, the Midwest ISO should provide information and clear procedures that parties to carved-out GFAs may require, such as the information on how generator outages and back-up power will be handled.

360. We reiterate that the schedules submitted for the carved-out GFAs must be as accurate as possible, and we note that the accuracy of the schedules will be apparent in the quarterly filings the Midwest ISO makes with the Commission.³³⁷ The IMM will also be monitoring the schedules submitted for carved-out GFAs. While there may not be a financial incentive to submit accurate schedules for carved-out GFAs (since there is no penalty for deviations from the schedules when changes are allowed under the terms of a carved-out GFA), we expect the transmission owners and ITC participants to use all the information at their disposal so that the day-ahead schedules submitted for carved-out GFAs need as few changes as possible. Though we continue to believe the size of the carve-out is entirely manageable, parties should strive to make the Midwest ISO's administration of the carve-out effective and efficient.

³³⁶ GFA Order at P 144.

³³⁷ *Id.*

361. The Cooperatives concern about the requirement that transactions internal to the Midwest ISO be tagged for carved-out GFAs, even though they previously were not tagged, is not persuasive. Since the transactions under the carved-out GFAs will not be part of the Energy Markets, the Midwest ISO must have a method for keeping track of these transactions for the purpose of implementing TLR procedures. Tagging the transactions will allow the Midwest ISO to distinguish them from any other Energy Market transactions. Therefore, we find the Midwest ISO's requirement that all carved-out GFA transactions be tagged to be appropriate.

4. Compliance Filing Proposal – Real-Time Imbalances

362. In the Midwest ISO's November Compliance Filing, it states that its real-time scheduling timelines must be observed by parties to carved-out GFAs. Where generation and load schedules are balanced, deviations from day-ahead schedules resulting in a real-time transmission schedule imbalance shall not clear in the real-time spot market. However, where load and generation are not balanced in real-time, excess generation over load or excess load over generation will be settled as a spot energy sale or purchase. That is, a market participant with a carved-out GFA schedule that generates in excess of load will be appropriately compensated at the real-time LMP for the excess generation. Likewise, a shortage of generation relative to load will settle as a spot purchase at the real-time LMP. The Midwest ISO states that, as with other real-time spot transactions, there is no counter party to any unmatched injections or withdrawals and such "imbalances" can only be settled as spot purchase or sales. Moreover, the Midwest ISO explains, the reliability of the transmission system can be assured only by attaching financial consequences (*i.e.*, LMP prices) to such imbalances in Real-Time. Otherwise, there would be no immediate constraints on irresponsible or otherwise improper real-time scheduling behavior by parties to carved-out GFAs.

363. In addition, the Midwest ISO explains that:

the proposed Real-Time scheduling and energy imbalance treatment outlined herein reflects the operational realities of the Midwest ISO centralized dispatch platform. Upon implementation of the Midwest ISO security constrained economic dispatch protocol, the Midwest ISO will be responsible for sending dispatch signals on five minute intervals to manage energy imbalance in the Midwest ISO Region; whereas, today the Balancing Authority Operator is responsible for this function. To allow Balancing Authority Operators to continue

to manage energy imbalance for this subset of contracts subsequent to the implementation of the Energy Markets could jeopardize reliability and undermine the benefits of the centralized dispatch platform.³³⁸

(a) **Compliance Filing Protests**

364. Hoosier and the Midwest ISO TOs note that, in the GFA Order, the Commission left open the possibility that it would consider a tariff filing to permit transmission owners to recover the costs of the Schedule 17 charges that the Commission has authorized the Midwest ISO to assess for service provided pursuant to carved-out GFAs.³³⁹ They argue that if there are additional costs associated with real-time imbalances imposed on Midwest ISO transmission owners, the imposition of costs results in improper cost trapping.³⁴⁰

365. Basin Cooperatives and the Cooperatives state that the Midwest ISO's justification of its imbalance proposal is not valid, even if a compliance filing were an appropriate forum to challenge the Commission's order, which it is not. They argue that the Midwest ISO has not made an attempt to demonstrate that reliability has been adversely affected in the past or would be adversely affected in the future as a result of the imbalance provisions in the carved-out GFAs. Basin Cooperatives and the Cooperatives also argue that the Midwest ISO is assuming that no carved-out GFAs impose financial penalties on imbalances, which is incorrect. In addition, they believe the Commission concluded that any abuses with respect to scheduling pursuant to the terms of the carved-out GFAs could be adequately monitored and controlled through quarterly informational reports submitted by the IMM and application of Market Behavior Rule 2.

³³⁸ November Compliance Filing at 7-8 (footnotes omitted).

³³⁹ GFA Order at P 301-02.

³⁴⁰ Hoosier explains that this is a matter of particular concern because the Commission lacks the authority to enable Hoosier to pass through any TEMT-related charges to Hoosier's customers (because Hoosier is not subject to the Commission's jurisdiction), and thus it would likely suffer considerable and irreparable harm if the Midwest ISO is permitted to charge Hoosier for congestion or imbalance costs related to Hoosier's carved-out GFAs. Hoosier October Compliance Filing Protest at 4.

366. Marshfield states that the Midwest ISO's proposal to settle real-time imbalances at LMP prices is in direct conflict with the Commission's specific instructions that real-time imbalances be settled according to the provisions of the carved-out GFAs.

367. The Michigan-Kentucky Parties state that by not allowing parties to carved-out GFAs to decide whether to settle imbalances at the real-time LMP or whether to continue to settle imbalances under the terms of their carved-out GFAs, the Midwest ISO is ignoring a key provision of the GFA Order and unilaterally eliminating parties' imbalance arrangements under their carved-out GFAs. For example, the Michigan-Kentucky Parties cite a GFA with Wyandotte, Michigan, which provides that energy imbalances be settled on a return-in-kind basis. They state that the Midwest ISO's claim that reliability can only be assured by attaching financial consequences to real-time imbalances since there would be no immediate constraints on irresponsible or otherwise improper real-time scheduling behavior by parties to carved-out GFAs is not justification for failing to comply with the GFA Order. In addition, the Michigan-Kentucky Parties state that this is the same argument that the Midwest ISO proffered, and the Commission rejected, regarding the carved-out GFAs generally.

368. The Michigan-Kentucky Parties also argue that the Midwest ISO has not, as required by the GFA Order, articulated any specific reliability concerns regarding its administration of the carve-out, including the identification of the specific contracts and reliability problems posed by those specific contracts.³⁴¹ The Michigan-Kentucky Parties also do not believe the fact that the Midwest ISO will be responsible for sending dispatch signals to manage energy imbalances, whereas today the Balancing Authority Operator performs that function, justifies or explains the Midwest ISO's violation of a clear and direct order from the Commission and cannot justify an across the board denial of the imbalance provisions under the carved-out GFAs. They state that simply because the Midwest ISO performs the function does not mean that the carved-out GFA imbalance provisions cannot be honored.

369. The Midwest ISO TOs state that the Midwest ISO's proposed methodology for dealing with real-time imbalances directly conflicts with the GFA Order and must be rejected as an attempt by the Midwest ISO to circumvent the terms of that order. They state that imbalance charge also represents a potentially unrecovered cost, and the Midwest ISO TOs refer to their GFA Rehearing Request which details why such costs are improper.

³⁴¹ Michigan-Kentucky Parties November Compliance Filing Protest at 13.

370. WPS Resources states that the Midwest ISO's proposal to require parties to carved-out GFAs to settle energy imbalance at the real-time market price is in direct violation of the GFA Order.

(b) **Commission Determination**

371. In the GFA Order, the Commission stated, "the Midwest ISO should allow parties to carved-out GFAs to settle real-time imbalances through the provisions of their GFAs instead of requiring that such imbalances be procured through the Midwest ISO Real-Time Energy Market during the transition period."³⁴²

372. We clarify that for purposes of this finding, there is a distinction between real-time imbalances that occur as a result of changes made to the carve-out GFAs' non-binding day-ahead schedules and real-time imbalances between injections into and withdrawals from the transmission system. Our direction applies only to the former. In other words, if the terms and conditions of a carved-out GFA allow for schedule changes up until real-time, then the Midwest ISO may not charge a GFA for any deviation from the day-ahead schedule as long as the schedule is balanced. Allowing the Midwest ISO to charge for deviations from the non-binding day-ahead schedule where the terms and conditions of a carved-out GFA allow for changes after day-ahead would essentially make the schedules financially binding. In addition, as discussed above, any costs associated with changes post day-ahead made by carved-out GFAs that allow for such changes cannot be charged to the carved-out GFA load through uplift.

373. The second type of imbalance for purposes of this discussion is real-time differences between what is injected into the system and what is withdrawn. We clarify that we did not intend to exempt these types of imbalances from the real-time Energy Markets. If a carved-out GFA deviates from its non-binding day-ahead schedule, but the injections and withdrawals associated with the carved-out GFA are in-balance in real-time, then, as explained above, there are no charges assessed to the carved-out GFA load. Separate and distinct from that, however, is the situation where the injection associated with a carved-out GFA does not match what is withdrawn. In that case, we agree with the Midwest ISO that these real-time injection and withdrawal imbalances under carved-out GFAs must be handled in the real-time spot market, as either a sale or purchase. The carved-out GFA transmission owner or ITC participant taking service

³⁴² GFA Order at P 145.

under the TEMT to meet its carved-out GFA obligations is, unless the GFA parties agree otherwise, appropriately responsible for the charges associated with this kind of imbalance since the Midwest ISO will now perform the real-time balancing function that was previously handled by the transmission owner (in its former role as Balancing Authority).

374. This distinction is consistent with the non-binding nature of the day-ahead schedules because, as we explained above, deviations from the day-ahead schedule for carved-out GFAs that contemplate such changes will not incur charges for the GFA load. In contrast, real-time differences between injections and withdrawals are not related to the non-binding day-ahead schedule but instead are specific disparities between energy actually injected onto the system and energy actually withdrawn by load. Any formal arrangements memorialized in carved-out GFAs to handle real-time differences between injections and withdrawals between the parties to GFAs are not being modified. The only change is the manner by which the transmission owner settles imbalances with third parties to meet its responsibilities under the GFA – before, its imbalances would typically be netted on a control area basis and it would settle such net imbalances through return of energy in-kind, in accordance with the rules governing inadvertent interchange between control areas, but now, the Midwest ISO will settle such imbalances through its Energy Markets.

D. Losses

1. Compliance Filing Protests

375. The Michigan-Kentucky Parties state that they have learned through discussions with the Midwest ISO that the Midwest ISO will not honor GFA physical loss provisions (where delivered energy equals energy injected at the source less a percentage that matches an established system loss factor).³⁴³ The Midwest ISO will instead require that losses be handled financially regardless of the loss provisions under a carved-out GFA. The Michigan-Kentucky Parties state that the Commission must remind the Midwest ISO that it cannot ignore the physical loss provisions or force carved-out GFA parties to negotiate new agreements.

376. Detroit Edison states that it understands the Midwest ISO's proposal to mean that the party designated as the "market participant" by the parties to the GFAs will receive the credit for losses in day-ahead and real-time settlements. If the GFA specifically requires a different financial disposition between or among the parties to the GFA, the

³⁴³ Michigan-Kentucky Parties November Compliance Filing Protest at 5.

parties will settle bilaterally without further involvement from the Midwest ISO. Detroit Edison requests clarification that its understanding of the treatment of losses is correct.

2. Commission Determination

377. We find that the Michigan-Kentucky Parties' concerns regarding losses for carved-out GFAs have been addressed with the submission of the January Compliance Filing. The revised tariff sheets make clear that carved-out GFAs that submit a non-binding day-ahead schedule and are balanced in real-time (*i.e.*, injections equal withdrawals) will not be exposed to any loss charges in the Energy Markets. We agree with Detroit Edison that any terms and conditions related to losses in a carved-out GFA will not change and the current arrangements should be settled outside the Energy Markets between the parties to the carved-out GFA. The Michigan-Kentucky Parties will not be required to purchase losses as part of the Energy Markets and their loss arrangements in the carved-out GFAs remain in effect.

E. TEMT Tariff Modifications – Annual Switching of GFA Treatment Options

378. As noted above, paragraph 223 of the GFA Order, directed the Midwest ISO to file revised tariff sheets, within thirty days of the GFA Order, reflecting modifications to the Midwest ISO's proposed treatment of GFAs adopted in the Procedural and GFA Orders (*e.g.*, rejection of the process proposed in Module A, section 12A, and Module C, section 38.2.5(j)).

379. The Commission also accepted that GFA parties that settled prior to July 28, 2004 could pick among the Midwest ISO's three treatment options on an annual basis as specified in section 38.2.5(j).³⁴⁴ However, the Commission directed the Midwest ISO to revise section 38.2.5(j) to state that only parties that settled may request a change in treatment of such agreements annually from among the three options as described in section 38.8.3. Further, market participants that did not voluntarily settle may request a change of treatment annually between Options A and C, but they may not choose Option B.

³⁴⁴ GFA Order at P 264; Module C, Original Sheet No. 400.

380. Further, the Commission directed the Midwest ISO to evaluate any impacts that could be caused by annual switching among the GFA options. As a result of this evaluation, the Commission directed the Midwest ISO:

to file with the Commission within 60 days a proposal to clarify section 38.2.5(j) that lists the date when such switching could occur. This evaluation should especially focus on synchronizing any ability to switch among the GFA options with the FTR allocation periods to avoid any timing conflicts, such as requests for changes in treatment in between FTR allocation periods. The date to allow changes in GFA treatment to occur should coincide with the date for redistributions of FTRs. However, the Commission will not unilaterally mandate a date on which any changes in the options may occur, given the intricate nature of the FTR process and the potential need for future timeline changes.³⁴⁵

1. Compliance Filing Proposal

381. The Midwest ISO revised TEMT section 38.2.5(j) to specify that:

(a) Only parties that settled before July 28, 2004 may request a change in treatment of their GFAs annually from among the three options described in Section 38.8.3.

(b) Parties that did not settle before such date may request a change of treatment annually between Options A and C, but may not choose Option B.³⁴⁶

382. The Midwest ISO also revised TEMT section 38.2.5(j) to add a new sentence identifying the date when the annual switching of GFA treatment options may be made. As directed by the Commission, this date was chosen after the Midwest ISO evaluated: (a) the impacts that could be caused by annual switching among the GFA options; and (b) synchronizing such annual switching with the FTR allocation periods to avoid any timing conflicts.³⁴⁷

³⁴⁵ GFA Order at P 265.

³⁴⁶ November Compliance Filing at 9.

³⁴⁷ *Id.*

2. Compliance Filing Protests

383. Basin Cooperatives, the Cooperatives and the Michigan-Kentucky Parties state that the Midwest ISO should be required to modify the TEMT to reflect the treatment of carved-out GFAs. Basin Cooperatives state that the Midwest ISO has not modified section 38.8 of the TEMT, which addresses the treatment of GFAs, to make any reference to the carved-out GFAs. They assert that section 38.8.3 of the TEMT gives parties only three options - A, B, or C - and makes no reference to the fact that carved-out GFAs exist and may retain that status.³⁴⁸ Basin Cooperatives state that sections 38.8.1 and 38.8.2, which establish requirements for Responsible Entities and Scheduling Entities and require those entities to be market participants, apply to all GFAs and do not exclude carved-out GFAs. Basin Cooperatives also argue that the use of the term “market participant” is objectionable because it contributes to the implication that the parties to carved-out GFAs are participating in the Day 2 Markets.³⁴⁹

384. The Cooperatives state that the November Compliance Filing fails to propose changes to section 38.8 of the TEMT to address the GFA Order’s carve-out of GFAs. In addition, they state that the GFA Order makes clear that a transmission owner or ITC participant takes transmission service under the Midwest ISO Tariff to satisfy its obligations under a GFA and that the GFA Order designates the transmission owner or ITC participant responsible for providing transmission service under the GFA to be the “Responsible Entity” for the GFA. The Cooperatives request that the Midwest ISO be directed to file proposed changes to section 38.8.1 of the TEMT to reflect these requirements.

385. The Michigan-Kentucky Parties request that the Midwest ISO be directed to file any required changes to the Midwest ISO tariff and business practice manuals to accommodate the GFA carve-out after any order issued on compliance with the GFA Order.

3. Commission Determination

386. Though the Midwest ISO did not amend section 38 of the TEMT to include the carved-out GFA category, the Midwest ISO did file revisions to this section to include the carved-out GFAs in its January Compliance Filing, and we address those revisions in the following section of this order. We disagree with Basin Cooperatives’ concerns that

³⁴⁸ Basin Cooperatives November Compliance Filing Protest at 5.

³⁴⁹ *Id.* at 7.

the term “market participants” contributes to the implication that the parties to carved-out GFAs are participating in the Day 2 Market. Transmission customers taking transmission service under carved-out GFAs qualify as market participants pursuant to section 38.2.2, which provides that market participants may select the optional treatment of transactions pursuant to the carved-out GFAs under the Energy Markets as described in section 38.8 of the TEMT.

VI. The Midwest ISO’s January Compliance Filing – Docket Nos. ER04-691-019 and EL04-104-018

A. Procedural Matters

387. Notice of the Midwest ISO’s January Compliance Filing was published in the *Federal Register*, 70 Fed. Reg. 5991 (2005), with protests and interventions due on or before February 11, 2005. The parties listed in Appendix A to this order filed comments or protests to the January Compliance Filing (January Compliance Filing Protests). On February 16, 2005, Michigan Agencies filed a motion to intervene out-of-time and protest. On February 28, 2005, the Midwest ISO filed an answer to the protests.

388. Pursuant to Rule 214 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2004), the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Given the early stage of this proceeding, their interest, and the lack of prejudice to other parties, we will grant Michigan Agencies’ motion to intervene out-of-time and protest.

389. Rule 213(a)(2) of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2004), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept the Midwest ISO’s answer because it has provided information that assisted us in our decision-making process.

B. Carved-Out GFA Issues

1. Compliance Filing Proposal

390. On January 21, 2005, the Midwest ISO filed revisions to the TEMT and other information to comply with the TEMT II Order and Compliance Order I (January Compliance Filing).³⁵⁰ As part of the January Compliance Filing, the Midwest ISO filed

³⁵⁰ This order addresses the GFA-related aspects of the Midwest ISO’s January Compliance Filing, a companion order in Docket Nos. ER04-691-019 and EL04-104-018 addresses the other aspects of that filing.

additional Tariff provisions to implement the requirements of the GFA Order with respect to the treatment of carved-out GFAs. The Midwest ISO filed, in section 1.30a, a new definition of carved-out GFAs. The Midwest ISO filed a new section 38.8.4 (and has re-numbered the existing section 38.8.4 as new section 38.8.5) to describe how the Midwest ISO will administer the carved-out GFAs consistent with the GFA Order and the plan it enumerated in the November Compliance Filing. The Midwest ISO states that the new section 38.8.4 addresses registration and data requirements, FTRs, scheduling, Reliability Assessment Commitment (RAC), settlement of imbalance charges, exemption from certain charges, and market monitoring and mitigation measures applicable to carved-out GFAs. The Midwest ISO also revised section 38.8.5 to clarify that carved-out GFAs, along with other GFAs, are subject to the requirements of the Midwest ISO Tariff relating to the transition period.

2. Compliance Filing Protests

391. Associated, Basin Cooperatives, and Rural Electric Cooperatives state that the Midwest ISO should add two lines, inadvertently omitted from the definition of carved-out GFAs, in section 1.30a and also correct section 38.8.4 to read “Carved-Out GFAs” instead of “Carve-Out GFAs.” Associated and Basin Cooperatives also state that the words used by the Midwest ISO that are intended to make *only* section 38.8.4 applicable to carved-out GFAs do not clearly do so, and they could be interpreted to mean that carved-out GFAs are subject to all of section 38.8, including section 38.8.4. Associated and Basin Cooperatives request that the Midwest ISO be directed to clarify section 38.8 to provide that carved-out GFAs will be subject only to subsection 38.8.4.

392. Associated, Basin Cooperatives, and Rural Electric Cooperatives state that section 38.8.4.6 could be interpreted to provide that the Midwest ISO may assess Schedules 10, 17, and 18 charges directly against the customers taking service under the carved-out GFAs, which is inconsistent with the GFA Order, which states that the transmission owners must take service under the Tariff to fulfill their obligations to customers taking service under the carved-out GFAs. They contend that, consistent with the GFA Order, Schedules 10, 17, and 18 charges may not be directly assessed against carved-out GFA customers. Therefore, Associated and Basin Cooperatives request that the Midwest ISO be required to modify section 38.8.4.6 to provide that the only parties to the carved-out GFAs that may be assessed charges under Schedules 10, 17 and 18 are the transmission owners.

393. Detroit Edison states that for the treatment of losses under carved-out GFAs, the Midwest ISO should clarify that the parties designated as the “market participant” by the parties to the GFA will receive credit for losses in day-ahead and real-time settlements. Detroit Edison states that if a GFA specifically requires a different financial disposition, the parties will settle bilaterally without further involvement from the Midwest ISO.

394. Detroit Edison states that the Midwest ISO should clarify that in accounting for GFAs in the FTR allocation process, the Midwest ISO should recognize and accommodate the use of multiple source points by facilities under carved-out GFAs such as the hydroelectric generating units under Detroit Edison's Ludington Agreements. It also states that the Midwest ISO should clarify that the historical flexibility associated with real-time dispatch capabilities of the Ludington hydroelectric pumped storage facility will continue after the Midwest ISO implements its TEMT. Detroit Edison states that the real-time scheduling protocol (that requires even a 30-minute lead-time) diminishes the true value of the Ludington facility as a means of preserving reliable grid operations since the Ludington facility requires little or no ramp up time, can respond to real-time emergencies by providing load following or regulation service as well as 10-minute operating reserves, and is an energy-limited resource. Detroit Edison requests that the Commission require the Midwest ISO to accommodate Ludington's unique attributes for the benefit of the grid and clarify the TEMT to allow for instantaneous dispatch of the Ludington facility without affecting Detroit Edison's right to recover congestion costs and losses.³⁵¹ It explains that the Commission determined that for the hydroelectric pumped storage facility under the Ludington Agreements, Schedule 17 charges may only be assessed on the facility's injections into the transmission system. Therefore, Detroit Edison requests that the Commission direct the Midwest ISO to expressly recognize this exemption in section 38.8.4.6.

395. Hoosier states that section 38.8.4.1 requires, for the first time, that parties to carved-out GFAs provide CPNode source(s) and sink(s) for carved-out GFAs. Hoosier claims that this new provision would have the effect of interfering with Hoosier's rights under its GFAs by severely restricting the sources available to Hoosier which is what the Commission said it was avoiding by carving these GFAs out of the Energy Markets. Hoosier claims that the requirement that only CPNodes are acceptable as sources effectively prohibits Hoosier from using purchases from marketers or use of Into Cinergy (Cinergy Hub) products.³⁵² Hoosier states that the November Compliance Filing provided a detailed explanation of how the carved-out GFAs would be administered and indicated that the identified sources for GFAs could be of four types and that identification of a CPNode was necessary only if a specific generator was the type of source identified. Hoosier claims that these new provisions should not be permitted at

³⁵¹ Detroit Edison January Compliance Filing Protest at 2.

³⁵² Hoosier January Compliance Filing Protest at 4.

this late date in the process. Therefore, it requests that the Commission reject the provision that requires the identification of the CPNode sources for each carved-out GFA or confirm that Cinergy Hub is an acceptable source for serving load pursuant to carved-out GFAs.

396. Midwest TDUs state that rather than clearly indicating that the responsibility of certain charges lies with the transmission owners taking service under the Tariff to provide service to the GFA customers, the provisions in certain sections, such as sections 38.8.4.1, 38.8.4.3 and 38.8.4.5, use vague language like “Carved-Out GFAs” or “the parties to Carved-Out GFAs” where they should be addressed to the transmission owners. Midwest TDUs also request that a clarifying statement be added to section 38.8.4.6 to state that Schedule 17 charges will be billed to the transmission owner or the ITC participant taking service under the Midwest ISO Tariff to meet its transmission service obligations under the carved-out GFAs. They state that this clarification would afford greater clarity and accuracy, and facilitate efficient and fair implementation of the carve-out.

397. Rural Electric Cooperatives state that section 38.8.4.1, Registration and Provision of Data, requires parties to carved-out GFAs to register and provide data required to administer and implement this section. They contend that requiring GFA customers that are not Midwest ISO members and not taking service under the TEMT to register and to provide the Midwest ISO with data is not appropriate. Rural Electric Cooperatives contend that the transmission owners taking service under the TEMT to meet their transmission service obligations under the carved-out GFAs should be required to register and provide any necessary data. They state that section 38.8.4.2, FTR Treatment, requires that the maximum capacity associated with each carved-out GFA be reflected in the Midwest ISO’s FTR allocation model in a manner that reflects expected transmission usage under the carved-Out GFAs. Rural Electric Cooperatives contend that the GFA Order directed that the maximum megawatt capacity for each carved-out GFA be removed from the model used for FTR allocation. Therefore, they request that section 38.8.4.2 be rejected as being inconsistent with the GFA Order.

398. Rural Electric Cooperatives assert that section 38.8.4.3, Scheduling of Transactions, requires parties to carved-out GFAs to provide the Midwest ISO with non-binding day-ahead schedules under the carved-out GFAs. They contend that this differs from the GFA Order, which accepted the Midwest ISO transmission owners offer to provide this information. Rural Electric Cooperatives state that the GFA Order affirmed that the transmission owners would be taking service under the TEMT in order to fulfill their obligations to their counterparties under their GFAs. Therefore, they contend that the transmission owners taking service under the TEMT to meet transmission service obligations under the carved-out GFAs should be required to

provide any necessary schedules. Also, Rural Electric Cooperatives explain that, under section 38.8.4.3, transactions involving carved-out GFAs, on a daily basis, are to be tagged and entered into the Physical Scheduling System and into the Interchange Distribution Calculator, even though NERC e-tag rules do not require intra-control area transactions to be tagged. They state that the details of the tagging requirement are not spelled out, but unless the requirement is eliminated, the responsibility for this requirement should be placed on the Midwest ISO transmission owners. Rural Electric Cooperatives state that section 38.8.4.3 provides that the carved-out GFA schedules and generation offers submitted in the day-ahead energy market may be updated in the real-time energy market. They contend that since the schedules under this section are non-binding, there should not be a requirement to update the schedules and they should be provided voluntarily. Rural Electric Cooperatives request that the Midwest ISO be required to revise section 38.8.4.3 to apply to the transmission owners taking service under the TEMT to meet their obligations under a GFA, rather than applying more broadly to the parties to carved-out GFAs.

399. Further, Rural Electric Cooperatives explain that section 38.8.4.5, Settlement of Imbalances, states that carved-out GFAs must observe real-time scheduling requirements in section 40.2.3. They state that the requirement for carved-out GFAs to meet these requirements presents ambiguity as to which entity is required to comply. Rural Electric Cooperatives request that the Midwest ISO be required to revise this provision to apply to the transmission owners taking service under the TEMT to meet their obligations under GFAs.

400. Rural Electric Cooperatives also explain that section 38.8.4.6, Market Settlement and Exemption from Certain Charges, provides that carved-out GFAs shall not be subject to charges under the Tariff except for Schedules, 10, 17, and 18 charges. They assert that any reference to Schedule 18 charges is not correct since Schedule 18 charges relate to the imposition of a Sub-Regional Rate Adjustment. Rural Electric Cooperatives request that since Schedule 18 charges do not appear to be related to GFAs, they should be eliminated from section 38.8.4.6. Rural Electric Cooperatives state that, pursuant to Opinion Nos. 453 and 453-A and the GFA Order, the responsibility for paying Schedules 10 and 17 charges lies with the transmission owners, not the GFA customers. They state that although the Midwest ISO transmission owners have filed to pass through Schedules 10 and 17 charges to GFA customers, the Commission has not acted on that filing. Therefore, Rural Electric Cooperatives request that the Midwest ISO be required to revise section 38.8.4 to specify that the transmission owners taking service under the TEMT to meet their transmission service obligations under the carved-out GFAs are responsible for Schedules 10 and 17 charges.

401. Michigan Agencies state that the section 38.8.4 revisions seek to implement practices that were protested and remain pending before the Commission. They state that the Midwest ISO should permit parties to schedule at the kilowatt level, as provided for in certain GFAs, or make an adjustment in the settlement process to hold the GFA party harmless from the Midwest ISO's scheduling limitations, which currently require that scheduling under carved-out GFAs be in whole-megawatt increments. Michigan Agencies state that the Midwest ISO should be required to modify either section 38.8.4.2 (scheduling is actually under section 38.8.4.3) or section 39.2.9 of the Midwest ISO Tariff to accommodate such schedules. They also argue that the Midwest ISO must honor the physical loss arrangements under their carved-out GFAs. Michigan Agencies state that they identified the difficulty of using the Midwest ISO's financial loss arrangement for their carved-out GFAs earlier in their November Compliance Filing Protest and the Midwest ISO responded that the Michigan Agencies should enter into new agreements to handle their GFA losses on a financial basis. They state that, consistent with the GFA Order, the Commission should again direct the Midwest ISO that it cannot ignore the physical loss provisions or force the Michigan Agencies to negotiate new agreements with the host zone owners.

402. Michigan Agencies state that the Midwest ISO, in the November Compliance Filing, proposed a market settlement "uplift" charge that the Midwest ISO alleges is related to the carved-out GFAs and would be lumped into Schedule 10. They contend that the "uplift" charge is associated with the administration of "implicit" FTRs and is simply a congestion charge by another name. Michigan Agencies state that the Commission's directive in the GFA Order was that carved-out GFAs shall not be subject to congestion charges or FTR administrative charges. Therefore, they request that the Commission direct the Midwest ISO to remove these "uplift" charges from Schedule 10 and place them in Schedule 16 where they belong.

403. Further, Michigan Agencies state that section 38.8.4 and certain of its subsections should include a provision that the data collected to implement Day-2 service should not be used to limit or alter the GFA parties' use of the carved-out GFAs consistent with the GFA Order. They assert that the provision in section 38.8.4.6 needs to be clarified so that Schedule 18 charges are not applicable to the Michigan Agencies. They state that Schedule 18 is a sub-regional rate adjustment implemented to compensate the GridAmerica Companies for lost revenues associated with GridAmerica Companies' elimination of their individual through and out rates when they joined the Midwest ISO.

Therefore, Michigan Agencies request that the Midwest ISO be directed to modify section 38.8.4.6 to add the phrase “except as otherwise ordered by the Commission.” They assert that they are exempt from Schedule 18 charges pursuant to the terms of a settlement agreement reached in the GridAmerica proceeding in Docket No. ER03-580-000.³⁵³

3. The Midwest ISO’s Answer

404. The Midwest ISO states that it is willing to make the suggested corrections to the typographical errors pointed out in the protests in its clean-up filing, which will be submitted prior to April 1, 2005. With respect to the definition of carved-out GFAs, the Midwest ISO is prepared to complete the cross-reference to the GFA Order and will also include a reference to Attachment P to the TEMT as it may be updated from time to time in accordance with the terms of the GFA Order regarding carved-out GFAs.

405. Specifically, with regard to section 38.8, the Midwest ISO is willing to revise the section to state that “only” section 38.8.4 applies to carved-out GFAs. However, the Midwest ISO contends that the proposed replacement of the phrase “of this Tariff” with “of this section” is superfluous. The Midwest ISO answers that there is no material difference between stating that a specific sub-section is part of that Tariff and stating that the sub-section is part of a section of that same Tariff.

406. The Midwest ISO answers the assertion that section 38.8.4 should not refer to “parties” to carved-out GFAs but rather only to the transmission owners or ITC participants, stating that it will make any changes directed by the Commission to clarify that day-ahead scheduling responsibilities for carved-out GFAs pertain to the transmission owners or ITC participants taking TEMT service to meet their obligations under the carved-out GFAs, as provided for in P 144 of the GFA Order. However, the Midwest ISO states that, in addressing the “physical” carve-out of GFAs, the GFA Order noted that parties with GFAs cannot operate “outside the market” in all senses but in certain respects follow the same scheduling practices as other users of the Midwest ISO system. Therefore, the Midwest ISO asserts that all parties to carved-out GFAs cannot avoid coordination responsibilities required for the Midwest ISO to operate reliably.

³⁵³ Michigan Agencies January Compliance Filing Protest at 5. See Stipulation and Agreement filed by GridAmerica LLC, the GridAmerica Companies, the Midwest ISO, and certain Midwest ISO transmission owners, Docket Nos. ER03-580-000 and EL03-119-000 (December 18, 2003) (GridAmerica Settlement). This uncontested Settlement was approved on March 3, 2004, in *Midwest Independent Transmission System Operator, Inc.*, 106 FERC ¶ 61,200 (2004) (GridAmerica Settlement Order).

407. With respect to the Midwest TDUs' claim that section 38.8.4 should not refer to "Carved-Out GFAs," but rather to "schedules submitted under Carved-Out GFAs" to avoid any inference that the TEMT amends the GFAs, the Midwest ISO states that section 38.8.4.5 properly describes how imbalances associated with carved-out GFAs should be settled to meet system reliability requirements. It explains that such provisions on the settlement of imbalances apply not only to the schedules submitted but also the GFA parties themselves.

408. With respect to Rural Electric Cooperatives and others' claim that Schedule 18 should be excluded from section 38.8.4.6, the Midwest ISO states that it is appropriate to include Schedule 18 in this section because it includes language placing cost responsibility for this schedule on transmission owners as though they took "Transmission Service under the tariff on behalf of their bundled retail customer load and wholesale transmission load subject to Grandfathered Agreements."

409. In response to Detroit Edison's argument that section 38.8.5 should not limit GFA carve-out treatment to the transition period absent a public interest finding for modifying carved-out GFAs at the end of the transition period, the Midwest ISO states that the GFA Order explicitly limits carved-out treatment to the remainder of the transition period subject to evaluation of the appropriate treatment thereafter. The Midwest ISO also asserts that Detroit Edison's argument amounts to and reiterates a rehearing request that the Midwest ISO cannot decide for Detroit Edison.

410. With respect to Rural Electric Cooperatives and others' claim that the maximum capacity of each carved-out GFA should be removed from the FTR allocation, the Midwest ISO states that it interpreted the Commission's directive to mean that transmission capacity for carved-out GFA transmission usage is to be reflected in the FTR allocation model. It explains that carved-out GFA congestion cost refunds are analogous to FTRs in that both depend upon funding from congestion costs associated with transmission usage. The Midwest ISO contends that excluding carved-out GFAs from the FTR allocation model will result in over-allocation of FTRs and increase uplift associated with carved-out GFA congestion cost refunds.

411. In response to the argument that since day-ahead schedules for carved-out GFAs are non-binding, they should not be required to be updated in real-time under section 38.8.4.3, the Midwest ISO states that section 38.8.4 provides that real-time schedule updating "may" be updated not "shall." Further, it states that the GFA Order recognizes that carved-out GFAs cannot be wholly exempted from scheduling and dispatch protocols for reliability. Therefore, the Midwest ISO responds that it is appropriate to require real-time updating of day-ahead schedules for carved-out GFAs to ensure that the Midwest ISO can manage real-time energy flows in a reliable manner.

412. With respect to Hoosier's concern that section 38.8.4.1 requires that parties to carved-out GFAs provide CPNode source(s) and sink(s) for carved-out GFAs, the Midwest ISO explains that the GFA Order recognizes that carved-out GFAs cannot be entirely physical since GFAs must still follow certain scheduling practices in order for the Midwest ISO to perform security-constrained economic dispatch. The Midwest ISO states that for the financial process of initial FTR allocation, data registration did not require the identification of specific CPNode sources for slice-of-system GFAs. However, it states that for the physical scheduling in the Energy Markets, data registration needed specific CPNode source information. The Midwest ISO claims that specific CPNode source is necessary for both scheduling and settlement purposes with regard to the Midwest ISO's internal transactions, and for reliability purposes with respect to external transactions. It states that the scheduling and settlement of carved-out GFAs will follow the same protocols and use the same systems as all other transmission usage, which are based on CPNode level data input for sources and sink.

413. The Midwest ISO also answers Detroit Edison's argument that in accounting for GFAs in the allocation of FTRs, the Midwest ISO should recognize the use of source points such as the Ludington hydro units that receive energy from Detroit Edison's generating resources or from the border of the Michigan Electric Coordinated System (MECS) control-area. It states that carved-out GFA registration provides for source flexibility with all valid sources being identified by market participants during the carve-out GFA registration process term, and all registered sources are valid for carved-out GFA scheduling purposes.

4. Commission Determination

414. In light of the Midwest ISO's answer, we accept its offer to make revisions to certain sections regarding the carved-out GFAs in the TEMT. Specifically, the Commission directs the Midwest ISO to make the revisions described in its answer to complete section 1.30a, correct typographical errors to the title of section 38.8.4, and the punctuation error in section 38.8.4.6.

415. We also direct the Midwest ISO to make the revision described in its answer to amend section 38.8 to state "only" section 38.8.4 applies to carved-out GFAs, but we agree with the Midwest ISO that the replacement of the phrase "of this Tariff" with "of this section," is unnecessary. With regard to the use of "parties" rather than "Transmission Owners and ITC Participants" and "Carved-Out GFAs" instead of "Carved-Out GFA schedules" in various subsections of section 38.8.4, we agree with the Midwest ISO's answer that all parties to carved-out GFAs have the responsibility to coordinate with the Midwest ISO in order for the Midwest ISO to operate the

transmission system reliably.³⁵⁴ However, the GFA Order accepted the Midwest ISO transmission owners' offer to submit non-binding schedules for service they take under the TEMT to meet their obligations to carved-out GFAs,³⁵⁵ and the ultimate responsibility for scheduling, therefore, lies with the transmission owner or ITC participant (unless otherwise agreed to by the parties to the carved-out GFA). In addition, we have made clear that the provisions in the section 38.8.4 do not modify the underlying GFAs. Similarly, we find the request to modify section 38.8.4 to specify that the transmission owners are responsible for the Schedule 10 and 17 charges unnecessary because the GFA Order makes clear that the billing entity for carved-out GFAs is the transmission owner or ITC participant (unless otherwise agreed).³⁵⁶

416. We will not reject the provision in section 38.8.4.1 that requires CPNode source and sink points for carved-out GFAs because this requirement is consistent with our instruction to GFA Parties in the GFA Order. In the GFA Order we stated:

Although the Midwest ISO in its proposal to incorporate the GFAs, proposed that the GFAs file '[t]he source and sink points applicable under the Grandfathered Agreements,' we believe that the Midwest ISO may require more detailed information regarding the capacity between nodes to be reserved for the GFAs given the level of detail in its system model. . . . We therefore direct parties to the GFAs, working with the findings listed in Appendix B to this order, to timely provide more detailed data at the request of the Midwest ISO. Parties that do not comply with such a request risk having a smaller number of MW or inappropriate nodes set aside for their transactions under their GFAs when the Midwest ISO begins allocating FTRs this October.³⁵⁷

³⁵⁴ We also note that under NERC standards, "[e]ach Transmission Operator shall have the responsibility and clear decision-making authority to take whatever actions are needed to ensure the reliability of its area and shall exercise specific authority to alleviate operating emergencies." NERC Reliability Standards, Reliability Responsibility Standards and Authorities, Standard TOP-001-0, B.R1.

³⁵⁵ GFA Order at P 144.

³⁵⁶ *Id.* at P 300.

³⁵⁷ GFA Order at P 220 (citations omitted).

417. Therefore, we find that the Midwest ISO's January Compliance Filing is consistent with our initial determination that more detailed nodal source and sink information would be necessary to incorporate the carved-out GFAs. With regard to Hoosier's argument that it should be allowed to choose the Cinergy Hub as a source for serving its load under its GFA, we find that the Midwest ISO TEMT allows Internal Bilateral Transactions to use any CPNode, including Hubs and Interfaces as a source point.³⁵⁸ We find that this definition of CPNode that includes Hubs and Interfaces is applicable to the designation of sources and sinks for carved-out GFAs and resolves Hoosier's concerns

418. Rural Electric Cooperatives, Michigan Agencies and Detroit Edison raise other concerns that are addressed above in the November Compliance Filing section of this order. These concerns relate to: (1) FTR allocations in section 38.8.4.2; (2) real-time updating in section 38.8.4.3; (3) settlement of imbalances in section 38.8.4.5; (4) schedules at the kilowatt level; (5) limiting the use of data collection in section 38.8.4, (6) the proposal to charge uplift to carved-out GFAs; and (6) loss provisions.

419. Proposed section 38.8.4.6 of the TEMT states that carved-out GFAs shall not be subject to any charges under the Tariff except Schedules 10, 17, and 18. Schedule 18 is a Sub-Regional Rate Adjustment and imposes charges designed to recover lost revenues for transmission owners for a two year transition period beginning on October 1, 2003. The schedule includes language that Schedule 18 charges apply to load including "wholesale transmission service customer load subject to [GFAs]."³⁵⁹ Therefore, we disagree with Rural Electric Cooperatives contention that Schedule 18 does not appear to be related to GFAs. In addition, Schedule 18 also includes a provision that allows parties to pay a lump sum and be exempted from future charges under the schedule, which apparently is what Michigan Agencies has done. However, we disagree with Michigan Agencies' argument that the Midwest ISO needs to modify proposed section 38.8.4.6 to address such exemptions because Schedule 18, by its own terms, already explains when Schedule 18 charges are applicable. Therefore, we deny Rural Electric Cooperatives' and Michigan Agencies' requests that we require modification of this section of the TEMT.

³⁵⁸ TEMT, Module A, sections 1.145 and 1.153.

³⁵⁹ See GridAmerica Settlement at Attachment A, Midwest ISO OATT, Original Sheet No. 238P.01. This Settlement was approved in the GridAmerica Settlement Order at P 2.

420. Issues raised by Detroit Edison regarding the Ludington pumped storage facility are addressed above in a specific section on this facility. In addition, we note that concerns raised by Detroit Edison about the unique aspects of a pumped storage facility were addressed in the Commission's order on the Midwest ISO's readiness certification³⁶⁰ and in the order on rehearing and compliance filings related to the TEMT,³⁶¹ issued concurrently with this order.

VII. Motion to Add GFAs

A. Great River Energy's Motion to Add GFAs to Appendix B

421. On November 22, 2004, Great River Energy (Great River) filed a motion to add three GFAs to Appendix B of the GFA Order.³⁶² Great River explains that it is a new member of the Midwest ISO and its integration into the Midwest ISO was scheduled for December 1, 2004. Great River requests that these GFAs be carved-out because they meet the criteria for a carve-out in the GFA Order. Namely, Great River is not a public utility as defined in section 201 of the FPA and all parties agree that these GFAs are subject to the *Mobile-Sierra* public interest standard of review. Great River also states that if these GFAs are carved-out, the parties to the GFAs commit to submitting day-ahead and modified real-time schedules to the Midwest ISO concerning transmission service in accordance with the GFA Order.³⁶³ The impact of carving out its GFAs, according to Great River, is *de minimis* because the GFAs represent only a total of 153 megawatts. Great River provides information concerning the GFAs and states that all parties to the GFA agree to the information Great River has provided.

³⁶⁰ *Midwest Independent Transmission System Operator, Inc.*, 110 FERC ¶ 61,289 (2005).

³⁶¹ *Midwest Independent Transmission System Operator, Inc.*, Docket No. ER04-691-012, *et al.* (April 14, 2005).

³⁶² These GFAs are listed as GFA Nos. 451, 460, and 461 on the Midwest ISO's Attachment P.

³⁶³ Great River Motion at 5 (*citing* GFA Order at P 150).

B. Commission Determination

422. We will grant Great River's motion and add GFA Nos. 451, 460, and 461 to Appendix B, effective December 1, 2004.³⁶⁴ Also, since Great River is not a public utility as defined in section 201 of the FPA and because all parties agree that these GFAs are subject to the *Mobile-Sierra* public interest standard of review, we will, in accordance with the criteria laid out in the GFA Order,³⁶⁵ direct the Midwest ISO to carve these GFAs out of the Energy Markets. We accept Great River's offer to submit non-binding schedules to the Midwest ISO and expect Great River to provide the Midwest ISO information it may request in order to carve-out these GFAs, in accordance with paragraph 220 and ordering paragraph (G) of the GFA Order. We also clarify that parties wishing to add or modify GFA information in the future should first submit such requests to the Midwest ISO. After reviewing such requests, the Midwest ISO should submit to the Commission, under section 205, a filing with a revised Attachment P to reflect the requested additions and/or modifications.

The Commission orders:

(A) The requests for rehearing of the Procedural Order are hereby denied, as discussed in the body of this order.

(B) The requests for rehearing of the GFA Order are hereby granted in part and denied in part, as discussed in the body of this order.

(C) The Midwest ISO's October Compliance Filing is hereby accepted, subject to modification, as discussed in the body of this order.

(D) The Midwest ISO's November Compliance Filing is hereby accepted, subject to modification, as discussed in the body of this order.

(E) The Midwest ISO's January Compliance Filing is hereby accepted, subject to modification, as discussed in the body of this order.

³⁶⁴ Great River was formally integrated into the operations of the Midwest ISO on December 1, 2004.

³⁶⁵ GFA Order at P 143, 150.

Docket No. ER04-691-001, *et al.*

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(F) This Midwest ISO is directed to make compliance filings, within 30 days of the date of this order, as discussed above.

(G) Appendix B is hereby revised, as discussed above.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

Appendix A

Parties Filing Requests for Rehearing of Procedural Order

Docket Nos. ER04-691-001 and EL04-104-001

AMP-Ohio - American Municipal-Ohio, Inc. and the City of Cleveland, Ohio

Cinergy – Cinergy Services, Inc.

Detroit Edison – The Detroit Edison Company

Hoosier - Hoosier Energy Rural Electric Cooperative, Inc.

IMEA - Illinois Municipal Electric Agency

LG&E – LG&E Energy LLC

Manitoba Hydro

Midwest ISO - Midwest Independent Transmission System Operator, Inc.

Midwest Parties - Michigan Public Power Agency, Michigan South Central Power Agency, the City of Wyandotte, Michigan, the City of Hamilton, Ohio, and the East Kentucky Power Cooperative

Midwest TDUs – Great Lakes Utilities, Indiana Municipal Power Agency, Lincoln Electric System, Madison Gas and Electric Company, Midwest Municipal Transmission Group, Missouri Joint Municipal Electric Utility Commission, Missouri River Energy Services, Southern Minnesota Municipal Power Agency, Upper Peninsula Transmission Dependent Utilities, and Wisconsin Public Power, Inc.

Rural Electric Cooperatives – National Rural Electric Cooperative Association, American Public Power Association, Associated Electric Cooperative, Inc., Basin Electric Power Cooperative, Capital Electric Cooperative, Inc., Central Power Electric Cooperative, Inc., Dairyland Power Cooperative, East River Electric Power Cooperative, Inc., Great River Energy, and Minnkota Power Cooperative

WPS Resources – WPS Resources Corporation

Xcel – Xcel Energy Services Inc.

Parties Filing Requests for Rehearing of GFA Order

Docket Nos. ER04-691-006; ER04-106-003; and EL04-104-005

Alcoa - Alcoa Power Generating Inc.

Alliant – Alliant Energy Corporate Services, Inc.

Ameren – Ameren Services Company

AMP-Ohio

Associated - Associated Electric Cooperative, Inc.

Basin Cooperatives – Basin Electric Power Cooperative and Central Power Electric Cooperative, Inc.

Cinergy

Docket No. ER04-691-001, *et al.*

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Columbia – City of Columbia, Missouri

Consumers – Consumers Energy Company

Dairyland – Dairyland Power Cooperative

Detroit Edison

EKPC - East Kentucky Power Cooperative, Inc.

FirstEnergy – FirstEnergy Service Company

Hoosier

International Transmission - International Transmission Company

LG&E

Manitoba Hydro

METC - Michigan Electric Transmission Company, LLC

Michigan Agencies - Michigan Public Power Agency and Michigan South Central Power Agency

Midwest ISO TOs – Ameren Services Company, as agent for Union Electric Company d/b/a AmerenUE, Central Illinois Public Service Company d/b/a AmerenCIPS, and Central Illinois Light Co. d/b/a AmerenCilco; Aquila, Inc. d/b/a Aquila Networks (f/k/a Utilicorp United, Inc.); City Water, Light & Power (Springfield, Illinois); Indianapolis Power & Light Company; LG&E Energy Corporation (for Louisville Gas and Electric Co. and Kentucky Utilities Co.); Minnesota Power (and its subsidiary Superior Water, L&P); 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.

Midwest TDUs

Minnesota Power

MMTG - Midwest Municipal Transmission Group and Central Minnesota Municipal Power Agency

MRES - Missouri River Energy Services

Montana-Dakota – Montana-Dakota Utilities Company

Otter Tail – Otter Tail Power Company

PSEG – PSEG Energy Resources & Trade LLC

Rural Electric Cooperatives – National Rural Electric Cooperative Association, Associated Electric Cooperative, Inc., Basin Electric Power Cooperative, Central Iowa Power Cooperative, Central Power Electric Cooperative, Inc., Corn Belt Power Cooperative, Dairyland Power Cooperative, East Kentucky Power Cooperative, Inc., East River Electric Power Cooperative, Inc., Hoosier Energy Rural Electric Cooperative, Inc., Minnkota Power Cooperative, Inc., Northeast Missouri Electric Power Cooperative, Southern Illinois Power Cooperative, and

Docket No. ER04-691-001, *et al.*

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Wolverine Power Supply Cooperative, Inc.
Southern Indiana - Southern Indiana Gas and Electric Company
TVA – Tennessee Valley Authority
Wabash - Wabash Valley Power Association, Inc.
WPS Resources
Xcel

Parties Filing Comments or Protests to the Midwest ISO's October 18, 2004

Compliance Filing

Docket Nos. ER04-691-009 and EL04-104-008

The Cooperatives - National Rural Electric Cooperative Association, Basin Electric Power Cooperative, Central Power Electric Cooperative, Inc., Corn Belt Power Cooperative, Dairyland Power Cooperative, East River Electric Power Cooperative, Inc., Hoosier Energy Rural Electric Cooperative, Inc., Sunflower Electric Power Corporation, and Wolverine Power Supply Cooperative, Inc.

Hoosier

Michigan-Kentucky Parties - Michigan Public Power Agency, Michigan South Central Power Agency, the City of Wyandotte, Michigan, the City of Hamilton, Ohio, and the East Kentucky Power Cooperative

Midwest ISO TOs

WPS Resources

Parties Filing Comments or Protests to the Midwest ISO's November 15, 2004

Compliance Filing

Docket Nos. ER04-691-010; ER04-106-004; ER04-106-005; and EL04-104-009

APGI

Basin Cooperatives – Basin Electric Power Cooperative, Central Power Electric Cooperative, Inc., and East River Electric Power Cooperative, Inc.

Columbia

The Cooperatives - National Rural Electric Cooperative Association, Basin Electric Power Cooperative, Central Power Electric Cooperative, Inc., Corn Belt Power Cooperative, Dairyland Power Cooperative, East River Electric Power Cooperative, Inc., Southern Illinois Power Cooperative, and Wolverine Power Supply Cooperative, Inc.

Detroit Edison

Hoosier

Marshfield - Marshfield Electric & Water Department

Michigan-Kentucky Parties

Midwest ISO TOs

Docket No. ER04-691-001, *et al.*

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Midwest TDUs

SMMPA - Southern Minnesota Municipal Power Agency

WPS Resources

Relevant Parties Filing Comments or Protests to the Midwest ISO's January 20, 2005 Compliance Filing

Docket Nos. ER04-691-019 and EL04-106-018

Associated Cooperatives - Associated Electric Cooperative, Inc. and Northeast Missouri Electric Power Cooperative

Basin Cooperatives

Detroit Edison

Hoosier

Michigan Agencies

Midwest TDUs

Rural Electric Cooperatives – National Rural Electric Cooperative Association, Corn Belt Power Cooperative, Dairyland Power Cooperative, and Southern Illinois Power Cooperative