UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Midwest Independent Transmission System Operator, Inc.	**)** **)** **)**	**Docket No. ER07-1372-008**

COMMENTS OF THE ORGANIZATION OF MISO STATES

Pursuant to the Federal Energy Regulatory Commission's (Commission) Rule 211 of the Rules of Practice and Procedure 18 C.F.R. 385.211, the Organization of MISO States (OMS) submits the following comments concerning the Midwest Independent Transmission System Operator Inc.'s (Midwest ISO) May 23, 2008 filing in the above captioned docket, of amendments to its Balancing Authority Agreement in connection with the establishment of an Ancillary Services Markets under the Midwest ISO's Open Access Transmission, Energy and Operating Reserve Markets Tariff.

I. INTRODUCTION

The amendments to the Midwest ISO's Balancing Authority Agreement reallocate some key responsibilities and functions of existing Balancing Authorities to the Midwest ISO so that the Midwest ISO will be able to operate as the sole Balancing Authority under the Ancillary Services Market. The amendments also redefine the role of the Local Balancing Authorities (LBA).

II. POSITION AND RECOMENDATION

The OMS supports the amendment of the Balancing Authority agreement to enable the Ancillary Services Market to commence. However, the OMS recommends that the Commission: (1) direct the Midwest ISO to provide explanation regarding certain language in the amended agreement; and (2) require modifications to that language as required by law.

III. DISCUSSION

A. Section 14.3 Improperly Binds Non-Parties to the Mobile-Sierra Standard of Review.

Section 14.3 of the proposed amended Balancing Authority Agreement states:

> **14.3 MOBILE-SIERRA STANDARD**. Absent the agreement of the Parties as detailed in Section 14.4, the standard of review for changes or conditions to this Amended Agreement, whether proposed by a Party, a non-Party or the Commission acting sua sponte shall be the "public interest" standard of review set forth in United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332 (1956) and Federal Power Commission v. Sierra Pacific Power Co., 350 U.S. 348 (1956) (the "Mobile-Sierra" standard).[1]

On March 28, 2008, the United States Court of Appeals for the D.C. Circuit issued a decision in *Maine Public Utilities Commission v. FERC* that addresses rights of non-parties to agreements.[2] The restrictions imposed on non-parties by Section 14.3 of the amended Balancing Authority Agreement appear to violate the *Maine* decision. Specifically, pages 23-24 of the *MPUC v FERC* Opinion state:

> Courts have rarely mentioned the Mobile-Sierra doctrine without reiterating that it is premised on the existence of a voluntary contract between the parties. In Mobile, the Supreme Court stated that "the relations between the parties" may be established by contract, subject only to "public interest" review. United Gas Pipeline Co. v. Mobile Gas Serv. Corp., 350 U.S. 332, 339 (1956) (emphasis added). Similarly, this Court has emphasized that the deferential public interest standard only applies to "freely negotiated private contracts that set firm rates or establish a specific methodology for setting the rates for service." Atl. City, 295

[1] Amended Balancing Authority Agreement, Section 14.3 (underlining added).
[2] *Maine Public Utilities Commission v. FERC,* 520 F.3d 464, (D.C. Cir. 2008) ("*Maine*").

> F.3d at 14 (emphasis added); see also Maine PUC v. FERC, 454 F.3d 278, 283-84 (D.C. Cir. 2006); Richmond Power & Light v. FPC, 481 F.2d 490, 493 (D.C. Cir. 1973) ("The contract between the parties governs the legality of the filing.").
>
> This case is clearly outside the scope of the Mobile-Sierra doctrine. As we explained, Mobile-Sierra is invoked when "one party to a rate contract on file with FERC attempts to effect a unilateral rate change by asking FERC to relieve its obligations under a contract whose terms are no longer favorable to that party." Maine PUC, 454 F.3d at 284. Here, the settling parties are attempting to thrust the "public interest" standard of review upon non-settling third parties who have vociferously objected to the terms of the settlement agreement. As the Supreme Court has noted, "[i]t goes without saying that a contract cannot bind a nonparty." EEOC v. Waffle House, Inc., 534 U.S. 279, 294 (2002). The Mobile-Sierra doctrine applies a more deferential standard of review to preserve the terms of the bargain as between the contracting parties. Atl. City, 295 F.3d at 14. <u>But when a rate challenge is brought by a non-contracting third party, the Mobile-Sierra doctrine simply does not apply; the proper standard of review remains the "just and reasonable" standard in section 206 of the Federal Power Act.</u>[3]

The Court has made clear that contracting parties cannot bind third parties to the Mobile-Sierra standard. Accordingly, the Commission should direct the Midwest ISO to strike the words "a non-Party or the Commission" from Section 14.3.

B. Section 14.2 Contains Language that Obscures the Meaning and Intent of the Section and May Contradict Language in Section 14.4.

Section 14.2 states, in part:

> **14.2 OTHER MODIFICATIONS OR CONDITIONS. …**Except as provided in Section 14.4, the Parties intend that there will be no other modifications or conditions to this Amended Agreement absent the agreement of the Parties . . . .[4]

In Section 14.2, the phrase "absent the agreement of the Parties" requires clarification. As stated, the phrase appears to provide an alternative route to modification than that found in Section 14.4. Section 14.4 establishes the conditions for acceptance of modifications to the agreement. In particular, Section 14.4 provides that the agreement may be modified or

[3] *Maine* PUC, at 23-24 (underlining added).
[4] Amended Balancing Authority Agreement, Section 14.2.

conditioned "only by at least a three-fourths affirmative vote of the LBAs [local balancing authorities]." If the phrase "absent the agreement of the Parties" in Section 14.2 is intended to require one hundred percent agreement of the parties under some circumstances, then these circumstances are not made clear in the amended balancing authority agreement. If the phrase in Section 14.2 means that the amended Balancing Authority Agreement can be modified or conditioned by a three-fourths or greater affirmative vote of the LBAs, including a one hundred percent affirmative vote, then the cited language in Section 14.2 is redundant to that in Section 14.4.

In any event, the Midwest ISO should clarify its intent with respect to this language. The OMS believes that the appropriate remedy is to strike the phrase "absent the agreement of the Parties" from Section 14.2. Striking this phrase would not change any of the apparent intent of the amended Balancing Authority Agreement and would serve to improve clarity and potentially avoid future litigation regarding the meaning of Sections 14.2 and 14.4.

C. The Intent of the Language Regarding Reimbursement Provisions for Signatories to the Amended Agreement That Were Not Signatories to the Original Agreement Is Unclear.

Section 8.2 establishes circumstances under which Local Balancing Authorities may be reimbursed for their reasonably incurred costs to implement the amended agreement. However, this section includes language that appears to establish different conditions for parties that are signatories to the amended agreement who were also signatories to the original agreement and parties that sign the amended agreement but were not signatories to the original agreement. Section 8.2 states:

> **8.2 COST REIMBURSEMENT.** …Cost reimbursement under this Section 8.2 shall be limited to costs incurred by signatories, or their successors and assigns, to the Original Agreement. Any cost recovery by additional signatories

> shall be addressed, if at all, by separate agreement with the Midwest ISO under specific reimbursement guidelines established by the BA Committee.[5]

The amended Balancing Authority Agreement and the accompanying filing letter fail to illuminate this difference in treatment between signatories to the amended agreement who were signatories to the original agreement and those that were not. Accordingly, the Commission should direct the Midwest ISO to explain the purpose and intent of the referenced part of Section 8.2 and to require modifications to the language if necessary.

D. The Intent and Purpose of the Limitations Placed on the Midwest ISO's Flexibility in Section 8.4 Is Not Clear.

Section 8.4 of the amended Balancing Authority Agreement states:

> **8.4 COST INCURRENCE LIMITS.** The Midwest ISO shall not knowingly take any action under this Amended Agreement which would cause an LBA to incur or face costs relating to fulfilling its responsibilities pursuant to this Amended Agreement that are not recoverable pursuant to the Tariff provision to be implemented as provided in Schedule 24 of the Tariff, or otherwise reimbursed by the Midwest ISO.[6]

The purpose and intent of this section are not clear and the Midwest ISO's filing letter does not shed light on the matter. For example, it is not clear to which other "costs" the section applies. In addition, the limitation in Section 8.4 on the Midwest ISO's authority to take actions raises questions about whether Section 8.4 improperly restrains the Midwest ISO's ability to protect the reliability of the grid.

Accordingly, the Commission should direct the Midwest ISO to explain the purpose and intent of Section 8.4 and to require modifications to the language in Section 8.4 if necessary.

[5] Amended Balancing Authority Agreement, Section 8.2.
[6] Amended Balancing Authority Agreement, Section 8.4.

IV. CONCLUSION

Whereas, for the reasons discussed above, the OMS recommends that the Commission direct the Midwest ISO to provide the needed explanations and to make the needed additional modifications to the amended Balancing Authority Agreement described above.

The OMS submits these comments because a majority of the members have agreed to generally support them. The following members generally support these comments. Individual OMS members reserve the right to file separate comments regarding the issues discussed in these comments:

Illinois Commerce Commission
Iowa Utilities Board
Kentucky Public Service Commission
Michigan Public Service Commission
Minnesota Public Utilities Commission
Montana Public Service Commission
Nebraska Power Review Board
North Dakota Public Service Commission
South Dakota Public Utilities Commission
Wisconsin Public Service Commission

The Manitoba Public Utilities Board and the Missouri Public Service Commission did not participate in this pleading. The Indiana Utility Regulatory Commission, the Public Utilities Commission of Ohio and the Pennsylvania Public Utility Commission abstained from this pleading.

The Iowa Office of Consumer Advocate as associate members of the OMS, participated in these comments and generally supports these comments.

Respectfully Submitted,
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Dated: June 13, 2008

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Des Moines, Iowa, this 13th day of June, 2008.

William H. Smith, Jr.

Document Content(s)

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