UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

Transmission Owners of the Midwest Independent Transmission System Operator, Inc.	Docket Nos. ER05-447-004 ER05-447-005

ORDER ON REHEARING AND COMPLIANCE FILING

(Issued November 2, 2005)

1. In this order, the Commission addresses the requests for rehearing of the Commission's March 24, 2005 Order, which conditionally accepted the Transmission Owners of the Midwest Independent Transmission System Operator, Inc.'s (Midwest ISO TOs)[1] proposed schedule 23 to the Midwest ISO's Transmission and Energy Markets

[1] The Midwest ISO TOs for purposes of this proceeding consist of: Ameren Services Company, as agent for Union Electric Company d/b/a AmerenUE, Central Illinois Public Service Company d/b/a AmerenCIPS, Central Illinois Light Company d/b/a AmerenCilco, and Illinois Power Company d/b/a AmerenIP; Alliant Energy Corporate Services, Inc. on behalf of its operating company affiliate Interstate Power and Light Company (f/k/a IES Utilities Inc. and Interstate Power Company); Aquila, Inc. d/b/a Aquila Networks (f/k/a Utilicorp United, Inc.); Cinergy Services, Inc. (for Cincinnati Gas & Electric Company, PSI Energy, Inc., and Union Light Heat & Power Company); City of Columbia Water and Light Department (Columbia, MO); Great River Energy; Hoosier Energy Rural Electric Cooperative, Inc.; Indianapolis Power & Light Company; International Transmission Company; LG&E Energy LLC (for Louisville Gas and Electric Company and Kentucky Utilities Company); Michigan Electric Transmission Company, LLC; Minnesota Power (and its subsidiary Superior Water, L&P); Montana-Dakota Utilities Company; 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.

Tariff (TEMT or Midwest ISO Tariff).[2] Schedule 23 provides for the Midwest ISO TOs' recovery of Midwest ISO schedule 10[3] and schedule 17[4] costs from customers under specified grandfathered agreements (GFAs) carved-out of the Midwest ISO energy markets. This order also addresses the Midwest ISO TOs' filing to comply with the March 24 Order.

I. Background

2. The Midwest ISO proposed to implement the new TEMT in a filing dated March 31, 2004. The TEMT allows the Midwest ISO to initiate so-called Day 2 operations in its 15-state region, including day-ahead and real-time energy markets and a Financial Transmission Rights (FTR) market.

3. As a threshold issue, the Midwest ISO stated in that filing that it would be unable to operate its proposed energy markets without integrating an estimated 300 GFAs that were effective in the Midwest ISO region. The Midwest ISO asserted 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.

4. In response, 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.[5] In the Procedural Order, the Commission initiated a three-step

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[2] *Transmission Owners of the Midwest Independent Transmission System Operator, Inc*., 110 FERC ¶ 61,339 (2005) (March 24 Order).

[3] Schedule 10 (ISO Cost Recovery Adder) of the Midwest ISO Tariff provides for recovery of the Midwest ISO's costs associated with investment and expenses to run the ISO. The ISO Cost Recovery Adder is based on the budgeted expenses to be recovered that month divided by the MWh of transmission service expected to be provided under the Midwest ISO Tariff during the same period, subject to a true-up.

[4] Schedule 17 (Energy Market Service) of the Midwest ISO Tariff provides for a deferral of start-up costs related to the establishment of energy markets and recovery of such deferred costs and the ongoing costs of providing Energy Markets Service once the markets are operational.

[5] *Midwest Independent Transmission System Operator, Inc.*, 107 FERC ¶ 61,191 (2004) (Procedural Order), *order on reh'g*, 111 FERC ¶ 61,042 (2005).

investigation[6] of the GFAs under section 206 of the Federal Power Act (FPA)[7] "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."[8]

5. Following the GFA investigation, the Commission approved the TEMT in two orders. On August 6, 2004, the Commission accepted and suspended the proposed TEMT and permitted the bulk of it to become effective March 1, 2005, subject to further orders on subjects including the GFAs.[9] On September 15, 2004, in Step 3 of the GFA investigation, the Commission addressed the results of its investigation of the GFAs and how they should be treated in the Midwest ISO's energy markets.[10] The GFA Order

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[6] The Commission ordered GFA parties to file interpretations of their contracts in Step 1 of the investigation, and established trial-type hearing procedures before administrative law judges – Step 2 of the investigation – to elicit the GFA information from those parties who were not able to agree in Step 1. The Commission also offered GFA holders an opportunity to settle their GFAs by voluntarily accepting the GFA treatment that the Midwest ISO proposed in the TEMT. Step 2 of the investigation concluded on July 28, 2004, with the presiding judges' oral presentation to the Commission of the results of the hearing and the issuance of their written Findings of Fact. *Midwest Independent Transmission System Operator, Inc.*, 108 FERC ¶ 63,013 (2004).

[7] 18 U.S.C. § 824e (2000).

[8] Procedural Order at P 67. The Commission also directed the Midwest ISO to move the start of the energy markets to March 1, 2005. However, on January 27, 2005, after the Midwest ISO held several conferences with stakeholders, it agreed to a 30-day delay of the market start, to April 1, 2005, to allow for further testing, training and refining of market participants' internal systems.

[9] *Midwest Independent Transmission System Operator, Inc.*, 108 FERC ¶ 61,163 (2004) (TEMT II Order), *order on reh'g*, 109 FERC ¶ 61,157 (2004) (TEMT II Rehearing Order), 111 FERC ¶ 61,043 (2005) (Compliance Order III). The March 1, 2005 effective date was subsequently extended to April 1, 2005. *See Midwest Independent Transmission System Operator, Inc.*, 110 FERC ¶ 61,169 (2005) (February 17 Order).

[10] *Midwest Independent Transmission System Operator, Inc.*, 108 FERC ¶ 61,236 (2004) (GFA Order), *order on reh'g*, 111 FERC ¶ 61,042 (2005) (GFA Rehearing Order).

found that the GFAs' impact on the energy markets would be much less than the Midwest ISO had estimated,[11] and that the Midwest ISO could reliably operate its energy markets with some capacity carved out.[12] Thus, the GFA Order, among other things, divided the GFAs into several categories, with differing consequences for their treatment, required the Midwest ISO to carve some of the GFAs out of its markets, and addressed the applicability of charges under schedule 16 and schedule 17 to transactions taking place under GFAs.

6. As relevant here, the Commission directed the Midwest ISO to carve-out those GFAs from the Midwest ISO energy markets, representing transmission service provided under: (1) GFAs for which the parties have explicitly provided that unilateral modification is subject to the *Mobile-Sierra*[13] "public interest" standard of review; (2) GFAs that are silent with respect to the standard of review; and (3) GFAs providing for transmission service by an entity that is not a public utility.[14] While carving out these GFAs from the energy markets, the Commission imposed on the transmission owner or Independent Transmission Company (ITC) participant that is taking service under the Midwest ISO Tariff to meet its transmission service obligations the responsibility to pay schedule 17 charges.[15] The Commission, however, did not adopt a tariff mechanism to directly charge GFA customers the schedule 17 charges in the GFA Order, as the Midwest ISO TOs had urged. The Commission stated that a concrete proposal identifying the GFA party that should be responsible for such costs or addressing whether or not the contracts already address responsibility for such costs had not been put forth, and, thus, the proposal was not ripe for consideration.

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[11] *Id.* at P 130 (The Commission found that, given the number of GFAs for which the parties agreed to settle on one of the Midwest ISO's proposed treatment options under the TEMT, the proper treatment of GFAs representing only 15,378 MW, or only 14.3 percent of the Midwest ISO's peak capacity, remained in dispute. The Midwest ISO's March 31 filing, in contrast, originally sought modification of contracts representing more than 2½ times that much capacity.").

[12] *Id.* at P 100.

[13] *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*).

[14] GFA Order at P 4, 141-46.

[15] *Id.* at P 6.

A. The Midwest ISO TOs' Schedule 23 Filing

7. On January 13, 2005, the Midwest ISO TOs filed proposed schedule 23, which allows for the recovery from GFA customers of schedule 10 and 17 charges that are assessed to transmission owners providing service pursuant to carved-out GFAs[16] (Schedule 23 Filing). The Midwest ISO TOs explained that their schedule 23 submittal was in response to the Commission's GFA Order[17] and the Commission's March 31, 2004 Order[18] allowing them to file such a provision, and Opinion Nos. 453 and 453-A.[19]

8. Under schedule 23, carved-out GFA customers pay the Midwest ISO the costs assessed to the transmission owners by the Midwest ISO; each month, the Midwest ISO will bill carved-out GFA customers "an amount equal to the amount absent schedule 23 it would have billed the transmission owner under Section 7 of the Tariff for Schedule 10 and 17 charges associated with Carved-Out GFAs."[20] Schedule 23 also provides that schedule 10 and 17 costs shall not be recovered under schedule 23 if the costs are otherwise recovered from the carved-out GFA customer.[21]

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[16] Attachment 1 to schedule 23 includes a list of the carved-out GFAs to which schedule 23 applies.

[17] GFA Order at P 301.

[18] *Midwest Independent Transmission System Operator, Inc.*, 106 FERC ¶ 61,337 at P 18 (2004) (March 31 Order) ("The Midwest ISO TOs may make a filing with the Commission that proposes…to recover Schedule 16 and 17 costs from their customers as new services.").

[19] *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 voluntary 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). There, the Commission held that transmission owners that take service under the Midwest ISO Tariff for GFA transactions are required to pay schedule 10 charges for service they take for delivery to load located within the Midwest ISO footprint.

[20] Schedule 23, section 2.2.

[21] *Id*. at section 2.5. Schedule 23 provides customers with the ability to obtain information from the transmission owner to assure that no double payment occurs. If a carved-out GFA customer disputes the load data provided by the transmission owner to

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9. In support of their Schedule 23 Filing, the Midwest ISO TOs argued that the schedule 10 and 17 charges to be recovered under schedule 23 involve new services the costs of which, under Commission precedent, they should be allowed to recover from the GFA customers. The Midwest ISO TOs asserted that in Opinion Nos. 463[22] and 477,[23] the Commission approved Pacific Gas and Electric Company's (PG&E) recovery of California Independent System Operator Corporation (CAISO) costs from customers under contracts that pre-dated the formation of the CAISO based on a finding that the costs are associated with new services not already provided in the contracts. They argued that, like those costs, the Midwest ISO costs that they seek to pass through to GFA customers are costs associated with administering the Midwest ISO-controlled grid and are associated with services that are fundamentally different than the services provided by the transmission owners under the GFAs prior to the advent of the Midwest ISO.[24]

B. The March 24 Order

10. As is discussed more fully below, in the March 24 Order, the Commission found that schedules 10 and 17 address new services that could not have been provided by the Midwest ISO TOs to the carved-out GFA customers prior to the advent of the Midwest ISO.[25] Therefore, the Commission conditionally accepted the Midwest ISO TOs' proposed schedule 23 and found that schedules 10 and 17 address new services and new costs which the Midwest ISO TOs could appropriately pass through to GFA customers.

11. In addition, the Commission required the Midwest ISO TOs to file as a compliance filing modifications to their schedule 23 proposal to include provisions for the Midwest ISO and the transmission owners to affirmatively verify schedule 10 and 17 charges to the GFA customers to ensure that there are no duplicative charges, to

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the transmission provider, the carved-out GFA customer and the transmission owner will work to resolve the dispute and will handle any type of reconciliation between the two parties.

[22] *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).

[23] *Pacific Gas and Electric Company*, Opinion No. 477, 109 FERC ¶ 61,093 (2004), *reh'g pending*.

[24] Schedule 23 Filing at 5-7.

[25] March 24 Order at P 38.

affirmatively demonstrate that no double counting occurs, and to specify the process through which disputes will be resolved.[26] The Commission also required the Midwest ISO TOs to file as a compliance filing modifications to schedule 23 to identify all credits that the transmission owners receive under the Midwest ISO Tariff based schedule 10 and 17 charges applicable to the carved-out GFAs and provide for offset of schedule 23 charges by the amount of such credits.[27]

12. On April 22, 2005, the Midwest ISO TOs' filed to comply with the Commission's March 24 Order. Notice of the Midwest ISO TOs' compliance filing was published in the *Federal Register*, 70 Fed. Reg. 23,861 (2005), with protests and interventions due on or before May 13, 2005. Timely protests were filed by Midwest Municipal Transmission Group (MMTG) and Dairyland Power Cooperative (Dairyland). International Transmission Company (International Transmission) filed timely comments. On May 31, 2005, the Midwest ISO TOs filed an answer.

13. On April 25, 2005, MMTG; East Kentucky Power Cooperative, Inc. (East Kentucky); and Basin Electric Power Cooperative (Basin), Central Power Electric Cooperative, Inc. (Central), East River Electric Power Cooperative, Inc. (East River), and Dairyland (collectively, the Cooperatives) filed requests for rehearing of the Commission's March 24 Order.

II. Discussion

A. Procedural Matters

14. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2005), prohibits an answer to a protest or answer unless otherwise ordered by the decisional authority. We are not persuaded to accept the answer filed by the Midwest ISO TOs and will, therefore, reject it.

B. Requests for Rehearing of the March 24 Order

1. Schedule 23 – New Services

15. In the March 24 Order, the Commission held that the costs that the Midwest ISO TOs proposed to pass through to GFA customers under schedule 23 "are separate and distinct from the costs that the Midwest ISO TOs recover under current GFA provisions"

[26] *Id*. at P 54.

[27] *Id*. at P 55.

and, thus, they address new services.[28] The Commission cited Opinion Nos. 463 and 463-A, and Opinion No. 477, where it found that certain costs that PG&E incurs under the CAISO's tariff, for transactions under GFAs, are associated with a new and different service that is not already addressed in the GFAs. Thus, the Commission found that PG&E's proposal to pass these costs through to its GFA customers did not constitute an amendment to, or modification of, the GFAs.[29] Specifically, in Opinion Nos. 463 and 463-A, the Commission approved, as a new service, PG&E's pass-through to its GFA customers of the CAISO's Grid Management Charge, which provides for recovery of the CAISO's overarching costs of maintaining the reliability of the regional transmission grid, and planning and operating that grid.[30] In Opinion No. 477, the Commission found that the costs that PG&E incurs under the CAISO tariff for certain additional services for transactions under GFAs, including energy imbalance and losses, are associated with new services.[31]

16. Similarly, in the March 24 Order, the Commission found that schedules 10 and 17 of the Midwest ISO TEMT recover the costs of services that represent a monumental transformation with respect to the way that electricity is sold and distributed in the Midwest ISO region, that cannot be duplicated or provided by any party operating in a

[28] March 24 Order at P 38

[29] *Id*. at P 28.

[30] *See* Opinion No. 463 at P 50-52; Opinion No. 463-A at P 25-31. The Commission found that the CAISO's service associated with the Grid Management Charge was a new service because the CAISO plans and operates the combined CAISO grid on a regional basis in a manner that is significantly different than the individual utility-by-utility planning and operations that predated the CAISO's existence.

[31] *See* Opinion No. 477 at P 54-65. A second phase of the hearing in that proceeding is currently under way. Among the issues being addressed in the second phase is whether specific provisions in individual GFAs should absolve GFA customers from some or all of the costs that PG&E proposes to recover for such services. *California Independent Transmission System Operator, Inc.*, 107 FERC ¶ 63,030 at P 145 (2004).

smaller footprint than the Midwest ISO, and that, therefore, could not have been provided by the Midwest ISO TOs to the carved-out GFA customers prior to the advent of the Midwest ISO.[32]

17. The Commission also distinguished the costs at issue in this proceeding from those at issue in Opinion Nos. 459 and 459-A,[33] where it held that reliability-related costs could not be passed through as a new service to customers taking service under GFAs.

a. Requests for Rehearing

18. In their request for rehearing, the Cooperatives argue that the March 24 Order erred by not rejecting proposed schedule 23 as an attempt to implement a generic pass-through of the Midwest ISO's costs to GFA customers. They assert that the Commission accepted schedule 23 without conducting a case-by-case review of each carved-out GFA to determine whether the pass-through of Midwest ISO costs should be allowed under a new service rationale. The Cooperatives state that they should be afforded a hearing opportunity to address such concerns and cite precedent setting proposed pass-through schedules for hearing for the purpose of analyzing the particular terms of each GFA to determine if costs may be passed through as a new service.[34] Specifically, they point to the Commission's recent holding in *Otter Tail Power Company*,[35] where the Commission set for hearing and settlement judge procedures Otter Tail Power Company's (Otter Tail) proposal to amend 12 GFAs to recover the costs that Otter Tail incurs under the TEMT to meet its GFA obligations including schedules 10, 16, and 17, and other charges under the TEMT.

19. The Cooperatives also argue that Commission erred by relying on prior Commission orders that do not support the determination that schedules 10 and 17 constitute new services for GFA customers of the Midwest ISO TOs. They argue that the Commission primarily relies on Opinion Nos. 463 and 463-A and Opinion No. 477, which do not support acceptance of schedule 23's generic pass-through of the schedule 10 and 17 charges to GFA Customers.[36] Specifically, the Cooperatives point to Opinion

[32] March 24 Order at P 38.

[33] *Pacific Gas & Electric Company*, Opinion No. 459, 100 FERC ¶ 61,160 at P 19-20, *reh'g denied*, Opinion 459-A, 101 FERC ¶ 61,139 (2002).

[34] Cooperatives' Rehearing Request at 4.

[35] 110 FERC ¶ 61,220 (2005) (*Otter Tail*).

[36] Cooperatives' Rehearing Request at 8.

No. 463-A, where the Commission distinguished Opinion No. 453-A, involving the Midwest ISO, and stated that:

> the Commission rejects the claim that our approach in [Opinion No 453-A] cannot be reconciled with Opinion No. 463. First, while both of these cases involve the manner in which ISO administrative costs can be passed through, it does not follow that what is reasonable and appropriate for the Midwest ISO cost adder is necessarily so for the California ISO GMC. Indeed, the costs at issue differ significantly because of the different division of responsibilities that has developed in the two regions. For example, while the pre-existing control areas in California were consolidated under the ISO, the individual control areas in the Midwest ISO remain largely intact. Thus, while in California the ISO is performing all control area functions, in the Midwest ISO most control area responsibilities remain with the individual transmission owners.[37]

20. The Cooperatives also argue that the March 24 Order reversed, without explanation, the Commission's determination in the GFA Order that, consistent with Opinion Nos. 459 and 459-A, schedule 17 services are essentially the same as reliability services already provided under existing GFAs.[38]

21. Further, the Cooperatives state that the Commission erred in the March 24 Order by accepting schedule 23 even though it has not been demonstrated that GFA customers will actually receive new services. They state that the March 24 Order did not address Dairyland's protest raising the issue of whether carved-out GFA load will in fact receive any services paid for by schedule 17 charges to be passed through to carved-out GFA customers under schedule 23. Specifically, the Cooperatives state that schedule 17 recovers costs of the Midwest ISO's security-constrained economic dispatch to implement Day 2 congestion management services, while carved-out GFAs will instead be subject to Day 1 Transmission Line-Loading Relief (TLR) congestion management services, the costs of which are already recouped under schedule 10. Thus, the Cooperatives assert that they are not receiving these new market operation services. Similarly, East Kentucky argues that schedule 23 provides no new service whatsoever,

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[37] *Id*. at 9.

[38] GFA Order at P 162. The Cooperatives explain that, in the GFA Order, the Commission held that "[t]ransmission 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." *Id*.

but is simply an attempt by the transmission owners to avoid asking the Commission to make a public interest finding that the carved-out GFAs should be abrogated to include Midwest ISO charges, which the Commission has repeatedly said it would not do.[39]

22. The Cooperatives argue that the March 24 Order also relied upon presumed benefits to GFA customers associated with the implementation of the proposed TEMT that have not been demonstrated. Specifically, they state that the Commission relied upon Order No. 2000's[40] theoretical discussion of the benefits of RTOs, even though Order No. 2000 did not address how GFA customers would benefit from an RTO.[41] They also assert that the Commission failed to specifically address Basin, East River and Central's argument that their carved-out GFAs will not benefit from the Midwest ISO's schedule 17. The Cooperatives argue that the parties to carved-out GFAs do not participate in or receive any of the schedule 17 services, and therefore they cannot benefit from services that they do not receive.

23. The Cooperatives further argue that the Commission erred in the March 24 Order by authorizing the pass-through of Midwest ISO charges to GFA customers without showing that the rates are just and reasonable. They argue that the March 24 Order acknowledged Dairyland's protest that the Midwest ISO TOs failed to demonstrate that schedule 23 will produce just and reasonable rates, but did not address the substance of that portion of its protest. They explain that the Commission found in *Otter Tail* that proposals to pass-through Midwest ISO charges must be structured, "to preclude the automatic pass-through of unidentified future costs."[42] They further state that the Commission's acceptance of the generic pass through of schedule 10 and 17 costs eliminated the customer's ability to challenge the prudence of those costs, in conflict with the Commission's finding in the GFA Rehearing Order that the prudence of such costs would be reviewed in connection with proposals to pass through such costs to the GFA

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[39] East Kentucky Rehearing Request at 9.

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

[41] Cooperatives' Rehearing Request at 16.

[42] Cooperatives' Rehearing Request at 20.

customer.[43] The Cooperatives argue that the March 24 Order's failure to address whether the pass-through of charges under schedule 23 will produce just and reasonable rates is arbitrary and capricious.

24. The Cooperatives and MMTG claim that the March 24 Order erred by authorizing the pass through of Midwest ISO charges to GFA customers that have not voluntarily joined the Midwest ISO. They state that the pass-through of the schedule 10 and 17 charges to carved-out GFAs would be contrary to the voluntary approach to RTO formation under Order No. 2000.[44] Further, they assert that any RTO administrative costs incurred by Midwest ISO transmission owners result from their decision to participate in the Midwest ISO and they should accept the consequences of their decisions.

25. East Kentucky argues that the Commission ignored its prior findings that GFA customers should not pay Midwest ISO administrative cost adders. It explains that, in Opinion No. 453-A, the Commission expressly stated that "the rates, terms and conditions of bundled retail agreements and grandfathered agreements will still be honored throughout the transition period."[45] East Kentucky also points to an order addressing the Midwest ISO's Opinion No. 453 compliance filing where the Commission stated that "the existing agreements for bundled loads and grandfathered agreement loads served by the Midwest ISO TOs already provide for the recovery of the costs of serving those loads."[46] Thus, it states that because the Commission fails to follow its prior orders on Midwest ISO cost adders without any reasoned explanation for its deviation, the Commission should reverse its ruling in the March 24 Order.

26. MMTG argues that schedule 23 is barred by *res judicata*, collateral estoppel, law of the case, and principles of justiciability. It states that, prior to approving schedule 23, the Commission consistently declined to authorize blanket pass-through of Midwest ISO administrative charges to GFA customers. MMTG asserts that, under Opinion Nos. 453 and 453-A, any transmission owner seeking to pass through schedule 10 charges to its customers was required to seek individualized amendment of the affected agreements at

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[43] Cooperatives' Rehearing Request at 19-20.

[44] *See* Order No. 2000, FERC Stats. & Regs. ¶ 31,089 at 31,033-34.

[45] Opinion No. 453-A at 61,411.

[46] *Midwest Independent System Operator, Inc.*, 101 FERC ¶ 61,113 at P 12 (2002).

the Commission pursuant to the appropriate FPA standard.[47] It further states that the issue of blanket pass-through has been litigated before the Commission and the D.C. Circuit Court of Appeals, and, thus, the Midwest ISO TOs are barred from relitigating it.[48] Thus, MMTG argues that claim and issue preclusion apply to the procedural prerequisite established for such pass-through and that, absent evidence that efforts at individualized amendment have failed, schedule 23 is unripe for Commission consideration. Furthermore, MMTG argues that, in approving schedule 23, the Commission sends a message to the Midwest ISO transmission owners that a new services argument is a way to get around FPA requirements.

27. Moreover, MMTG argues that a substantial percentage of carved-out agreements involve one or more non-jurisdictional signatories and that the Commission lacks jurisdiction to assess the Midwest ISO administrative costs directly to those non-public utility GFA customers. It states that, rather than addressing jurisdictional considerations on a case-by-case basis, the Commission lumps them together, approving schedule 23 without regard to the identity of the transmission owner or customer; the legal relationship between the provider, owner, and customer; the appropriate standard for modification; and any relevant contractual terms.[49] MMTG asserts that the Commission must assert its jurisdiction in relation to each of these factors. Further, MMTG states that the Commission's implication that the identity of transmission providers and customers is irrelevant contradicts the plain meaning of section 201(f)[50] of the FPA.

28. In addition, MMTG argues that schedule 23 is inconsistent with *Mobile-Sierra* and that, in order to justify amending agreements subject to the *Mobile-Sierra* standard of review, the transmission owners would need to demonstrate that it meets the "practically insurmountable" public interested standard for modification.[51] MMTG argues that there

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[47] MMTG Rehearing Request at 3.

[48] *Id.* at 3-4.

[49] *Id.* at 6-7.

[50] 16 U.S.C. § 824(f) (2000). This section states that "[n]o provision in this [subchapter] shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing…". *Id.*

[51] MMTG Rehearing Request at 8-9.

is no evidence in the record that schedule 23 benefits the public interest or any interest other than the Midwest ISO owners.

29. MMTG also asks that the Commission ensure that schedule 23 meets the requirements of the filed rate doctrine; it explains that the filed rate doctrine requires specification of a precise rate; "mere information which an affected customer might (but also might not in the case of schedule 23) be able to estimate its own cost liability does not suffice."[52] Specifically, MMTG states that it hopes that the issues raised in relation to implementation, invoicing, and provision of accurate notice and information under the filed rate doctrine, will be satisfactorily addressed by the Midwest ISO TOs' compliance filing. It argues that, to the extent that the requirements of the filed rate doctrine are not adequately addressed in the compliance phase of this proceeding, the Commission should direct the Midwest ISO TOs to further revise schedule 23 to meet the statutory standards for precision, accuracy, and predictability. Furthermore, it states that customers need an adequate amount of time to review this information and contest any bills. MMTG asserts that a minimum of 30 days from the receipt of the bill would be a reasonable amount of time for review of schedule 23 charges.

b. Commission Determination

30. The Commission denies the requests for rehearing of its holding that schedules 10 and 17 address new services in the Midwest ISO energy markets. We reiterate that, as we explained in the March 24 Order, these services "could not have been provided by the Midwest ISO TOs to the carved-out GFA customers prior to the advent of the Midwest ISO, and the costs that the Midwest ISO TOs propose to pass through to GFA customers under schedule 23 thus are separate and distinct from the costs that the Midwest ISO TOs recover under current GFA provisions."[53] Contrary to parties' assertions on rehearing, the costs under schedule 23, like the costs at issue in Opinion Nos. 463 and 463-A, and in Opinion No. 477, are, in fact, associated with a new service and the Midwest ISO TOs thus may appropriately pass these costs through to GFA customers. We did not err in relying on Opinion No. 463-A, where we distinguished the Midwest ISO's administrative costs at issue in Opinion No. 453-A, because, although the services and functions provided by the Midwest ISO to its customers are different from the services and functions that the CAISO provides, in both cases we were able to make a determination that the costs at issue address new services and so do not constitute an amendment to, or modification of, the GFAs. In sum, because schedule 23 addresses new services,

[52] MMTG Rehearing Request at 11.

[53] March 24 Order at P 38.

contrary to MMTG's argument on rehearing, there is no need for the transmission owners to demonstrate that modification to those GFAs subject to the *Mobile-Sierra* standard of review meets the public interest standard. In other words, schedule 23 does not modify the rates, terms or conditions of services provided under the GFAs.

31. Specifically, we disagree with the Cooperatives' assertion that the March 24 Order reversed the GFA Order's determination that schedule 17 services are essentially the same as the reliability services at issue in Opinion Nos. 459 and 459-A, which services the Commission in those orders found were already provided under existing GFAs, because the Commission, in the GFA Order, made no such finding.

32. First, we note that the GFA Order made no final determination as to whether or not schedule 17 addressed new services. Instead, the Commission stated that, while the transmission owners and the Midwest ISO urged the Commission to adopt a tariff mechanism to charge GFA customers directly for schedule 17 services, "they have not made a concrete proposal identifying the GFA party that should be responsible for such costs or addressing whether or not the contracts already address responsibility for such costs … thus, the proposal is not ripe for consideration."[54]

33. In this regard, we also reiterate that the costs at issue in Opinion Nos. 459 and 459-A were "the costs of generation redispatch itself, *i.e.*, the actual costs of operating generating units out of merit order to maintain system security, and the firm transmission contracts executed prior to the CAISO's existence inherently included redispatch costs as part of that firm service."[55] In contrast, the costs at issue here are the costs associated with the Midwest ISO's administration of its energy markets, which constitutes a fundamentally different service than the service the transmission owners provided, or could have provided, prior to the advent of these new markets.[56] As the Commission stated in the GFA Rehearing Order, "schedule 17 is designed to recover the Midwest ISO's costs of providing Energy Market Services, including market modeling and scheduling, market bidding support, [locational marginal pricing (LMP)] support, market settlements and billing, and market monitoring,"[57] which is fundamentally different from

[54] GFA Order at P 302.

[55] March 24 Order at P 36.

[56] *Id*.

[57] GFA Rehearing Order at P 176.

the costs of generation redispatch itself, and are services that were not provided in the Midwest ISO footprint prior to the commencement of the Midwest ISO's energy markets.

34. Second, we note that the Commission has repeatedly held that the Midwest ISO's Day 2 energy markets will be more reliable and efficient overall than the Day 1 energy market. In the GFA Rehearing Order, the Commission reiterated that, under the TEMT, the Midwest ISO's:

> 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. 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 … . 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.[58]

35. In addition, the Commission stated that the Midwest ISO's Day 2 energy markets provide price signals that will facilitate identification of cost-effective transmission system improvements that will reduce congestion and the potential for curtailments, and that 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.[59]

36. Third, we reiterate that, with respect to market opportunities under the TEMT, "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 … with price formation aided by transparent market prices produced by the markets that the Midwest ISO will operate and monitor."[60] As the Commission stated in the GFA Rehearing Order:

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[58] *Id*. at P 177 (footnotes omitted).

[59] *Id*. at P 178.

[60] *Id*. at P 179.

> 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 … 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.[61]

37. In response to the Cooperatives argument that the Commission "relied upon presumed benefits" to GFA customers associated with the implementation of the proposed TEMT that have not been demonstrated, we find that their request for rehearing represents an impermissible collateral attack on the TEMT provisions that were considered and accepted by the Commission in both the TEMT II and GFA Orders.[62] Therefore, we reject those arguments. We also reiterate here that the Commission has, on numerous occasions, found that the Midwest ISO's Day 2 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.[63]

38. In addition, we disagree with the Cooperatives' assertion that because schedule 17 recovers costs associated with Day 2 market congestion management, while carved-out GFAs will be subject to Day 1 congestion management based on TLRs, the costs of which they state are already recouped under schedule 10, carved-out GFA customers will not receive any services paid for by schedule 17 charges. The Cooperatives point to the Midwest ISO's January 20, 2005 filing of tariff revisions to implement the GFA carve-

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[61] *Id*. at P 180.

[62] TEMT II Order at P 3, 577 n.337, and 588; TEMT II Rehearing Order at P 68; GFA Order at P 297-98; GFA Rehearing Order at P 174-81; March 24 Order at P 33-35.

[63] *Id*.

out,[64] which they state would require carved-out GFA transactions to be tagged and subject to curtailment in accordance with TLR procedures for congestion relief, but we find that they incorrectly characterize how the Midwest ISO will implement the carve-out. The tariff revisions filed on January 20, 2005, which were conditionally accepted in the GFA Rehearing Order, provide that transactions under carved-out GFAs will be tagged and curtailed using TLR procedures where necessary.[65] However, in its November 15, 2004 filing to comply with the GFA Order, where the Midwest ISO described how it would implement the carve out, the Midwest ISO explained that, in most cases, it will redispatch market generation and load to provide required transmission congestion relief, and curtailment of carved-out GFA schedules will not occur, thus providing a benefit to carved-out GFAs relative to current treatment. [66] Further, as we discuss above, the reduced reliance on TLRs in the Midwest ISO's market will result in a more stable and reliable system that will benefit all using it.

39. In response to the Cooperatives' assertion that the Commission accepted schedule 23 without a hearing or conducting a case-by-case review of each carved-out GFA to determine whether the pass-through of Midwest ISO costs should be allowed under a new service rationale, we note that, in this proceeding, we concluded that a hearing was unnecessary because schedule 23 provides new services that were not and could not have been provided by the Midwest ISO TOs prior to the advent of the Midwest ISO. Further, the Midwest ISO TOs' proposal will not pass through schedule 10 or schedule 17 costs where the costs are otherwise recovered from the GFA customer, and the Midwest ISO TOs have excluded those GFAs that already provide for recovery of the cost of these new services from the list of GFAs subject to schedule 23;[67] those particular GFAs had been modified since the advent of the Midwest ISO to include these new services. The parties that seek a hearing here do not allege that their contracts were among those modified to provide for recovery of the cost of these new services, but instead merely claim that the Midwest ISO is performing the same services under schedules 10 and 17 that were previously provided by the Midwest ISO TOs before the advent of the Midwest ISO.

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[64] *See* Midwest ISO January 20, 2005 compliance filing, Docket Nos. ER04-691-019, *et al*.

[65] *See* TEMT section 38.8.4.3, Substitute First Revised Sheet Nos. 454 and 454A, FERC Electric Tariff, Third Revised Volume No. 1.

[66] *See* Midwest ISO November 15, 2004 compliance filing, Docket Nos. ER04-691-010, *et al*., Transmittal Letter at 6.

[67] Schedule 23 Filing at 5.

However, as discussed above, we reject those arguments.

40. In addition, the Midwest ISO TOs' schedule 23 proposal differs from the proposal in *Otter Tail*, where Otter Tail proposed to pass through to its GFA customers the costs that Otter Tail incurs under the TEMT to meet its GFA obligations, including schedule 10, schedule 16 (the Financial Transmission Rights Administrative Service Cost Recovery Adder), schedule 17, and other charges under the TEMT. In that case, Otter Tail proposed to amend 12 GFAs which were subject to the "just and reasonable" standard of review and, as particularly relevant here, which the Commission required Otter Tail to integrate into the Midwest ISO energy markets. Moreover, in accepting and suspending Otter Tail's proposal and setting it for hearing and settlement judge procedures, the Commission directed that, in the hearing and settlement judge procedures, "participants should address, among other things, what modifications to the proposed new rider are necessary to better define what charges are properly passed through to GFA customers."[68] Thus, Otter Tail's proposal was not sufficiently clear as to what charges would be passed through to Otter Tail's GFA customers, presenting issues of material fact. On the other hand, the charges in the Midwest ISO TOs' schedule 23 proposal were sufficiently clear and were ripe for consideration, and schedule 23 was, in fact, accepted subject to certain modifications.

41. As is discussed below, moreover, in order to prevent double recovery, in the March 24 Order, the Commission expressly directed the Midwest ISO TOs to modify their proposal to include provisions for the Midwest ISO and the transmission owners to affirmatively verify schedule 10 and 17 charges to the GFA customers to ensure that there are no duplicative charges, to affirmatively demonstrate that no double counting occurs, and to specify the process through which disputes will be resolved.

42. In addition, we deny requests for rehearing that the Commission erred by authorizing the pass-through of Midwest ISO charges to GFA customers without showing that the rates are just and reasonable. In the March 24 Order, in conditionally accepting the Midwest ISO TOs' schedule 23 under section 205 of the FPA,[69] the Commission effectively found those rates to be, and that no one demonstrated that they were not, just and reasonable, subject to certain conditions. Further, as we stated in the March 24 Order, "[i]n the GFA Order, the Commission approved the treatment of carved-out GFAs and found the application of schedule 10 and 17 charges to carved out GFAs to be just and reasonable. Any concerns about the justness and reasonableness of the treatment of

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[68] *Otter Tail*, 110 FERC ¶ 61,220 at P 16.

[69] 18 U.S.C. § 824d (2000).

carved-out GFAs should have been raised in that proceeding. We will not allow parties to relitigate those issues here."[70] We reaffirm those findings here. Further, the Commission's acceptance of schedule 23 is consistent with its finding in *Otter Tail* that proposals to pass-through Midwest ISO charges must be structured, "to preclude the automatic pass-through of unidentified future costs."[71] Otter Tail's proposal did not well define the charges which would be passed through, and the Commission directed that the charges that would be passed through under the GFA must be specifically identified. In contrast, proposed schedule 23 specifically identifies the charges subject to passthrough, namely schedules 10 and 17, and does not provide for automatic pass-through of unidentified future costs.

43. With respect to the Cooperative's assertion that the Commission's acceptance of the passthrough of schedule 10 and 17 costs under schedule 23 eliminated the customer's ability to challenge the prudence of those costs, in conflict with the Commission's finding in the GFA Rehearing Order that the prudence of such costs would be reviewed in connection with proposals to pass through such costs to the GFA customer, we disagree that our acceptance of schedule 23 conflicts with the GFA Rehearing Order. There, the Commission addressed requests that the Commission clarify that the GFA Order did not predetermine the outcome of future proceedings to pass through TEMT cost to GFA customers, including whether costs associated with the GFA treatment option selected by the transmission owner are prudent. The Commission was specifically asked to clarify that the transmission owner would have to demonstrate in any passthrough proceeding that the costs it seeks to flow through would not have been avoided under another option.[72] In response, the Commission clarified that it did not predetermine the outcome of future proceedings involving proposals to pass TEMT related costs through to customers under particular GFAs and the specific issues presented are more appropriately raised when proposals to pass through TEMT costs to GFA customers are filed.[73] However, the issue of whether costs associated with the GFA treatment option selected by the transmission owner are prudent is not relevant with respect to schedule 23 because schedules 10 and 17 apply to all GFAs, regardless of the GFA treatment option.

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[70] March 24 Order at P 56.

[71] *Otter Tail*, 110 FERC ¶ 61,220 at P 16.

[72] GFA Rehearing Order at P 147.

[73] *Id*. at P 151.

44. We also reject both East Kentucky's argument that the Commission ignored its prior findings that GFA customers should not pay Midwest ISO administrative cost adders and MMTG's argument that schedule 23 is barred by *res judicata*, collateral estoppel, law of the case, and principles of justiciability because the broader issue of whether to allow pass-through has already been litigated and, thus, the Midwest ISO TOs are barred from relitigating it.[74] We reaffirm our holding in the March 24 Order that, while:

> the Commission previously rejected proposals to directly assess schedule 10 and schedule 17 charges to GFA customers, those proposals were either not supported on the basis of providing new services, in the case of Opinion No. 453-A, or were not concrete proposals identifying the GFA party that should be responsible for such costs or addressing whether or not the contracts already address responsibility for such costs. Thus, *those proposals were not ripe for acceptance*. Here, the Midwest ISO TOs have made a proposal that allows us to find that the services are new for the GFAs at issue and that the contracts do not address responsibility for such costs.[75]

45. With respect to MMTG's concerns that proposed schedule 23 violates the filed rate doctrine, we find that schedule 23, as conditionally accepted in the March 24 Order satisfies the requirements of the filed rate doctrine. Schedule 23 is a formula rate that directly passes through, dollar-for-dollar, the schedule 10 and 17 charges assessed to the transmission owner for transactions under the GFA, and contains protections to prevent double billing or double counting. The Commission has allowed the use of formula rates by public utilities for many years as long as the formula is sufficiently clear that all parties can determine what costs go into the rate and how it will be calculated.[76] In such a case, the filed formula constitutes the filed rate. The formula here, subject to the conditions applied in the March 24 Order, adequately specifies the inputs into the charges and how the charges are calculated and, therefore, can be accepted.

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[74] *See* Opinion No. 453-A at ¶ 61,413-14; *Midwest ISO Transmission Owners v. FERC*, 373 F.3d at 1372.

[75] March 24 Order at P 39 (emphasis added).

[76] *See, e.g., Midwest Independent Transmission System Operator, Inc.*, 101 FERC ¶ 61,221 at P 64 (2002), *order on paper hearing and compliance filing*, 108 FERC ¶ 61,235 at P 60 (2004).

46. With respect to MMTG's request to change the billing due date to a minimum of 30 days after receipt of the bill, we will deny the request. Other than demonstrating that customers' own processes and practices may not mesh neatly with the Midwest ISO's billing cycle, MMTG has not demonstrated that the Midwest ISO's processes and practices at issue here are unjust and unreasonable.

47. In response to the Cooperatives' and MMTG's claim that the March 24 Order erred by authorizing the pass through of Midwest ISO charges to GFA customers that have not voluntarily joined the Midwest ISO, Cooperatives and MMTG are correct that the Commission does not require RTO participation. However, where utilities voluntarily form an RTO, the Commission allows the RTO and its members to recover their costs prudently incurred in forming and operating the RTO from customers who benefit from the RTO's services, as the Commission did in the March 24 Order.

48. Finally, in response to arguments that the Commission lacks jurisdiction to assess the Midwest ISO administrative costs directly to those non-public utility GFA customers, what is at issue here are the rates of a jurisdictional utility, and the identity of the customer is irrelevant in evaluating the jurisdictional utility's jurisdictional rates.[77] We thus reiterate our holding in the GFA Rehearing Order that:

> 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).[78]

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[77] Indeed, if the identity of the *customer*, and its jurisdictional status, were determinative, any contract with a non-public utility customer would be non-jurisdictional in the first place and thus rates, terms, and conditions that we have regulated for years would now be effectively unregulated. But the Federal Power Act, 16 U.S.C. § 824 *et seq*. (2000), in fact, focuses on the identity of the *provider* of the service -- the power seller or the transmission provider – and not on the identity of the customer.

[78] GFA Rehearing Order at P 173.

Thus, we will deny the requests for rehearing on this issue.

2. Alleged Double-Collection of Midwest ISO Charges Under Schedule 23

49. In the March 24 Order, the Commission disagreed with Dairyland that the proposed schedule 23 will result in double charges to Mid-Continental Area Power Pool (MAPP) members who are already paying the Midwest ISO for transmission and reliability services that the Midwest ISO currently provides to MAPPCOR.[79] While the services the Midwest ISO provides to MAPPCOR relate to operation of and administration of transmission service over the transmission system owned by MAPP members that have not joined Midwest ISO, the schedule 10 and 17 costs pertain to the administrative costs to operate the Midwest ISO transmission system and energy market, and to administer the Midwest ISO Tariff. Further, the Commission stated that, under schedule 23, MAPP members who are GFA customers should and will pay for the costs associated with the transmission service they take under the GFAs over the Midwest ISO-controlled transmission grid.

a. Requests for Rehearing

50. The Cooperatives argue that MAPP members that are GFA customers are already paying the Midwest ISO for a variety of transmission-related services, including security coordination services.[80] They state that the Midwest ISO has also agreed to provide to MAPPCOR, at cost, office space and administrative and support services in connection with certain reliability functions currently performed by MAPPCOR. The Cooperatives explain that MAPPCOR pays the Midwest ISO for services under these agreements and MAPP members pay MAPPCOR for these services. For example, they assert that, under the MAPP Agreement, dues are apportioned to transmission-owning MAPP members based on the member's native load, regardless of control area or RTO footprint boundaries.[81] Therefore, the Cooperatives explain that Dairyland, as a transmission-

[79] March 24 Order at P 40.

[80] Cooperatives' Rehearing Request at 13. The Cooperatives explain that, pursuant to section 3.3 of an Agreement for Provision of Transmission-Related Services by the Midwest ISO to MAPPCOR dated March 1, 2000, the Midwest ISO has agreed to provide to MAPPCOR, at cost, for MAPP members that do not join the Midwest ISO, transmission-related services currently provided by MAPPCOR under the Restated Mid-Continental Area Power Pool Agreement (MAPP Agreement).

[81] Cooperatives' Rehearing Request at 14-15.

owning MAPP member, pays MAPPCOR for these services based not only on the load in Dairyland's control area, but also for its load in control areas that are within the Midwest ISO footprint. Thus, they argue that the Commission's analysis regarding double-charges to MAPP members was not accurate.

b. Commission Determination

51. We will deny the request for rehearing on this issue. The services which the Midwest ISO provides MAPPCOR are separate and distinct from the services the Midwest ISO provides under schedules 10 and 17 of the Midwest ISO Tariff. The services which the Midwest ISO provides MAPPCOR are transmission-related services currently provided by MAPPCOR under the MAPP Agreement for service over the transmission systems of MAPP members that have not joined the Midwest ISO. In contrast, the services the Midwest ISO provides under schedules 10 and 17 are associated with service under the Midwest ISO Tariff over the Midwest ISO transmission system. Under schedule 23, MAPP members who are GFA customers should and will pay for the costs associated with the transmission service they take under the GFAs over the Midwest ISO-controlled transmission grid. The fact that Dairyland pays both schedule 23 charges and a share of MAPPCOR costs based on its load served in the Midwest ISO footprint simply reflects that to serve its load it must take service, and should pay, under two separate tariffs – the MAPP Agreement and the Midwest ISO Tariff.

3. GFA No. 220

52. In its protest to the Schedule 23 Filing, East Kentucky stated that schedule 23 should not apply to base load amounts under GFA No. 220. It noted that footnote 4 to Attachment 1 of schedule 23 states that GFA No. 220 "is subject to proceedings in Docket No. ER02-2560, in which [Louisville Gas and Electric Company] has requested cost recovery of schedule 10 and 17 charges. [Louisville Gas and Electric Company] lists this GFA here in the event that the Commission denies recovery in Docket No. ER02-2560." East Kentucky asserted that the Commission concluded in those proceedings that the Midwest ISO schedule 10 adder could not be passed through under GFA No. 220 for base load amounts because those amounts are fixed, and that charges under future schedules under the Midwest ISO Tariff, such as schedule 17, cannot be automatically passed through to East Kentucky without a section 205 filing.[82] Thus, it

[82] East Kentucky Protest at 3 (*citing Louisville Gas & Electric Company and Kentucky Utilities Company*, 109 FERC ¶ 61,330 at P 8, 9 (2004) (December 22 Order), *order on reh'g*, 111 FERC ¶ 61,323 (2005) (Louisville Rehearing Order). The December 22 Order is an order that affirms in part and reverses in part an initial decision in *Louisville Gas & Electric Company, Kentucky Utilities Company*, 106 FERC ¶ 63,039 (continued)

requested that the Commission require the Midwest ISO TOs to modify Attachment 1 of schedule 23 to state that schedules 10 and 17 do not apply to base load amounts under GFA No. 220.

53. In the March 24 Order, the Commission found that, while East Kentucky was correct that the Commission previously rejected the proposal by Louisville Gas and Kentucky Utilities in Docket No. ER02-2560-000 to pass through schedule 10 charges for base load amounts under GFA No. 220, "the proposal in that proceeding was not supported on the basis that schedule 10 was associated with a new service not already provided by the GFA," and "was not ripe for acceptance."[83] Thus, the Commission did not require the Midwest ISO TOs to modify schedule 23 to state that schedules 10 and 17 do not apply to base load amounts under GFA No. 220.

a. East Kentucky's Request for Rehearing

54. On rehearing of the March 24 Order, East Kentucky argues that the Commission's determination that Louisville Gas and Kentucky Utilities' original September 2002 proposal to pass through schedule 10 charges for base load amounts under GFA No. 220 "was not ripe for acceptance" disregards previous orders in Docket No. ER02-2560 and is without rational basis. East Kentucky argues that, if Louisville Gas and Kentucky Utilities' proposal was not "ripe for acceptance" when they first submitted their modifications to GFA No. 220 for Commission approval, then the Commission should have rejected their filing at that time. Instead, East Kentucky explains that, in its order setting the Louisville Gas and Kentucky Utilities' proposal for hearing, the Commission found that the proposal substantially complied with the Commission's filing requirements and would not reject it for lack of support.[84] East Kentucky states that the Commission also held that:

> [i]n evaluating whether the proposed rates at issue here reflect the cost of providing service under the Agreements, *the charges that Midwest ISO*

(2004) (Initial Decision), resolving a proposal to modify the rates under an Interconnection Agreement and a Transmission Agreement between Louisville Gas & Electric Company (Louisville Gas), Kentucky Utilities Company (Kentucky Utilities) and East Kentucky.

[83] March 24 Order at P 50.

[84] *Id*. (*citing Louisville Gas & Electric Company and Kentucky Utilities Company*, 100 FERC ¶ 61,182 at P 17 (2002)).

> *levies on transmission owners for service provided under these grandfathered contracts, including the Schedule 10 charges, may be considered*.[85]

55. East Kentucky asserts that it ceased challenging the assessment of schedule 10 on loads in excess of the base load amounts under GFA No. 220 because the Commission, in that same order, also ruled that the Midwest ISO rates were an appropriate starting point for the new GFA rates. However, East Kentucky states that it continued to argue, and the Commission agreed, that schedule 10 should not apply to base load amounts because the rates for such loads were fixed and therefore subject to the *Mobile-Sierra* public interest standard of review, so that Louisville Gas and Kentucky Utilities did not have the right to unilaterally alter those rates.[86] Thus, it states that the Commission's failure to uphold its earlier orders in Docket No. ER02-2560 in the March 24 Order must be overturned.

56. Further, East Kentucky states that the proposal to assess schedule 23 charges is a collateral attack on the Commission's December 22 Order. It explains that, in the December 22 Order, the Commission remanded to the presiding judge its finding that Louisville Gas and Kentucky Utilities' proposed rate must be adjusted to reflect an allocation of costs assuming that Louisville Gas and Kentucky Utilities did not provide access to its system under the Midwest ISO Tariff.[87]

57. East Kentucky also argues that the Midwest ISO administrative costs are not a "new service" with respect to base loads under GFA No. 220. It states that, although Louisville Gas and Kentucky Utilities did not use the words "new service" in their initial brief in Docket No ER02-2560, they did argue that these were costs not contemplated at the time the agreements were executed. However, East Kentucky explains that, in its Initial Decision, the presiding judge ruled that schedule 10 "cannot be added to what has been fixed by a contract and is now grandfathered."[88] Thus, East Kentucky argues that

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[85] *Id*. (*citing Louisville Gas & Electric Company and Kentucky Utilities Company*, 101 FERC ¶ 61,182 at P 23 (2002) (emphasis added)). In addition, East Kentucky asserts that, in response to its request for rehearing of that order, the Commission found that the applicability of schedule 10 charges to GFA No. 220 was properly at issue in the ER02-2560 proceeding. *See* East Kentucky rehearing request at 4 (*citing Louisville Gas & Electric Company and Kentucky Utilities Company*, 103 FERC ¶ 61,104 at P 18 (2003)).

[86] East Kentucky Rehearing Request at 5.

[87] December 22 Order at P 32.

[88] Initial Decision, 106 FERC ¶ 63,039 at P 52 (2004).

the issue of schedule 10's application to GFA No. 220 has been fully litigated, briefed to the Commission, and affirmed by the Commission. It states that, in ruling in the instant proceeding that schedule 23 should apply to this same base load service, the Commission ignored its rulings in that proceeding.

b. Commission Determination

58. We deny East Kentucky's request for rehearing of the Commission's ruling that the Midwest ISO TOs may apply schedules 10 and 17 to base load amounts under GFA No. 220. Contrary to East Kentucky's assertions, our ruling was not a collateral attack on the Commission's December 22 Order because, as the Commission stated in the March 24 Order, the proposal in Docket No. ER02-2560-000 to pass through schedule 10 charges for base load amounts under GFA No. 220 was rejected due to lack of support and ripeness. Whereas here, in this proceeding, the Midwest ISO TOs' Schedule 23 Filing allowed us to find that the services are new for the GFAs at issue and that the contracts do not address responsibility for such costs. Louisville Gas and Kentucky Utilities did argue in their initial brief in Docket No ER02-2560 that schedule 10 charges were costs not contemplated at the time the agreements were executed. That argument, while not inconsistent with a finding that the costs are associated with a new service, does not, in and of itself, support a finding that the costs are associated with a new service. That argument is fundamentally different from the case made by the Midwest ISO TOs in their Schedule 23 Filing that schedules 10 and 17 represent new services that were not, and could not have been, provided by the Midwest ISO TOs prior to the advent of the Midwest ISO.

59. Further, we disagree with East Kentucky that the Commission's acceptance of the proposal to assess schedule 23 charges for base load under GFA No. 220 conflicts with the Commission's findings regarding the issue remanded to the presiding judge. The presiding judge had found in his Initial Decision that the Midwest ISO OATT rate that Louisville Gas and Kentucky Utilities proposed to utilize for pricing service under the GFAs is higher than the rate Louisville Gas and Kentucky Utilities would have charged if Louisville Gas and Kentucky Utilities did not participate in the Midwest ISO. The presiding judge had found that, if East Kentucky pays this higher rate under its GFAs, then it should get service over the entire Midwest ISO transmission system in return. In the December 22 Order, the Commission acknowledged that the rate that Louisville Gas and Kentucky Utilities charge is higher than the rate Louisville Gas and Kentucky Utilities would have charged if Louisville Gas and Kentucky Utilities did not participate in the Midwest ISO.[89] However, the Commission found that the appropriate solution is

[89] *See* Louisville Rehearing Order, 111 FERC ¶ 61,323 at P 32.

not to expand the scope of service under the agreements to match the rates, i.e., to include access to the entire Midwest ISO system. Rather, the appropriate solution is to set the rates to reflect an allocation of costs to the agreements at issue there assuming that Louisville Gas and Kentucky Utilities did not provide access to their system under the Midwest ISO OATT. Thus, the issue on remand is the appropriate allocation of the costs of the Louisville Gas and Kentucky Utilities transmission system to service under the agreements at issue there. Passthrough of schedule 10 and 17 charges are not an issue in the remand proceeding, as these costs are associated with new regional services and are due to these new regional services.

C. Compliance in Response to March 24 Order

60. As noted above, in the March 24 Order, the Commission required the Midwest ISO TOs to include provisions for the Midwest ISO and the transmission owners to affirmatively verify schedule 10 and 17 charges to the GFA customers to ensure that there are no duplicative charges, to affirmatively demonstrate that no double counting occurs, and to specify the process through which disputes will be resolved. The Commission also required the Midwest ISO TOs to file as a compliance filing modifications to schedule 23 to identify all credits that the transmission owners receive under the Midwest ISO Tariff-based schedule 10 and 17 charges applicable to the carved-out GFAs and provide for offset of the schedule 23 charges by the amount of such credits. [90]

1. The Midwest ISO TOs' Compliance Filing

61. On April 22, 2005, the Midwest ISO TOs made a compliance filing (April 22 Filing) in response to the requirements of the March 24 Order. The April 22 Filing includes clarification and revisions to schedule 23 of the Midwest ISO TEMT. The Midwest ISO TOs propose that, at the time an initial bill is issued under schedule 23, each transmission owner will certify that the schedule 10 and 17 charges billed to its GFA customers are not duplicative of costs otherwise recovered by the transmission owner. In addition, each transmission owner will provide a break-down of charges under the GFA demonstrating that no double recovery occurs. If the transmission owner already recovers schedule 10 costs under the GFA, the Midwest ISO must show on its bill to the customer under schedule 23 that such schedule 10 costs are not included on the bill under schedule 23. The revisions also require the transmission owners to provide, at the time the certification is made, data and information to allow the carved out GFA customer to determine that there is no double recovery. The revised schedule also

[90] March 24 Order at P 54, 55.

provides that any disputes concerning double recovery shall be subject to the dispute resolution procedures of section 12 of the Midwest ISO TEMT.

62. The April 22 Filing also adds a new provision to schedule 23, that requires each transmission owner to identify all credits it receives under the Midwest ISO Tariff based on schedule 10 and 17 charges assessed under schedule 23 for each GFA customer, and to offset these credits against the charges to each carved-out GFA customer under schedule 23.

2. Comments

63. Dairyland contends that revisions to schedule 23 fail to comply with and remedy the flaws identified in the March 24 Order. Dairyland states that a certification by the transmission owner does not constitute an affirmative demonstration that there are no duplicative charges. Dairyland also contends the provision for a transmission owner to provide data and information, to allow the carved-out GFA customer to determine that there is no double recovery, is insufficient. Dairyland asserts that it is unclear what type of information the transmission owner would provide. It argues that proposed revisions fail to comply with the March 24 Order's requirement that the Midwest ISO itself certify and demonstrate that there are no duplicative charges.

64. International Transmission asserts that, in the GFA Rehearing Order, the Commission held that International Transmission is not responsible for charges assessed under the Midwest ISO TEMT with respect to GFAs to which it is a party.[91] Instead, International Transmission states that the carved-out GFA customers are responsible and are to be billed directly for such charges. International Transmission explains that section 2.2 in schedule 23 is written so that the Midwest ISO TOs are responsible for charges that are not paid by the carved-out GFA customers. International Transmission states that schedule 23 needs to be further revised to reflect the Commission's decision in the GFA Rehearing Order.

65. MMTG states that schedule 23 requires additional revisions to ensure that customers are protected from duplicative or erroneous charges. MMTG suggests that schedule 23 be revised to specify certain data that will be provided to the GFA customer to demonstrate that the charges assessed to them are accurate and that there is no double recovery. MMTG asserts that this information is also necessary for customers to comply with any auditing and recordkeeping requirements of applicable state and local laws.

[91] International Transmission Protest at 3.

66. MMTG also asserts that the proposed revisions to incorporate into schedule 23 the dispute resolution process under section 12 of the TEMT is redundant with, and potentially conflicts with, sections 2.2 and 2.3 of schedule 23, which authorize the Midwest ISO and/or the Midwest ISO TOs to initiate proceedings to pursue payment when GFA customers have not paid charges due under schedule 23 and authorizes the Midwest ISO to file an unexecuted service agreement if the GFA customer is not otherwise already obligated to comply with the terms of the TEMT. MMTG requests that sections 2.2 and 2.3 of schedule 23 be deleted, or, in the alternative, that they be revised to require notification to the GFA customer of any intent to commence proceedings with the Commission, in court or other measures not contemplated under section 12 of the TEMT.

3. Commission Determination

67. We agree with Dairyland that certain of the proposed revisions in the April 22 Filing fail to comply with the March 24 Order. The March 24 Order required the Midwest ISO TOs to include provisions in schedule 23 for both the *Midwest ISO and the Midwest ISO TOs* to affirmatively verify and demonstrate that no duplicative charges or double counting occurs.[92] The proposed revisions in the April 22 Filing fail to provide the joint verification and demonstration we required in the March 24 Order. In addition, the proposed revisions only address double charges between schedule 23 and the GFA. This in insufficient, as the GFA customer may take service directly under the TEMT for certain transactions and under its GFA for others. The Midwest ISO should demonstrate in the invoice that no double counting occurs between transactions taking place under the GFA and the GFA customer's transactions taking place directly under the TEMT. We will, therefore, require the Midwest ISO TOs to file further modifications to schedule 23, within 30 days of the date of this order, to provide the joint verification and demonstration required in the March 24 Order.

68. With respect to the request by MMTG that schedule 23 be revised to include the underlying data that will be provided, we agree in part. Schedule 23 should specify minimum data requirements necessary to ensure no double billing or double collection, such as billing determinants (e.g., reservations or loads) to which schedule 10 and 17 charges are applied under schedule 23 and other arrangements, and the total schedule 10 and 17 charges under schedule 23 and other arrangements. We will, therefore, require the Midwest ISO TOs to file further modifications to schedule 23, within 30 days of the date of this order, to specify such minimum data requirements.

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[92] *See* March 24 Order at P 54.

69. However, MMTG also requests that GFA customers be provided with detailed information regarding the derivation of the schedule 10 and 17 rates themselves. We will not require that such information be provided with invoices of schedule 23 charges. Schedule 23 is simply a mechanism for recovery from the GFA customers of charges assessed to Midwest ISO TOs under schedules 10 and 17 of the TEMT. Schedules 10 and 17 of the TEMT contain formula rates that have been approved by the Commission and that define the underlying data and methodology by which schedule 10 and 17 rates are determined. In addition, any changes to schedules 10 and 17 would need to be filed with the Commission under section 205 of the FPA. As a result, appropriate notification would be provided to GFA customers of any changes in those formula rates. Thus, we find the provision of additional information about the derivation of schedule 10 and 17 charges unnecessary.

70. We agree with International Transmission that schedule 23 should be updated to reflect our findings in the GFA Rehearing Order, issued subsequent to the March 24 Order. In the GFA Rehearing Order, the Commission found that International Transmission should not be responsible for charges assessed under the TEMT with respect to the carved-out GFAs to which it is a party.[93] We direct the Midwest ISO TOs, in their compliance filing, within 30 days of the date of this order, to update attachment 1 of schedule 23 to remove these GFAs, since International Transmission is not responsible for schedule 10 or 17 charges for transactions under GFAs in the first instance.

71. We also disagree with MMTG's assertion that the proposed revisions to incorporate into schedule 23 the dispute resolution process under section 12 of the TEMT is redundant with, and potentially conflicts with, sections 2.2 and 2.3 of schedule 23. Sections 2.2 and 2.3, respectively, authorize the Midwest ISO and/or Midwest ISO TOs to initiate proceedings to pursue payment when GFA customers have not paid charges due under schedule 23 and authorize the Midwest ISO to file an unexecuted service agreement if the GFA customer is not otherwise already obligated to comply with the terms of the TEMT. The April 22 Filing provides that disputes about *double recovery* resulting from schedule 23 shall be governed by the dispute resolution process in section 12 of the TEMT. Issues of double recovery are separate and distinct from issues of nonpayment and the filing of service agreements. Therefore, there is no redundancy and we will not require modification to these provisions. With respect to MMTG's request that the Midwest ISO and the Midwest ISO TOs be required to notify the customer prior to initiating proceedings in court, at the Commission, or in any other forum not contemplated under section 12 of the Midwest ISO TEMT, we find this unnecessary as we would expect that the Midwest ISO and the Midwest ISO TOs would find it in their

[93] *See* GFA Rehearing Order at P 150.

own interest to attempt to resolve disputes amicably in the first instance before incurring litigation expenses.

72. With respect to MMTG's request that a point person be designated to address billing inquiries, we direct the Midwest ISO to provide appropriate contact information to GFA customers with invoices containing schedule 23 charges.

The Commission orders:

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

(B) The Midwest ISO TOs' compliance filing is hereby conditionally accepted, subject to modification, as described in the body of this order.

(C) The Midwest ISO TOs are hereby directed to make a compliance filing, within 30 days of the date of this order, as discussed in the body of this order.

By the Commission. Chairman Kelliher dissenting with a separate statement attached.

(S E A L)

Magalie R. Salas,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Transmission Owners of the	Docket Nos. ER05-447-004
Midwest Independent Transmission System Operator, Inc.	ER05-447-005

(Issued November 2, 2005)

Joseph T. KELLIHER, Chairman, *dissenting*:

I would have granted rehearing and set for hearing the issue of whether the costs recovered under Midwest ISO's schedules 10 and 17 constitute "new services" for the reasons explained in my dissent from the March 24 Order.[1]

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Joseph T. Kelliher

[1] *See Transmission Owners of the Midwest Independent Transmission System Operator, Inc.*, 110 FERC ¶ 61,339 at 62,353 (2005).