

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Midwest Independent Transmission System
Operator, Inc.

Docket Nos. ER06-690-000
ER06-690-001

ORDER CONDITIONALLY ACCEPTING TARIFF REVISIONS AND DIRECTING
COMPLIANCE FILING

(Issued May 15, 2006)

1. On March 1, 2006, as amended on March 16, 2006, the Midwest Independent Transmission System Operator, Inc. (Midwest ISO) filed proposed revisions to its Open Access Transmission and Energy Markets Tariff (TEMT or tariff) and to the Agreement of Transmission Facilities Owners to Organize the Midwest Independent Transmission System Operator, Inc., a Delaware Non-Stock Corporation (TOA or agreement), to consolidate and clarify the dispute resolution procedures contained in those documents. As discussed below, the Commission will conditionally accept the proposed revisions, to become effective May 1, 2006, as requested.

Background

2. Currently, the Midwest ISO's dispute resolution procedures are located in section 12 of the TEMT and appendix D of the TOA. The Midwest ISO proposes to consolidate its dispute resolution procedures in a new attachment HH to the TEMT, and to revise section 12 of the TEMT and appendix D of the TOA to incorporate the attachment HH procedures by reference.

3. In addition, the Midwest ISO proposes to modify and/or clarify its dispute resolution procedures in a number of respects, based on experience and feedback obtained as a result of recent arbitration and mediation proceedings. Among the proposed revisions, the Midwest ISO proposes: (i) clarification that the existence of the alternative dispute resolution procedures does not foreclose the rights of a party to file a complaint with the Commission; (ii) provisions for the Midwest ISO to notify potentially affected parties when resolution of a dispute could impact the distribution of revenues to such parties; (iii) clarification of procedures with respect to selection of neutral mediators and arbitrators; (iv) clarification of procedures for identifying and providing notice to third-parties who may have an interest in a dispute; (v) provisions for allocation of costs

associated with various dispute resolution procedures among parties; (vi) clarification of how the rights of intervening parties are to be established; (vii) clarification of the rights of parties to seek discovery, including presumptive limits on such discovery; and (viii) clarification of the confidentiality provisions of the dispute resolution procedures.

4. The Midwest ISO requests that the Commission make its proposed revisions effective on May 1, 2006.

Notices and Responsive Filings

5. Notice of the March 1 filing was published in the *Federal Register*, 71 Fed. Reg. 13,830 (2006), with interventions and protests due on or before March 22, 2006. Timely motions to intervene were filed by: Consumers Energy Company; the Midwest Stand-Alone Transmission Companies;¹ and Wisconsin Public Service Corporation, Upper Peninsula Power Company, WPS Energy Services Inc., and WPS Power Development, LLC. A timely motion to intervene and protest was filed by the Midwest ISO Transmission Owners.² The Midwest

¹ The Midwest Stand-Alone Transmission Companies, for purposes of this proceeding, consist of: American Transmission Company LLC; International Transmission Company; and Michigan Electric Transmission Company, LLC.

² The Midwest ISO Transmission Owners, 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 Co. d/b/a AmerenCILCO, and Illinois Power Company d/b/a AmerenIP; Alliant Energy Corporate Services, Inc. on behalf of its operating company affiliate Interstate Power and Light Company (f/k/a IES Utilities Inc. and Interstate Power Company); American Transmission Systems, Incorporated, a subsidiary of FirstEnergy Corp.; Aquila, Inc. d/b/a Aquila Networks (f/k/a Utilicorp United, Inc.); Cinergy Services, Inc. (for Cincinnati Gas & Electric Co., PSI Energy, Inc., and Union Light Heat & Power Co.); City of Columbia Water and Light Department (Columbia, MO); City Water, Light & Power (Springfield, IL); E.ON U.S. LLC (for Louisville Gas and Electric Company and Kentucky Utilities Company); Great River Energy; Hoosier Energy Rural Electric Cooperative, Inc.; Indiana Municipal Power Agency; Indianapolis Power & Light Company; Minnesota Power (and its subsidiary Superior Water, L&P); Montana-Dakota Utilities Co.; Northern Indiana Public Service Company; Northern States Power Company and Northern States Power Company (Wisconsin), subsidiaries of Xcel Energy Inc.; Northwestern Wisconsin Electric Company; Otter Tail 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.

TDUs³ filed a motion to intervene and protest one day late. On April 6, 2006, the Midwest ISO filed an answer to the protests filed by the Midwest ISO Transmission Owners and the Midwest TDUs.

6. Notice of the March 16 filing was published in the *Federal Register*, 71 Fed. Reg. 16,300 (2006), with interventions and protests due on or before April 6, 2006. None was filed.

Discussion

A. Procedural Matters

7. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2005), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. We will grant the Midwest TDUs' motion for late intervention given their interest, the early stage of this proceeding, and the absence of any undue prejudice or delay.

8. 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 unless otherwise ordered by the decisional authority. We will accept the answer of the Midwest ISO because it has provided information that assisted us in our decision-making process.

B. Analysis

1. Burden of Bringing the Dispute to the Jurisdictional Authority if All Parties Fail to Consent to Arbitration

9. Under the arbitration procedures set forth in proposed section IV of attachment HH, a dispute involving an alleged breach of a federal or state law or regulation "shall only be heard by a court or agency having jurisdiction thereof and over the Parties, unless all Parties consent to arbitration of such assertion."⁴ The procedures further provide that a party seeking to invoke jurisdiction of the appropriate regulatory

³ The Midwest TDUs, for purposes of this filing, consist of: Great Lakes Utilities; Indiana Municipal Power Agency; Madison Gas & Electric Company; Midwest Municipal Transmission Group; Missouri Joint Municipal Electric Utility Commission; Missouri River Energy Services; and Southern Minnesota Municipal Power Agency.

⁴ March 1 Filing at Attachment HH, section IV.A, Original Sheet No. 1894.

authority shall make the necessary filing to commence proceedings before such regulatory authority within 120 days of receiving the demand for arbitration. If the necessary filing is not made in this time frame, the dispute reverts to arbitration.⁵

a. Protests and Answer

10. The Midwest TDUs argue that the arbitration procedures unjustly impose on the party on the receiving end of an arbitration demand the burden of bringing a dispute before the appropriate jurisdictional authority, such as the Commission, if it does not agree to resolve the issue through arbitration. The Midwest TDUs argue that, instead, the party initiating arbitration should be placed with the burden of filing the dispute with the Commission in situations where not all parties agree with handling the dispute through arbitration. Moreover, the Midwest TDUs argue that it is unclear how the target of a demand for arbitration would fashion a filing to the Commission in response to a demand for arbitration. Finally, the Midwest TDUs note that it is unclear whether the party demanding arbitration could, if it sees appropriate, terminate arbitration and initiate a complaint with the Commission or another jurisdictional authority and effectively terminate the arbitration procedures.

11. In its answer, the Midwest ISO states that the underlying principle of the dispute resolution procedures is that alternate dispute resolution is the preferred method of dispute resolution. Therefore, the procedures default to the use of alternate dispute resolution when a party receiving a demand for arbitration, but who does not agree that the dispute should be handled through arbitration, fails to seek relief before the courts or before the Commission. The Midwest ISO states, for this reason, the burden appropriately rests on those who seek to circumvent the dispute resolution process to remove the dispute from the process.⁶

b. Commission Determination

12. We agree with the Midwest ISO's assertion that it is preferable for parties to pursue alternate dispute resolution procedures for disputes that arise under the TEMT and related documents before those disputes are brought to the Commission. The Commission has stated that it is essential that parties attempt to resolve their disputes

⁵ *Id.*

⁶ Midwest ISO Answer at 7-8 and n. 5 (citing *Strategic Energy L.L.C. v. California Independent System Operator Corporation*, 95 FERC ¶ 61,312 at n. 10 (2001)).

before bringing them before the Commission.⁷ In such cases, we relied upon the fact that parties could appeal an arbitration decision to the Commission or the courts, to ensure their due process rights were not abridged. Accordingly, we will accept the Midwest ISO's proposal requiring that the dispute revert to arbitration if the party receiving the demand for arbitration does not make the necessary filing to invoke jurisdiction of the appropriate regulatory authority within 120 days of receiving the demand for arbitration.

13. In response to the Midwest TDUs' argument, we clarify that a target of a demand for arbitration can file, prior to the start of arbitration proceedings, a complaint or petition for declaratory order, pursuant to sections 385.206 and 385.207 of the Commission's Regulations and Procedures.⁸ Parties involved at this point should be familiar with the issues in dispute and able to fashion such a response in accordance with our regulations.

14. In addition, we agree with the Midwest TDUs that it is unclear whether the party demanding arbitration could terminate the process and file a complaint with the Commission. Moreover, once a party has invested its resources and the resources of others to arbitration, it should be required to follow through with that commitment. As discussed above, the Commission strongly encourages that parties attempt to resolve their disputes before bringing them to the Commission. Termination of arbitration procedures without consequence once the process has begun would be counterproductive substantively and monetarily. Accordingly, we will direct the Midwest ISO to clarify the procedures set forth in proposed section IV of attachment HH in this regard.

15. Similarly, we find that there may be an inconsistency in proposed section III.A, which establishes when mediation is required.⁹ On the one hand, this section states that the proposed mediation procedures are not intended to limit parties' right to file a complaint with the Commission. However, on the other hand, the proposed language in the first sentence of section III.A states that any dispute governed by these procedures shall be subject to non-binding mediation subsequent to informal dispute resolution in section II, but before the initiation of arbitration, regulatory, judicial, or other dispute resolution, unless the Alternate Dispute Resolution (ADR) Committee determines that

⁷ E.g., *Pacific Gas and Electric Company*, 81 FERC ¶ 61,122 at 61,489 (1997); *California Power Exchange Corporation*, 88 FERC ¶ 61,112 at 61,266 (1999) ("The Commission prefers and strongly encourages parties to resolve disputes on their own, or with the help of a mediator, and, thus, eliminate the need to bring disputes before the Commission.").

⁸ 18 C.F.R. §§ 385.206 and 385.207 (2005).

⁹ March 1 Filing at Attachment HH, section III.A, Original Sheet No. 1889.

mediation would be highly unlikely to lead to resolution of the dispute. Thus, section III.A leaves unclear whether, and if so when, a party to a dispute that is not resolved through informal dispute resolution procedures in section II *may* terminate the process before or during mediation and file a complaint with the Commission, and the consequences for such action. Consistent with *Pacific Gas and Electric Company*, *supra* note 7, the intent of proposed section III.A should be for parties to participate in mediation before bringing a dispute to the Commission to resolve, unless the ADR Committee determines that mediation would be highly unlikely to lead to resolution of the dispute. Accordingly, we direct the Midwest ISO to clarify proposed section III.A in this regard.

2. Notice of Arbitration

16. Proposed section III.B.3 of attachment HH requires that the Midwest ISO identify and notify all parties who may have a direct monetary interest that will be affected by the mediation of the dispute.¹⁰

a. Protests and Answer

17. The Midwest ISO Transmission Owners argue that the arbitration procedures set forth in proposed section IV of attachment HH do not contain a notice provision, and that proposed section IV should be revised to provide that the Midwest ISO notify all parties with a monetary interest in a dispute as is required under the procedures for mediation set forth in section III.B.3.

18. Similarly, the Midwest TDUs state that while proposed section IV.B requires that a demand for arbitration identify all affected parties, section IV.B contains no specific notice provisions, and no guarantee that all parties with an interest in such demand for arbitration will be identified. The Midwest TDUs state that the Midwest ISO should be required to post notices of arbitration demands on its website.

19. In its answer, the Midwest ISO states that all potential parties and intervenors are notified of disputes after informal dispute resolution procedures (under proposed section II) reach an impasse, and those entities are asked to participate in the mediation process. The Midwest ISO states that because mediation is a precursor to arbitration, the notice requirements of proposed section III.B.3 are adequate and requires no further revisions.

¹⁰ *Id.* at Attachment HH, section III.B.3, Original Sheet No. 1891.

b. Commission Determination

20. We disagree with the Midwest ISO's assertion that, because mediation is a precursor to arbitration, the notice provisions under the mediation procedures in proposed section III.B.3 serve to adequately notify all parties and intervenors in instances where mediation advances to arbitration. In their protest, the Midwest ISO Transmission Owners point out that the ADR Committee can determine that mediation is not appropriate for a particular dispute and, in that case, the dispute could go directly to arbitration.¹¹ In such instances, the notice provisions of proposed section III.B.3 will not apply prior to arbitration procedures being invoked. Furthermore, we find there is no guarantee that all affected parties and intervenors will be notified of a dispute advancing from mediation to arbitration. Accordingly, we will direct the Midwest ISO, within 30 days of the date of this order, to revise proposed section IV to set forth specific identification and notice provisions requiring the Midwest ISO to identify and notify all parties who may have a direct monetary interest that will be affected by the arbitration of the dispute when a dispute advances to arbitration.

21. Moreover, under proposed section II.B.4, should parties reach a resolution under the informal dispute resolution procedures, "that would result in a change in the distribution of revenue by the Transmission Provider (consistent with Appendix C to the ISO Agreement), the Transmission Provider shall determine those Parties who may have a direct monetary interest that will be affected by the resulting change and notify the appropriate Parties of the proposed change."¹² We find that notification, only in circumstances that would result in a change in the distribution of revenue, is limited in scope. Thus, we will require the Midwest ISO to revise the procedures set forth in proposed section II.B.4 of attachment HH to require the Transmission Provider to identify and provide notice to entities who may have a direct monetary interest in all circumstances, not just revenue distribution, when parties reach a resolution under the informal dispute resolution procedures of proposed section II. In addition, we note that section II.B.4 provides that any parties who dispute the proposed resolution reached under the informal dispute resolution procedures of proposed section II shall then have the opportunity to initiate a dispute in accordance with the attachment HH dispute resolution procedures or the Federal Power Act (FPA). Consistent with our discussion above, we will direct the Midwest ISO to clarify proposed section II.B.4 to provide that such parties should participate in informal dispute resolution under section II, and

¹¹ *Id.* at Attachment HH, section III.B.1, Original Sheet No. 1890.

¹² *Id.* at Attachment HH, section II.B.4, Original Sheet No. 1889.

mediation under section III, if necessary and the ADR Committee deems it appropriate, before bringing such disputes to the Commission for resolution.

22. In addition, we will also adopt the Midwest TDUs' suggestion that the Midwest ISO be required to post notices of dispute proceedings on its website. This will help ensure that parties with a potential monetary interest in a dispute receive notice in the event that the Midwest ISO is unable to identify all such parties. Thus, we will require the Midwest ISO to also revise proposed section II to provide that the Midwest ISO will post notices when parties reach a resolution under the informal dispute resolution procedures of proposed section II, and to revise proposed sections III and IV to provide that the Midwest ISO will post notices when mediation and arbitration procedures are invoked, on its website.

3. Rights of Intervenors

23. The arbitration procedures set forth in proposed section IV of attachment HH provide that arbitrators shall permit any party to intervene in an arbitration proceeding upon timely filing of an application which demonstrates that the party has a direct monetary interest that will be materially affected by the decision of the arbitrators and that will not be represented adequately by an existing party to the proceeding.¹³ Any party seeking to intervene must indicate whether it believes it should be aligned with either the plaintiff side or the defendant side of the dispute, and any party to the dispute may challenge such alignment. The arbitration procedures also provide that the arbitrator will determine the actual alignment of the parties, based on comparability of specific positions advanced by each party concerning the issues involved in the dispute, and the arbitrator will determine the nature and extent to which any intervenors may participate in the proceeding upon consultation with the parties and the intervenors themselves.¹⁴ Finally, the procedures for conducting discovery during arbitration provide that a rebuttable presumption shall exist that intervenors will not be entitled to present witnesses or submit requests for data or documents, but instead must coordinate such efforts with the parties with which they are aligned, except at the arbitrator's discretion.¹⁵

¹³ *Id.* at Attachment HH, section IV.E, Original Sheet No. 1896.

¹⁴ *Id.*

¹⁵ *Id.* at Attachment HH, section IV.G.1, Original Sheet No. 1899.

a. Protests and Answer

24. The Midwest TDUs argue that the rebuttable presumption that intervenors will not be permitted to independently seek discovery or present testimony and that intervenors must coordinate efforts with the party to which they are aligned (except at the arbitrator's discretion) is too narrow. The Midwest TDUs assert that, given that appeals of arbitration decisions are limited to the record developed by the arbitrator,¹⁶ such a limited role for intervenors increases the likelihood that intervenors with a stake in the outcome of the arbitration will file complaints before the Commission.

25. Similarly, the Midwest ISO Transmission Owners argue that an intervenor with a financial interest in a dispute should be afforded the same rights as any other party to the dispute. The Midwest ISO Transmission Owners state that, absent the ability to conduct discovery and present witness testimony, an intervenor will be unable to marshal evidence to support its arguments, unless those arguments happen to be supported by the party with which it is aligned. The Midwest ISO Transmission Owners argue that forcing an intervenor that has a monetary interest in a dispute to engage in discovery and present witness testimony only through the party with which it is aligned essentially grants that party the right to veto positions that serve the interests of the intervenor. The Midwest ISO Transmission Owners aver that, while it may be necessary, in the interests of convenience and efficiency, to align intervenors with parties, their interests may not be precisely aligned and, during the course of a dispute, interests may diverge. Moreover, the Midwest ISO Transmission Owners maintain that an intervenor should have the right to appeal the arbitrator's decision limiting its right to participate but that the Midwest ISO's proposal fails to address how an intervenor would seek review of the arbitrator's decision denying the intervenor the right to present evidence that it believed was not adequately presented by the party to which it was aligned.

26. The only way to ensure that each participant to a dispute can protect its financial interest, according to the Midwest ISO Transmission Owners, is to afford each participant equal rights to conduct discovery and present evidence. The Midwest ISO Transmission Owners submit that the arbitrator can make appropriate rulings to ensure that unduly cumulative evidence does not hamper the proceedings.

¹⁶ Section IV.O of Attachment HH states: "Any such review must be initiated within forty-five (45) days from the date of the arbitrator's decision and would be limited to the facts contained in the record[.]" March 1 Filing at Attachment HH, section IV.O, Original Sheet No. 1906.

27. In its answer, the Midwest ISO notes that the current process is silent as to the level of participation afforded to intervenors in arbitration procedures if an arbitrator grants a request to intervene. The Midwest ISO states that the proposed language does not limit the intervenors' participation level, but only clarifies that participation by intervenors is at the discretion of the arbitrator, upon consultation with all parties and the proposed intervenors, to determine the magnitude of participation. The Midwest ISO further asserts that allowing all intervenors full rights in the process, regardless of the magnitude of their financial interest, would extend the process, increase costs, and lead to repetitive litigation.

28. In response to the Midwest TDUs' assertion that limiting an intervenors' participation would limit the record for an appeal and potentially increase the number of complaints filed with the Commission, the Midwest ISO states that the procedures recognize cost effectiveness and flexibility, and would not necessarily lead to an increased number of proceedings.

29. With regard to the Midwest ISO Transmission Owners' argument that there is no "interlocutory" appeal process to address the arbitrator's decision to limit an intervenors participation level, the Midwest ISO states such a process would open the door to endless litigation. It notes that such a device is not currently in place and that an intervenor can institute its own dispute pursuant to proposed attachment HH if it is denied the right to participate. Furthermore, the Midwest ISO states that the appellate process under proposed section IV.O of the arbitration procedures also provides an opportunity for review of the arbitrator's decision if the intervenor's rights are circumscribed unfairly.

b. Commission Determination

30. We will accept the arbitration procedures set forth in proposed section IV of attachment HH, as clarified below. We recognize the importance of protestors' concerns regarding the scope of intervenors' participation rights. While it is not uncommon in an arbitration-type setting for the arbitrator to have discretion to align parties on a particular side of a dispute for purposes of prompt resolution of disputes and limiting procedural costs, the presumption under which the arbitrator must align parties, as proposed, could unnecessarily limit the active participation of intervenors with a direct monetary interest, potentially leading to unnecessary duplicative arbitration proceedings and litigation before the Commission if not implemented in a manner that respects parties' due process rights. However, we find that the ability to rebut the presumption provides intervenors with an opportunity to pursue their due process rights and allows the arbitrator to conduct the hearing in a manner that respects those rights. In this regard, we expect that the arbitrator, in determining the actual alignment of the parties, will implement his/her discretion in a manner that allows all parties with a stake in the dispute to be able to

present their position, either alone or in alignment with others, so as to avoid duplicative dispute resolution proceedings or unnecessary proceedings before the Commission.

31. Moreover, we agree with protestors' concerns regarding the right to review an arbitrator's decision if the party believes its rights have not been adequately represented. Under proposed section IV.O, review or appeal of an arbitrator's decision "would be limited to the facts contained in the record and be limited only to the issue of whether the arbitrator(s) decision revised or altered the FERC-filed Tariffs or the ISO Agreement or violates the FPA or FERC's policies and procedures."¹⁷ Given that the proposed language incorporates by reference the FPA and the Commission's policies and procedures, we interpret this provision to mean that a decision of the arbitrator may be appealed on the grounds that the conduct of the arbitrator, or the decision itself, violated the standards set forth in the Federal Arbitration Act or the Administrative Dispute Resolution Act.¹⁸ Accordingly, the Commission may review an arbitrator's decision where the rights of parties have been prejudiced. Such review occurs at the conclusion of the arbitration process, when parties may appeal the arbitrator's decision and findings of fact. We find this interpretation sufficiently addresses the concerns regarding intervenors' appeal rights raised by protestors. However, to remove any doubt about intervenors' appeal rights, we direct the Midwest ISO to clarify that a decision of the arbitrator may be appealed on the grounds that intervenors' procedural rights have been prejudiced.

4. Confidential Information

32. Under the proposed arbitration procedures, documents designated as confidential may not be used for any purpose other than arbitration.¹⁹

¹⁷ March 1 Filing at Attachment HH, section IV.O, Original Sheet No. 1906.

¹⁸ Federal Arbitration Act, 9 U.S.C. § 10 (2000) (permitting appeal, *inter alia*, "where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced"); Administrative Dispute Resolution Act of 1996, 5 U.S.C. § 581 (2000) (same).

¹⁹ March 1 Filing at Attachment HH, section IV.I.1, Original Sheet Nos. 1901-02.

a. Protests and Answer

33. The Midwest TDUs argue that the Midwest ISO should clarify that these confidential documents may also be used for purposes of appealing an arbitrator's decision to the Commission.

34. In its answer, the Midwest ISO acknowledges the Midwest TDUs' argument, and agrees to clarify that confidential information that is made part of the record of the arbitration can be used in an appeal to the Commission under seal, pursuant to 18 C.F.R. §§ 388.107 and 388.112 of the Commission's regulations.

b. Commission Determination

35. We agree with the Midwest TDUs and the Midwest ISO that clarification is necessary regarding the use of confidential information in the appeal of an arbitration decision. Therefore we will direct the Midwest ISO to include this revision, as set forth in its answer, in the compliance filing. In addition, while no party mentions confidentiality in mediation procedures, we recognize that the Administrative Dispute Resolution Act²⁰ and 18 C.F.R. § 385.606 of the Commission's regulations apply.

5. Procedural Manuals

36. Under proposed section 12 of the TEMT, two types of disputes are not initially governed by proposed attachment HH. Specifically, billing disputes associated with bills for transmission service brought within 90 days of invoice are governed initially by the Transmission Service Billing Dispute Resolution Manual and then, if necessary, by proposed attachment HH of the TEMT. In addition, disputes under module C of the TEMT (Transmission Provider Energy Markets, Scheduling and Congestion Management) brought within 115 days of operating day are governed initially by the Business Practices Manual for Market Settlements and then, if necessary, by proposed attachment HH of the tariff.²¹

a. Protests and Answer

37. The Midwest ISO Transmission Owners argue that these types of disputes, at least initially, are subject to resolution under procedures that have not been reviewed by the

²⁰ See *supra* note 19.

²¹ March 16 Filing at Module A, section 12, Substitute Third Revised Sheet No. 207.

Commission. The Midwest ISO Transmission Owners ask the Commission to require the Midwest ISO to include all dispute resolution procedures in one place, so that there are no future misunderstandings as to which provisions apply and so that parties rights are clearly set out and understood. The Midwest ISO Transmission Owners also argue that the Midwest ISO has not provided an explanation as to why these other procedures are not filed.

38. In its answer, the Midwest ISO states that the Transmission Service Billing Dispute Resolution Manual and the Business Practices Manual for Market Settlements are used to resolve disputes of a clerical or mathematical nature that are not conducive to a more timely resolution under the dispute resolution procedures of proposed attachment HH. The Midwest ISO states that many of these types of disputes have successfully and efficiently been resolved through the procedures set forth in these business practice manuals. The Midwest ISO also asserts that if these procedures do not lead to a satisfactory resolution, the party has the right to initiate the dispute resolution procedures under proposed attachment HH.

b. Commission Determination

39. We disagree with the Midwest ISO Transmission Owners. These manuals contain procedural information that initially governs disputes that often will only be of an administrative nature, as customers inquire about their invoices in an effort to understand their invoices and verify settlement amounts, and that do not initially warrant more timely application of the more formal procedures under proposed attachment HH. We find that, given the informal nature of these procedures, it is not necessary for these manuals to be on file with the Commission or otherwise be consolidated within the dispute resolution procedures of the TEMT.²² If these procedures fail to bring resolution, market participants have the right to invoke the dispute resolution procedures under proposed attachment HH.

²² See *Midwest Independent Transmission System Operator, Inc.*, 108 FERC ¶ 61,163 at P 656-58, *order on reh'g*, 109 FERC ¶ 61,157 (2004), *order on reh'g*, 111 FERC ¶ 61,043 (2005) ("Under our existing 'rule of reason' policy, we see no reason to require that the Midwest ISO file the Business Practices Manuals. ... The Commission will not require a section 205 filing of the Business Practices Manuals because, while implicating our jurisdiction, they mostly involve general operating procedures.").

6. Alternative Fee Arrangement

40. Proposed sections III.C and IV.M of attachment HH provide for the responsibility for the costs of mediation and arbitration, respectively. Proposed section III.C provides that the defendant's side and the plaintiff's side in the mediated matter will each bear one-half of the costs of mediation, and the costs will be shared equally among all parties on each side, unless the parties agree to an alternate fee splitting arrangement.²³ Proposed section IV.M provides that the costs of the arbitration shall be born by the parties to the dispute, with each party bearing one-half of the costs, unless the arbitrator decides, at the request of one party, that all of the costs should be borne by a party that substantially loses on a issue that is determined by the arbitrator to have been raised frivolously or in bad faith.²⁴

a. Protests and Answer

41. The Midwest ISO Transmission Owners note that the provision governing arbitration costs is inconsistent with the provision governing mediation costs, because it does not allow for alternative fee splitting arrangements for arbitration costs. The Midwest ISO Transmission Owners state that such a provision is necessary because they often participate in arbitration proceedings as a group, and therefore, have their own fee splitting arrangement for the costs of such arbitration in place.

42. In response, the Midwest ISO states that proposed section IV.M of attachment HH provides for fees and expenses to be split equally between opposing sides, and then equally amongst the parties on a particular side. The Midwest ISO states that this is simply a presumptive division, and nothing prevents the parties on a particular side to agree to an alternative fee splitting arrangement for arbitration costs.

b. Commission Determination

43. We agree with the Midwest ISO Transmission Owners that proposed section IV.M, governing arbitration costs, should be consistent with proposed section III.C, governing mediation costs, by recognizing alternate fee splitting arrangements among parties to arbitration in order to avoid any confusion. Accordingly, we will require the Midwest ISO to modify proposed attachment HH, within 30 days of

²³ March 1 Filing at Attachment HH, section III.C, Original Sheet No. 1893.

²⁴ *Id.* at Attachment HH, section IV.M, Original Sheet No. 1905.

the date of this order, to revise proposed section IV.M to recognize alternate fee splitting arrangements among parties to arbitration.

7. Changes to Revenue Distribution

44. Proposed section II.B.4 of attachment HH requires the Midwest ISO to notify all parties that could potentially be affected when informal resolution of a dispute “would result in a change in the distribution of revenue by the Transmission Provider (consistent with Appendix C to the [TOA]).”²⁵

a. Protests and Answer

45. The Midwest ISO Transmission Owners argue that, pursuant to section IX.C.6 of the TOA, any change in the methodology for distributing revenues under appendix C of that agreement is subject to the unanimous consent of the transmission owners, and therefore, attachment HH should reflect that requirement. The Midwest ISO Transmission Owners also request that proposed sections III and IV of attachment HH be modified to include similar provisions.

46. The Midwest ISO states that the Midwest ISO Transmission Owners’ concerns are misplaced. The Midwest ISO argues that proposed section II.B.4 was added to the dispute resolution procedures in order to provide notice to affected parties if it was determined, during the course of dispute resolution proceedings, that application of the existing revenue distribution methodology required changes. The Midwest ISO states that nothing in proposed section II.B.4 authorizes an actual change in the revenue distribution method itself and, in fact, proposed section II.B.4 explicitly requires any change to the revenue distribution to be consistent with appendix C of the TOA.

b. Commission Determination

47. We agree that any outcome from a dispute resolution proceeding requiring the redistribution of revenues must be consistent with appendix C of the TOA. We agree with the Midwest ISO that proposed section II.B.4 is explicit that changes in revenue distribution must be consistent with the revenue distribution methodology set forth in appendix C. Therefore, no revisions to the Midwest ISO’s proposal are necessary to address this issue.

²⁵ *Id.* at Attachment H, section II.B.4, Original Sheet No. 1889.

8. Role of Mediators

48. Proposed section III.B.4 provides that the mediator, if requested by the parties during the mediation process, shall provide the parties with a written recommendation of resolution of the dispute including the mediator's assessment of the merits of the principal positions being advanced by each party.²⁶ Section III.B.5 further requires that, if a dispute subject to mediation procedures is not resolved by the 30th day after the appointment of a mediator, or such later date as may be agreed upon by the parties, and if the mediator has not been previously requested to do so, the mediator shall promptly provide the parties a written, confidential, non-binding recommendation on resolution of the dispute, including the mediator's assessment of the merits of the principal positions being advanced by the parties.²⁷

49. We are concerned that this requirement that the mediator provide an assessment of the merits of the parties' positions, by compromising the neutrality of the mediator, could compromise the effectiveness of the mediation process and could limit the pool of individuals that could serve as mediators. If the parties wish for a non-binding advisory opinion during the course of the mediation process, they should also be provided the option to have an individual other than the mediator provide an early neutral evaluation of the parties' positions and to have assistance from the mediator and the ADR Committee in identifying and securing the services of such an individual. We will, therefore, direct the Midwest ISO to revise section III.B.4 consistent with this discussion, within 30 days of the date of this order.

9. Selection of Mediators and Arbitrators

50. Under proposed section III.B.2 of attachment HH, if parties cannot agree upon the selection of a neutral mediator, the chair of the ADR Committee (upon consultation with other members of the Committee and the parties to the dispute) "select[s] a neutral mediator from a list of qualified mediators maintained by the Committee."²⁸ By contrast, proposed section IV.C requires the ADR Committee to share with parties a list of potential arbitrators for the dispute.²⁹ We find no rationale for the inconsistent treatment

²⁶ *Id.* at Attachment H, section III.B.4, Original Sheet No. 1891.

²⁷ *Id.* at Attachment H, section III.B.5, Original Sheet Nos. 1891-92.

²⁸ *Id.* at Attachment H, section III.B.2, Original Sheet No. 1890.

²⁹ *Id.* at Attachment H, section IV.C, Original Sheet No. 1895.

under which the ADR Committee shares the list of mediators/arbitrators with disputing parties.

51. In addition, we recognize that compiling and maintaining lists of appropriately qualified mediators and arbitrators is a difficult and time-consuming task. The ADR Committee could engage the services of independent groups such as the American Arbitration Association or the International Institute for Conflict Prevention and Resolution, and coordinate with their counterparts at other regional transmission organizations and independent transmission system operators, as appropriate, to ensure that the parties to disputes under the proposed attachment HH procedures are well advised of qualified and effective mediators, arbitrators, and individuals to provide early neutral evaluation. In addition, the ADR Committee *should* advise parties that the Commission's Dispute Resolution Services (DRS)³⁰ and Office of Administrative Law Judges³¹ are available to provide mediation services and that DRS is available to aid parties in identifying and selecting a mediator or individual to provide early neutral evaluation.

52. Accordingly, we will require the Midwest ISO to modify proposed attachment HH, within 30 days of the date of this order: (1) to revise proposed section III.B.2 to require the ADR Committee to make available the full list of potential mediators available to disputing parties; and (2) to revise proposed section III.B.2 to require the ADR Committee to advise parties of the availability of DRS and Office of Administrative Law Judges to assist in mediation.

The Commission orders:

(A) The Midwest ISO's proposed revisions to the TEMT and the TOA are hereby conditionally accepted for filing as modified, effective May 1, 2006, as discussed in the body of this order.

³⁰ The Director of the Dispute Resolution Services is Richard L. Miles, who may be reached at 202-502-8702 or 1-877-FERC-ADR (1-877-337-2237).

³¹ If the parties decide to request a settlement judge, they must make their request to the Chief Judge by telephone at 202-502-8500. The Commission's website contains a listing of Commission judges and a summary of their background and experience (www.ferc.gov – click on Office of Administrative Law Judges).

(B) The Midwest ISO is hereby directed to submit a compliance filing, within 30 days of the date of this order, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.