

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Midwest Independent Transmission System  
Operator, Inc.

Docket Nos. ER04-1239-001

Illinois Power Company

ER04-1254-001

ORDER DENYING REHEARING AND REMANDING CONTESTED SETTLEMENT  
AGREEMENT TO THE CHIEF JUDGE FOR FURTHER PROCEEDINGS

(Issued November 23, 2005)

1. In this order, the Commission denies the requests for rehearing submitted by Illinois Power Company (Illinois Power) and Dynegy Power Marketing, Inc. (Dynegy) of the order issued on November 19, 2004.<sup>1</sup> Moreover, the Commission cannot approve the proposed settlement agreement submitted by Dynegy and Midwest Independent Transmission System Operator, Inc. (Midwest ISO) over the objections of the non-sponsoring parties. The Commission, therefore, will remand this proceeding to the Chief Judge for further proceedings, as discussed below.

**Background**

2. On July 29, 2004, the Commission issued an order authorizing the sale of Illinois Power to Ameren Corporation (Ameren) and approved Illinois Power's request to transfer functional control of its transmission facilities to Midwest ISO, to become effective October 1, 2004.<sup>2</sup> Midwest ISO's assumption of functional control of Illinois Power's transmission facilities required that certain transmission service agreements be transferred to Midwest ISO so that customers formerly receiving transmission service from Illinois Power could take service from Midwest ISO without interruption.

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<sup>1</sup> *Midwest Independent Transmission System Operator, Inc. and Illinois Power Co.*, 109 FERC ¶ 61,185 (2004) (November 19 Order).

<sup>2</sup> *Ameren Corp.*, 108 FERC ¶ 61,094 (2004).

3. Pursuant to this requirement, on September 24, 2004, Midwest ISO submitted for filing, in Docket No. ER04-1239-000, a notice of succession to succeed Illinois Power as the transmission provider under certain transmission service agreements (Transmission Service Agreements). In order to ensure continuity of customers' service under the Midwest ISO open access transmission tariff (OATT), Midwest ISO also requested waiver of the Commission's prior notice requirement and any other applicable Commission rules and regulations so that the notice of succession could be made effective on October 1, 2004.

4. On September 29, 2004, Illinois Power submitted for filing, in Docket No. ER04-1254-000, revisions to its OATT that removed services that would be provided under Midwest ISO's OATT and requested waiver of the Commission's prior notice requirement and any other applicable Commission rules and regulations, so that these revisions could become effective on October 1, 2004.

5. Dynegy protested both filings. It argued that the rates that it would pay for certain existing long-term firm point-to-point transmission service reservations would increase by nearly 250 percent as a consequence of the transfer of the relevant service agreements from the Illinois Power OATT to the Midwest ISO OATT. It argued that Midwest ISO should have filed the proposed rate change as a rate increase under Part 35 of the Commission's regulations, along with support for the justness and reasonableness of the proposed increase. It also stated that Dynegy and Midwest ISO had been discussing ways to mitigate the rate impact, but did not reach agreement before the filings were made. It therefore asked the Commission to reject the proposed rate increase or, in the alternative, accept it, suspend it for the maximum permissible period of five-month following the full sixty-day prior notice period, set the proposal for hearing, and hold the hearing in abeyance pending settlement judge procedures.

6. In the November 19 Order, in Docket No. ER04-1239-000, the Commission found that the proposed change in rates associated with Midwest ISO's filing may be unjust, unreasonable, unduly discriminatory or preferential and that Dynegy's protest raised issues of material fact that could not be resolved based on the existing record. However, it denied Dynegy's request for suspension for the maximum period allowable, and found good cause to grant Midwest ISO's requested waiver of the prior notice requirement. Accordingly, it accepted for filing Midwest ISO's proposed notice of succession of the Transmission Service Agreements, suspended it for a nominal period, to become effective October 1, 2004, subject to refund, and established hearing and settlement judge procedures. Also in the November 19 Order, in Docket No. ER04-1254-000, the

Commission conditionally accepted for filing, subject to a compliance filing, Illinois Power's proposed revisions to its OATT, to become effective on October 1, 2004, as requested.<sup>3</sup>

### **Rehearing Requests**

7. On December 20, 2004, Illinois Power and Dynegy submitted requests for rehearing of the November 19 Order on various grounds.

### **Notice of Succession**

8. Illinois Power argues that the Commission committed reversible error by giving Dynegy special treatment and setting for hearing the notice of succession. According to Illinois Power, Midwest ISO proposed in its filing to do nothing other than apply to existing agreements the Midwest ISO OATT, which had already been accepted by the Commission for all transmission owners and customers taking transmission service within the Midwest ISO footprint. Illinois Power further contends that the appropriate forum for Dynegy to raise its concerns is in a section 206 complaint.

9. Dynegy contends that the Commission erred by allowing a notice of succession to be used to implement a rate increase of nearly 250 percent from existing contract rates, in violation of Commission procedure, which prohibits a notice of succession from imposing a rate increase of any kind. Dynegy asserts that a notice of succession filing merely serves to effectuate the ministerial act of a name change for regulatory uses when a transfer of control or name occurs.<sup>4</sup> It does not, however, establish an "end-run" around the Commission's regulations on rate changes,<sup>5</sup> which, Dynegy contends, has occurred in this case.

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<sup>3</sup> *Illinois Power Company d/b/a AmerenIP* (Docket No. ER04-1254-002, Jan. 13, 2005) (unpublished letter order).

<sup>4</sup> 18 C.F.R. § 35.16 (2005).

<sup>5</sup> 18 C.F.R. § 35.13 (2005).

### **Commission Determination**

10. We will deny Illinois Power's and Dynegy's rehearing requests. While Illinois Power is correct that the Commission has accepted the Midwest ISO OATT,<sup>6</sup> Illinois Power is mistaken insofar as it asserts that our decision in the November 19 Order to set the matter for hearing is contrary to Commission precedent and constitutes special treatment of Dynegy. While the Midwest ISO OATT has been accepted for filing, it does not follow that a transmission customer whose transmission service agreements have been transferred to Midwest ISO cannot raise an issue of material fact as to whether the Midwest ISO OATT is just and reasonable as applied to it, and Illinois Power has not cited any precedent to support its assertion to the contrary. The Commission has found in certain instances involving similar circumstances that transmission customers have raised issues of material fact as to whether the transfer of a transmission service agreement to the Midwest ISO OATT is just and reasonable, and in these cases the Commission has set the matter for hearing, resulting in a number of Commission-approved settlements.<sup>7</sup>

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<sup>6</sup> *Midwest Independent Transmission System Operator, Inc.*, 84 FERC ¶ 61,231 (1998), *order on reh'g*, 85 FERC ¶ 61,372 (1998); *Midwest Independent Transmission System Operator, Inc.*, 97 FERC ¶ 61,033 (2001), *order on reh'g*, 98 FERC ¶ 61,141 (2002).

<sup>7</sup> *See Midwest Independent Transmission System Operator, Inc.*, 108 FERC ¶ 61,008 (2004) (setting for hearing notice of succession filed by Midwest ISO to succeed Ameren Energy Services Company (Ameren Energy)); *Midwest Independent Transmission System Operator, Inc.*, 99 FERC ¶ 61,117 (2002) (setting for hearing notice of succession filed by Midwest ISO to succeed Alliant Energy Corporate Services, Inc. (Alliant)). These proceedings were subsequently resolved by Commission-approved settlements. *See Midwest Independent Transmission System Operator, Inc.*, 110 FERC ¶ 61,068 (2005) (order approving settlement between Midwest ISO and Westar Energy, Inc. of issues arising from the notice of succession with respect to Ameren Energy); *Midwest Independent Transmission System Operator, Inc.*, 109 FERC ¶ 61,340 (2004) (order approving settlement between Midwest ISO and Archer Daniels Midland of issues arising from Midwest ISO's notice of succession with respect to Ameren Energy); *Midwest Independent Transmission System Operator, Inc.*, 102 FERC ¶ 61,038 (2003) (letter order approving settlement between Midwest ISO and Southern Minnesota Municipal Power Agency of issues arising from Midwest ISO's notice of succession with respect to Alliant); and *Midwest Independent Transmission System Operator, Inc.*, 101 FERC ¶ 61,234 (2002) (letter order approving settlement between Midwest ISO and various parties of issues arising from Midwest ISO's notice of succession with respect to Alliant).

Accordingly, our decision to set this matter for hearing in the November 19 Order is consistent with Commission precedent, and we reject Illinois Power's contention that we granted Dynegy special treatment in doing so.

11. We will also reject as unfounded Dynegy's request for rehearing in this regard. We agree with Dynegy's contention that a notice of succession may not be used to implement a rate increase as a matter of course, without a demonstration that the proposed rate increase is just and reasonable. For this reason, in the November 19 Order we found that the proposed notice of succession constituted a change in rates that had not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful, and we set this matter for hearing. However, given that Dynegy and Midwest ISO were engaged in discussions regarding ways to mitigate the rate impact on Dynegy, we held the hearing procedures in abeyance and directed the appointment of a settlement judge to aid the parties in their settlement efforts. Accordingly, we reject Dynegy's assertion that the Commission has inappropriately allowed a notice of succession to implement a rate increase. As discussed further below, in this order we establish hearing procedures to address the justness and reasonableness of the change in rates resulting from the notice of succession as applied to Dynegy.

### **Suspension Period**

12. Dynegy asserts that the Commission erred in the November 19 Order insofar as it imposed only a nominal suspension period without any finding that the maximum suspension period would lead to harsh or inequitable results. According to Dynegy, long-standing Commission policy mandates that, upon determining preliminarily that the rate increase resulting from acceptance of the notice of succession may be unlawful, the Commission should impose the maximum five-month suspension period unless it had found (which it did not) that the maximum suspension would lead to harsh or inequitable results.

13. Dynegy further contends that this error caused a similarly unjustified divergence from the Commission's policy of protecting and enforcing long-term transmission contracts with transmission owners that are joining an RTO. According to Dynegy, by suspending the rate increase only for a nominal period and making it effective on October 1, 2004, less than one week after the request was filed, the Commission violated the final two months of the Transmission Service Agreements' primary terms, undercut the reasonable expectation that both Dynegy and Illinois Power had in executing them, and made unprofitable many energy sale transactions made by Dynegy on the basis of the rates in those long-term firm Transmission Service Agreements. Dynegy notes that while the Commission's justification in the November 19 Order for accepting the rate increase – that the Commission has allowed an RTO's rates to replace pre-RTO rates under

individual-company OATTs, even when the RTO rates represented a rate increase – may be true, the Commission ignored rigorous conditions imposed in, and other important aspects of, those prior proceedings including, in the case of the ComEd Order, a four month delay from the date of filing before a much smaller rate increase took effect.<sup>8</sup>

### **Commission Determination**

14. We will reject Dynegy's request for rehearing regarding our decision to grant a nominal suspension period in the November 19 Order. The Commission's decision to suspend and set a proposed rate for hearing is discretionary based upon: (1) a review of the company's rate filing, necessarily – due to the need to act within a statutorily-mandated limited time – without the benefit of discovery or cross-examination or responsive testimony which may identify the underlying details which support the filing or which may demonstrate errors or other flaws in the rate filing; (2) an evaluation of the arguments and supporting documents filed by the intervenors, also necessarily without the benefit of discovery, cross-examination or responsive testimony; and (3) a preliminary analysis developed by the Commission's staff. Moreover, this preliminary analysis must typically be made within, as in this case, sixty days.<sup>9</sup>

15. In addition, when the Commission suspends and sets a proposed rate for hearing and settlement judge procedures, as in this case, the Commission is not making a final determination as to the reasonableness of the proposed rates, but rather is indicating that a final determination of the reasonableness of the proposed rates requires the development of an evidentiary record.<sup>10</sup> Consequently, the Commission's order merely decides

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<sup>8</sup> In support of its contention, Dynegy cites *PJM Interconnection, L.L.C.*, 106 FERC ¶ 61,252 (2004) (addressing proposed revisions to PJM Interconnection L.L.C.'s (PJM) OATT to reflect the integration of Commonwealth Edison Company (ComEd Order) and *PJM Interconnection, L.L.C.*, 96 FERC ¶ 61,060 (2001) (addressing proposed revisions to PJM's OATT to reflect the integration of Allegheny Power)(Allegheny Order).

<sup>9</sup> See *West Texas Utilities Co.*, 18 FERC ¶ 61,189 at 61,374 (1982) (*West Texas*); accord, e.g., *Pennsylvania Electric Co.*, 20 FERC ¶ 61,401 at 61,817 (1982) (*Pennsylvania Electric*); *Southern California Edison Co.*, 20 FERC ¶ 61,129 at 61,285 (1982) (*SoCal*).

<sup>10</sup> *Jersey Central Power & Light Co.*, 56 FERC ¶ 61,376 at 62,435 (1991) (*JCP&L*); *Pennsylvania Electric*, 20 FERC ¶ 61,401 at 61,817; *SoCal*, 20 FERC ¶ 61,129 at 61,285.

whether the rates should be suspended at all (and if so, for how long) and sets them for hearing and settlement judge procedures to allow for a subsequent determination of justness and reasonableness.

16. A discussion of the Commission's preliminary analysis at the time of the Commission's initial order would involve an inappropriate prejudgment of the merits of the issues being set for hearing and settlement judge procedures. As the courts have recognized, the very purpose of the hearing is to allow the Commission the opportunity to determine whether the proposed rate change is reasonable, and it is unreasonable to expect the Commission to provide at such an early stage of a proceeding a detailed explanation of its reasons for suspending a proposed rate change or of the various factors that lead to the choice of a particular suspension.<sup>11</sup>

17. Moreover, Dynegy misstates the Commission's suspension policy as expressed in *West Texas*. In *Gulf State Utilities Co.*,<sup>12</sup> the Commission explained that, under the Commission's suspension policy, rate filings would ordinarily be suspended for one day where preliminary review indicates that the proposed increase may be unjust and unreasonable but may not generate substantially excessive revenues, as defined in *West Texas*.<sup>13</sup> Thus, a preliminary finding that a rate increase may have not been shown to be just and reasonable is not, as argued by Dynegy, tantamount to a finding that such rates will generate substantially excessive revenues and, consequently, does not by itself mandate the imposition of the maximum suspension period. We also note that, contrary to Dynegy's assertions, the absolute size of a proposed rate is not the basis upon which the Commission determines whether or not to impose a maximum suspension. In *West Texas*, the Commission explained that a rate is "substantially excessive" where more than

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<sup>11</sup> See, e.g., *Boroughs of Ellwood City*, 701 F.2d 266, 271 (3<sup>rd</sup> Cir. 1983); *Cities of Anaheim v. FERC*, 723 F.2d 656, 661-62 (9<sup>th</sup> Cir. 1984); *Otter Tail Power Company v. FERC*, 583 F.2d 399, 408 n.38 (8<sup>th</sup> Cir. 1978), *cert. denied*, 440 U.S. 950 (1979); *Papago Tribal Utility Authority v. FERC*, 628 F.2d 235, 243 (D.C. Cir. 1980); see also *Connecticut Light and Power Co. v. FERC*, 627 F.2d 467, 472 (D.C. Cir. 1980); accord, e.g., *New England Power Co.*, 53 FERC ¶ 61,268 at 62,056-57 (1990); *Boston Edison Co.*, 55 FERC ¶ 61,087 at 61,256 & nn.10-11 (1991); *JCP&L*, 56 FERC at 62,435-36.

<sup>12</sup> 28 FERC ¶ 61,391 (1984).

<sup>13</sup> More recently, the Commission has followed the policy of suspending for a nominal period under such circumstances.

10 percent of the proposed rate increase is found, by the Commission's preliminary analysis, to be in excess of a cost-justified rate, as determined by the Commission's preliminary analysis.<sup>14</sup>

18. Finally, Dynegy's reliance on two prior Commission orders where there were longer delays from the filing date before the rate increase took effect, (ComEd Order), or certain conditions were imposed (Allegheny Order), when single-company OATT rates were replaced by higher RTO rates, is misplaced.<sup>15</sup> In the case of ComEd's integration into PJM, the delay was due to issues associated with NERC approval of reliability plans to implement the integration and satisfaction of conditions precedent to such integration regarding loop flow and congestion impacts on certain entities. In the case of Allegheny Power's integration into PJM, the conditions cited by Dynegy relate to a proposed change in the deficiency charge for installed capacity and reevaluation of PJM's license plate design at the end of the initial fixed term approved for use of that rate design. Thus, in those cases, the delays and conditions cited were unrelated to the Commission's acceptance of ComEd and Allegheny Power's individual-company OATT rates being replaced by the PJM OATT rates and the decision regarding suspension of that proposed change in rates.

#### **Waiver of the 60-Day Prior Notice Requirement**

19. Dynegy contends that the Commission erred in the November 19 Order by failing to enforce the 60 days prior notice request provided in section 205 of the Federal Power Act. Dynegy notes that, in the November 19 Order, the Commission ruled that the proposed rate increases in this case were accepted, subject to refund, effective October 1, 2004, a date much less than 60 days from the September 24, 2004 filing of the notice of succession and from the September 29, 2004 filing of Illinois Power's OATT revisions. Dynegy contends that, in the November 19 Order, the Commission failed to make the requisite finding of good cause for waiving the prior notice requirement. According to Dynegy, the November 19 Order is inconsistent with the Commission's policy on granting waiver of the notice requirement, as articulated in *Central Hudson Gas & Electric Corp.*,<sup>16</sup> which requires a showing, which is lacking here, that the effective date or rate change is prescribed by a previously filed agreement or that a new service is being offered.

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<sup>14</sup> *West Texas*, 18 FERC ¶ 61,189 at 61,375.

<sup>15</sup> See note 8, *supra*.

<sup>16</sup> 60 FERC ¶ 61,106, *reh'g denied*, 61 FERC ¶ 61,089 (1992).



20. Dynegy also asserts that Midwest ISO's sole claim of good cause was that Illinois Power's transfer of functional control of its transmission facilities shall occur well before the 60-day notice period expires. According to Dynegy, while this statement may constitute good cause for the Commission's expeditious approval of the transition of these transmission agreements to Midwest ISO, it does not constitute good cause for waiving the 60-day prior notice requirement as to the rate impact on Dynegy.

### **Commission Determination**

21. We will deny Dynegy's request for rehearing on this issue. Midwest ISO adequately demonstrated and the Commission found good cause for waiver of the prior notice requirement. As Midwest ISO explained, such waiver was necessary to allow Illinois Power to transfer functional control of its transmission facilities to Midwest ISO before expiration of the 60-day prior notice period. Good cause existed to allow the proposed October 1, 2004 effective date because it facilitated the expansion of Midwest ISO, thus promoting efficient and reliable wholesale electricity markets. Accordingly, the Commission determined that Midwest ISO had demonstrated the good cause for waiver of the 60-day prior notice requirement in the November 19 Order.<sup>17</sup> Dynegy cites no Commission or court precedent in support of its contention that a public utility must separately demonstrate good cause for such waiver with respect to each and every entity that may be affected by the change in rates.

### **Settlement Agreement**

#### **Offer of Settlement**

22. On March 4, 2005, Midwest ISO and Dynegy filed a Settlement Agreement that provided for Dynegy's payment to Midwest ISO of all applicable transmission rates set forth in the Midwest ISO OATT, so long as Midwest ISO provides the same discount to Dynegy as it provides to any other customer. Additionally, the Settlement Agreement proposes to reimburse Dynegy to resolve Dynegy's claim that the Midwest ISO rates would be more than double the transmission rates under the transmission service agreements with Illinois Power. Specifically, the Settlement Agreement states that Midwest ISO will pay \$1,581,536.41 to Dynegy as a credit against Midwest ISO's monthly charges for certain transmission services. Dynegy and Midwest ISO request that the Settlement Agreement become effective on March 4, 2005, and that the Commission waive the 60-day prior notice requirement for good cause.

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<sup>17</sup> November 19 Order, 109 FERC ¶ 61,185 at n.3 (*citing Central Hudson Gas & Electric Corp.*, 60 FERC ¶ 61,106, *reh'g denied*, 61 FERC ¶ 61,089 (1992)).

### Initial Comments

23. On March 24, 2005, several parties filed comments regarding the Settlement Agreement. In its comments, Illinois Power argues that the Commission should reject the Settlement Agreement because it does not meet regulatory requirements for approval, as there are genuine issues of material fact and insufficient evidence for the Commission to make a reasoned decision on the contested issues. Illinois Power also asserts that the Commission cannot approve the Settlement Agreement because it is contrary to the public interest and cannot be approved under the criteria articulated in *Trailblazer Pipeline Co.*<sup>18</sup>

24. Exelon opposes the Settlement Agreement on the ground that it is discriminatory, in violation of Order No. 888-A, and that it is inconsistent with *Bangor Hydro Electric Co.*<sup>19</sup> because it provides discounted rates to Dynegy but not to other similarly situated customers. However, Exelon subsequently withdrew its comments on June 22, 2005.

25. MidAmerican Energy Company (MidAmerican) opposes the Settlement Agreement because it provides rate relief to Dynegy, but not to any other similarly situated party. MidAmerican contends that the Settlement Agreement grants preferential discounting to Dynegy in contravention of the Federal Power Act's prohibition of unduly discriminatory or preferential rates and the Commission's decision in *Bangor Hydro*. MidAmerican further argues that the Settlement Agreement gives an unfair advantage to Dynegy, contrary to the Commission's goals of non-discriminatory access and competition in the wholesale power market.

26. The Midwest ISO Transmission Owners oppose the Settlement Agreement because it does not demonstrate the reason or the necessity for providing Dynegy with a discount in the form of \$1.581 million in credits for past transmission service. The Midwest ISO Transmission Owners also assert that the Settlement Agreement is not in the public interest, nor is it just and reasonable, because it will reduce revenues to transmission owners credited under the formula rate, which in turn will result in higher rates for other Midwest ISO members and other customers. Furthermore, they argue that the Settlement Agreement does not maximize transmission service revenues and consequently violates Commission-accepted provisions in the Midwest ISO Transmission

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<sup>18</sup> 85 FERC ¶ 61,345 (1998), *order on reh'g*, 87 FERC ¶ 61,110 (1999) (*Trailblazer*).

<sup>19</sup> 95 FERC ¶ 61,149 (2001) (*Bangor Hydro*).

Owners' Agreement<sup>20</sup> that provide that, in carrying out its duty to maximize revenues, "Midwest ISO and its Directors, Officers, employees, and agents shall have a custodial trust relationship to the Owners in performing" the obligation to maximize revenues.<sup>21</sup> They also contend that the Settlement Agreement violates Commission precedent and policy enumerated in *Bangor Hydro*, which does not allow selective transmission discounting. Finally, they argue that the Settlement Agreement, and in particular the discounting provisions, are a product of off-OASIS discussions, in violation of the requirement that any discussions among the transmission provider and its customers regarding discounts be negotiated through communications on OASIS, not in private meetings.

27. Dynege supports the Settlement Agreement because it will avoid further costly and protracted litigation between the parties. In addition, Dynege claims that, absent the mitigation that the Settlement Agreement provides to Dynege, certain wholesale transactions that it entered into for the last quarter of 2004 would have been put in a loss situation due to the proposed rate increase and, absent the mitigation provided by the Settlement Agreement, Dynege has no means to recoup that loss. Dynege further states that this mitigation will give Dynege less than it could have reasonably expected. Dynege contends that the settlement amount is consistent with the amount that Dynege would have paid had the Commission required 60 days' prior notice of the proposed rate increase and imposed the maximum suspension period for the increased rates.

28. Midwest ISO supports the Settlement Agreement because it provides a fair and balanced resolution of the complicated transition issues resulting from the integration of Illinois Power into Midwest ISO. Moreover, according to Midwest ISO, it is a party to a preexisting agreement with Dynege under which Midwest ISO is committed to support a settlement agreement offered by Dynege that would allow Dynege to take certain transmission services under the transferred agreements at the rates described and effective in the Illinois Power OATT at the time Dynege stopped taking service from Illinois Power until the date on which Regional Through and Out Rates (RTORs) were eliminated.<sup>22</sup>

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<sup>20</sup> Agreement of Transmission Facilities Owners to Organize the Midwest Independent Transmission System Operator Inc., a Delaware Non-Stock Corporation, Midwest ISO FERC Electric Tariff, First Revised Rate Schedule No. 1.

<sup>21</sup> *Id.*, Article Three, section III, Paragraph D.

<sup>22</sup> The Commission had concluded that RTORs under the Midwest ISO and PJM OATTs, which resulted in rate pancaking in the Midwest ISO and PJM regions, were

### Reply Comments

29. On April 4, 2005, several parties filed reply comments. In its reply comments, Illinois Power reiterates and supports the Midwest ISO Transmission Owners' comments. Illinois Power also states that Exelon's initial comments, which Exelon has since withdrawn, support Illinois Power's contention that the Commission should reject the Settlement Agreement.

30. MidAmerican first notes that, with respect to Midwest ISO's claim that it is committed through a pre-existing agreement to provide Dynegy with rate mitigation, neither Midwest ISO nor Dynegy has filed such an agreement with the Commission for rate mitigation. MidAmerican also reiterates its argument that singling out Dynegy for rate mitigation without providing any justification for this disparate treatment constitutes undue discrimination. Finally, MidAmerican emphasizes that all the non-sponsoring parties oppose the Settlement Agreement and requests that the parties engage in further negotiations to resolve their differences. In its reply comments, Dynegy rejects any claims that the Settlement Agreement amounts to a discount and argues that it is, instead, mitigation for the immediate rate increase Dynegy would have otherwise experienced when the Illinois Power agreements were transferred to Midwest ISO. *Bangor Hydro* is thus not applicable, according to Dynegy. Moreover, Dynegy contends that the Settlement Agreement does not contain an inappropriate discount because it is identical to the two previous Commission-approved settlement agreements between Midwest ISO and Archer-Daniels-Midland Company<sup>23</sup> and Westar.<sup>24</sup> Furthermore, Dynegy rejects the Midwest ISO Transmission Owners' contention that discussions regarding rate mitigation are required to be conducted on OASIS because the Commission would not have approved the similar Archer-Daniels-Midland and Westar settlement agreements if that were so.

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unjust and unreasonable and ordered that Midwest ISO and PJM eliminate them for transactions sinking within the combined footprint of these two RTOs. *Midwest Independent Transmission System Operator, Inc., et al.*, 104 FERC ¶ 61,105, *order denying reh'g, in part and granting reh'g, in part*, 105 FERC ¶ 61,212 (2003), *reh'g pending*. Eventually the Commission eliminated RTORs effective December 1, 2004. *Midwest Independent Transmission System Operator, Inc. et al.*, 109 FERC ¶ 61,168 (2004), *reh'g pending*.

<sup>23</sup> See *supra*, note 7.

<sup>24</sup> *Id.*

31. Dynegy states that, contrary to Illinois Power's argument that Dynegy received a net benefit in the form of three annulled transmission reservations for "out" service and elimination of RTORs, it saw no benefit from the elimination of RTORs, which would have been terminated regardless of whether Illinois Power joined Midwest ISO, nor from the annulment of the transmission reservation requirements. Dynegy states that Midwest ISO did not breach a fiduciary duty to the Midwest ISO Transmission Owners because the rate increase was over a short period of time and warranted mitigation, and because Midwest ISO has a duty to administer the tariff in an equitable manner. Finally, Dynegy submits that no party demonstrated that there were genuine issues of material fact and that, based on the facts in the record, the Settlement Agreement can be accepted consistent with *Trailblazer*.

32. The Commission's Trial Staff states in its reply comments that Dynegy's comments are not pertinent and do not provide support for the contested Settlement Agreement. Trial Staff also asserts that the record contains scant evidence upon which the Commission could decide issues of fact. However, Trial Staff notes that the scant record may not be fatal to certification in this case. The Commission could make a policy call that, consistent with prior cases, Dynegy, as a former customer of Illinois Power, must pay the Midwest ISO rate as of the effective date when Illinois Power joined Midwest ISO. If so, then the existing disputes regarding harms or benefits to Dynegy and whether Dynegy alone is entitled to a discount are irrelevant and not material. For these reasons, Trial Staff recommended that the Settlement Judge submit the Settlement Agreement to the Commission and report that a contested policy question exists as to whether, absent any other agreement between all parties to this proceeding, Dynegy must pay the full Midwest ISO rate as filed.

### **Settlement Judge Determination**

33. On April 6, 2005, the Settlement Judge referred the contested Settlement Agreement to the Commission. On April 7, 2005, the Chief Administrative Law Judge terminated the settlement judge procedures instituted in the November 19 Order.

### **Commission Determination**

34. Under Rule 602 of the Commission's Rules of Practice and Procedure, where an offer of settlement is contested by any party, the Commission may rule on the merits of the settlement issues if the record contains substantial evidence upon which to base a reasoned decision or there is no genuine issue of material fact.<sup>25</sup> If the Commission finds

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<sup>25</sup> 18 C.F.R. § 385.602(h)(1)(i) (2005). *See also Mobil Oil Corp. v. FERC*, 417 U.S. 283, 314 (1974).

that the record lacks substantial evidence or that the contesting parties or contested issues cannot be severed from the offer of settlement, the Commission may establish procedures for the purpose of receiving additional evidence before a presiding officer upon which a decision on the contested issues may reasonably be based, or take other action which the Commission determines is appropriate.<sup>26</sup>

35. Based on our preliminary review of the objections of the non-sponsoring parties and the record, the Commission is unable to approve the Settlement Agreement over the objections of all of the non-sponsoring parties because we find that Dynegy and Midwest ISO have failed to support by substantial evidence that the Settlement Agreement is just and reasonable and not unduly discriminatory or preferential and because there are a number of contested issues of material fact.

36. Thus, we will remand the proceeding to the Chief Judge to determine whether additional time should be allowed for settlement judge procedures or a presiding judge should be designated for a trial-type evidentiary hearing, consistent with the procedures established in the November 19 Order.

The Commission orders:

(A) The requests for rehearing submitted by Dynegy and Illinois Power are hereby denied, as discussed in the body of this order.

(B) The proceeding is remanded to the Chief Judge for further proceedings consistent with this order.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.

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<sup>26</sup> 18 C.F.R. § 385.602(h)(1)(ii) (2005).