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January 21, 2011

VIA ELECTRONIC FILING

The Honorable Kimberly D. Bose
Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, DC 20426

Re: Midwest Independent Transmission System Operator, Inc. and International Transmission Company d/b/a ITC*Transmission*, Docket No. ER11-1844-___; Request of New York Independent System Operator, Inc. for Expedited Reconsideration or Rehearing, Request to Stay Proceedings, and Motion to Shorten Response Period

Dear Secretary Bose:

Transmitted electronically for filing in the referenced docket is the Request of New York Independent System Operator, Inc. for Expedited Reconsideration or Rehearing, Request to Stay Proceedings, and Motion for Shortened Response Period.

If there are any questions concerning this filing, please call me at (202) 661-2205.

Very truly yours,

/s/ Howard H. Shafferman

Howard H. Shafferman
Counsel for
New York Independent System Operator, Inc.

Enclosure

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Midwest Independent Transmission System Operator, Inc. and International Transmission Company d/b/a ITC*Transmission*	**Docket No. ER11-1844-___**

REQUEST OF NEW YORK INDEPENDENT SYSTEM OPERATOR, INC. FOR EXPEDITED RECONSIDERATION OR REHEARING, REQUEST TO STAY PROCEEDINGS, AND MOTION TO SHORTEN RESPONSE PERIOD

Pursuant to Rules 212 and 713 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (the "Commission"), 18 C.F.R. §§ 385.212 and 713 (2010), the New York Independent System Operator, Inc. (the "NYISO") hereby requests **expedited reconsideration or rehearing** of the December 30, 2010 order issued by the Commission in the referenced proceeding (the "December 30 Order").[1] The NYISO also requests the Commission to stay the settlement judge and hearing proceedings established in that order,[2] pending a decision on this request for reconsideration or rehearing. **The NYISO moves for a shortened time period – until January 26, 2011 – for response to the NYISO's stay request.[3]**

I. INTRODUCTION AND SUMMARY

The Midwest Independent Transmission System Operator, Inc. ("Midwest ISO") and International Transmission Company ("ITC") (together, the "Filing Parties" or "MISO/ITC"), in their October 20, 2010 filing in this proceeding (the "MISO/ITC Filing"), seek to recover from

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[1] 133 FERC ¶ 61,275 (2010). The request for reconsideration or rehearing will be referred to herein as the "NYISO Request." The NYISO Request is set forth in Sections II and III of this pleading.

[2] The request to hold in abeyance is set forth in Section IV of this pleading.

[3] The motion to shorten response time is set forth in Section V of this pleading.

the NYISO and PJM a portion of the costs of ITC's Phase Angle Regulating Transformers at Bunce Creek on the Michigan-Ontario border (the "Replacement PARs") through unilateral changes to the Midwest ISO's own tariff under Section 205 of the Federal Power Act ("Section 205 filing").

Multiple parties – including NYISO and PJM, and entities doing business within the Midwest ISO, NYISO and PJM and beyond – intervened and protested the MISO/ITC Filing on a wide variety of grounds. The protests included an extensive array of arguments demonstrating that the Commission should reject the MISO/ITC Filing on its face, given its fundamental procedural and substantive infirmities. NYISO argued that none of the Commission and judicial orders cited in the MISO/ITC Filing authorized "*ex post* cost allocation to non-customers."[4]

NYISO is clearly not a customer of the Midwest ISO, as verified by the terms of the Midwest ISO's Open Access Transmission, Energy and Operating Reserve Tariff (the "Midwest ISO Tariff"). The Midwest ISO Tariff is the vehicle by which service is provided to "Tariff Customers," defined in Section 1.652 as a "Market Participant, Transmission Customer or Coordination Customer." The NYISO is not a Market Participant,[5] Transmission Customer[6] or Coordination Customer,[7] as each term is defined in the Midwest ISO Tariff.

4 *See* Protest of the New York Independent System Operator, Inc., at 34 (filed November 17, 2010) (the "NYISO Protest").

5 The NYISO has not registered with, or been qualified by, the Midwest ISO as a Market Participant. *See* Midwest ISO Tariff at § 1.384.

6 The NYISO has not executed a transmission Service Agreement or requested the Midwest ISO to file with the Commission an unexecuted Service Agreement. *See* Midwest ISO Tariff at § 1.666.

7 The NYISO is not taking Coordination Services from the Midwest ISO under Module F of its tariff. *See* Midwest ISO Tariff at § 1.98.

Many of the protests[8] argued that, as a matter of law, there was no basis for accepting the MISO/ITC Filing, given that it proposed to allocate costs to parties that were neither customers of Midwest ISO or ITC, nor voluntary parties to other contractual arrangements with the Midwest ISO or ITC (*e.g.,* regional transmission organization ("RTO") arrangements). The protests vigorously countered the MISO/ITC assertion that they have authority under Section 205 to file a rate and charge the NYISO and PJM for the costs of these facilities and explained why the Commission does not have the authority to accept the MISO/ITC Filing under Section 205. These arguments demonstrate that the MISO/ITC Filing is directly contrary to both the longstanding and frequently expressed policy of the Commission and judicial precedent. For this and other reasons, the protests called for rejection of the MISO/ITC Filing.

In response to the MISO/ITC Filing, the Commission issued the December 30 Order. In that order, the Commission addressed none of the protests, but simply accepted and suspended the MISO/ITC Filing subject to refund, and set the proceeding for settlement judge and hearing procedures. By accepting the filing, even subject to refund, the order necessarily denied the arguments that the Commission must reject the MISO/ITC Filing based on threshold legal issues. That is, the order denied the legal challenge to the authority, under the Federal Power Act, of MISO/ITC to unilaterally submit – and of the Commission to accept – a filing that purports to impose obligations on entities that are not Midwest ISO customers, and that have not executed an

[8] *See, e.g.,* Notice of Intervention and Protest of the Massachusetts Department of Public Utilities at 3-4; Motion to Intervene, Protest and Motion for Summary Rejection of New England Conference of Public Utilities Commissioners at 6-15; Motion to Intervene and Protest [of the] New England States Committee on Electricity at 2-5; Notice of Intervention and Protest of the Public Service Commission of the State of New York at 4; Motion to Intervene and Protest of the New York Transmission Owners and New York Municipal Power Agency at 4-5; Protest of PJM Interconnection, L.L.C. at 4-6; PJM Transmission Owners Group Protest to Rate Filing at 5-6; Motion to Intervene, Protest and Request for Summary Dismissal and Motion to Consolidate of the PSEG Companies at 7-9.

agreement with the Midwest ISO that addresses these issues. A request for reconsideration or rehearing of the December 30 Order regarding the threshold issue of the legal authority of the Midwest ISO to file, and of the Commission to accept, the MISO/ITC Filing is procedurally proper at this time.[9]

As discussed in Section IV below, the Commission should stay the settlement judge and hearing procedures pending its consideration of this rehearing request. Regrettably, the settlement process has little or no chance of succeeding, and thus – inevitably – will be followed by a hearing process that will demand investments of time and expense of an order of magnitude greater than the settlement talks, and involve an unusually large and diverse array of stakeholders.[10] Broad stakeholder involvement (beyond the parties that are directly affected by the proposed allocation) has been spurred largely by the unexpected and untoward precedential effect that this proceeding could produce if the limitations of Section 205 are not properly observed. Consumers will ultimately foot the expense of the hearing process that the

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9 *See, e.g., Portland General Electric Co.,* 29 FERC ¶ 61,044, at pp. 61,098-61,099 (1984) (Commission considered legal authority/jurisdictional challenge of Bonneville Power Administration raised in rehearing request regarding order setting rates for hearing under Federal Power Act); *El Paso Natural Gas Co.*, 22 FERC ¶ 61,205, at p. 61,374 (2003) (Commission sought additional information in response to rehearing request challenging acceptance/suspension order that failed to reject rate filing, as requested by the party filing the rehearing request).

Rehearing or reconsideration by the Commission at this time is particularly appropriate here, as the December 30 Order expressly precludes the presiding ALJ from ruling on motions to dismiss. *See* December 30 Order at ordering paragraph (E).

The NYISO reserves its right to raise other arguments (including but not limited to those made in the NYISO Protest) in the settlement and hearing proceedings, should they occur notwithstanding this request and the request for stay, and to pursue those arguments on rehearing following the issuance of a Commission order on initial decision, should one be issued.

10 The cost allocation dispute initiated by ITC and the Midwest ISO should not be permitted to prevent the Replacement PARs from being placed into operation.

Commission has ordered. The scope and breadth of the hearing will also drain the Commission's own resources.

The parties' efforts to litigate any pertinent facts to resolution before the presiding Administrative Law Judge in the hearing will be for naught, if the Commission delays ruling on the issues raised in this motion and, instead, belatedly recognizes the jurisdictional infirmity and properly finds that MISO/ITC did not have authority under Section 205 to make the filing, or that the Commission does not have authority to accept it.

For these reasons, the Commission should grant reconsideration or rehearing to consider and issue an order on the core legal issues, and should – pending the issuance of an order addressing the NYISO Request – stay the settlement and hearing proceedings to avoid what could well be an unnecessary expenditure of very substantial resources. An expeditious rehearing would not cause any hardship on the Filing Parties, as they have not proposed to begin collecting the filed rates until after the Replacement PARs are in service.

II. STATEMENT OF ISSUES

In accordance with Rule 713(c)(2) of the Commission's Rules of Practice and Procedure, the NYISO requests reconsideration and/or rehearing of the following issue:

- Whether Section 205 of the Federal Power Act permits the filing or acceptance of a rate filing where the filing utility does not have a contractual or customer relationship with the entities to which the rate will be charged. *See, e.g., In re Permian Basin Area Rate Cases*, 390 U.S. 747, 822 (1968); *Midwest Independent Transmission System Operator, Inc.,* Order on Initial Decision, 131 FERC ¶ 61,173 (2010); *Commonwealth Edison Co.,* 129 FERC ¶ 61,298 (2009).

III. SPECIFICATION OF ERROR AND REQUEST FOR EXPEDITED RECONSIDERATION OR REHEARING

The NYISO specifies that the Commission erred by not rejecting the MISO/ITC Filing on the ground that Section 205 does not permit the filing or acceptance of a rate filing where the filing utility does not have a customer or other contractual relationship with the entity or entities to which the rate will be charged. For this reason, and because sound policy considerations support the requirement that Section 205 filings be limited to charges to customers or to other entities with which there is a contractual relationship, the NYISO requests the Commission to grant expedited reconsideration or rehearing, and reject the MISO/ITC Filing.

Even if the Commission believes that it has legal authority under Section 205 to accept and suspend the MISO/ITC Filing, the Commission should instead exercise its discretion to reject the MISO/ITC Filing as unjust and unreasonable, consistent with the Commission's longstanding policy requiring a customer or other contractual relationship, or a voluntary arrangement, as a predicate for submitting a Section 205 filing.

A. Section 205 Filings Must Be Premised on a Customer or Other Contractual Relationship with the Entities to Which the Rate Will Be Charged

Judicial and Commission precedent dictate that a Section 205 rate filing by a utility must be premised on a customer or other contractual relationship with the entities to which the rate will be charged. As explained by the U.S. Supreme Court, this follows from the principle that "[t]he regulatory system created by the Act is premised on contractual agreements voluntarily devised by the regulated companies…."[11] If an entity is not seeking jurisdictional service as a customer from a utility under a contractual relationship, or if there is no other voluntary contractual agreement (such as an RTO agreement) by which charges can be assessed to an entity by a utility, application of the *Permian Basin* principle means that there is no authority

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11 *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 822 (1968) (*"Permian Basin"*). This case addressed rate filings under the Natural Gas Act. However, the "filing and rate-revision provisions of the Federal Power Act 'are in all material respects substantially identical to the equivalent provisions of the Natural Gas Act.' *FPC v. Sierra Pac. Power Co.,* 350 U.S. 348, 353, 76 S. Ct. 368, 371-372, 100 L. Ed. 388, 394 (1956); *see also Permian Basin Area Rate Cases* (Continental Oil Co. v. FPC), supra note 36, 390 U.S. at 821, 88 S. Ct. at 1388, 20 L. Ed. 2d at 366; *Richmond Power & Light v. FPC*, 156 U.S. App. D.C. 315, 317, 481 F.2d 490, 492, cert. denied, 414 U.S. 1068, 94 S. Ct. 578, 38 L. Ed. 2d 473 (1973)." *Cleveland v. Federal Power Comm'n*, 525 F.2d 845, 855 (D.C. Cir. 1976).

under the Federal Power Act's "regulatory system" for a utility to file for collection of a rate from the unrelated entity, and no authority under which the Commission may accept such a filing. Here, the NYISO is in no sense a customer of Midwest ISO or ITC, and NYISO is not a party to a contractual agreement by which it has consented to pay costs allocated to it by the Midwest ISO.

Through the years, Commission precedent has recognized that its rate-related authority under the Federal Power Act is premised on the existence of contractual relationships between a utility and its customers, and rejected rate filings that contravene this basic principle. Consistent with the contractual context of Federal Power Act regulation, the Commission has included customer-specific agreements in its *pro forma* tariffs. As recently as May 2010,[12] the Commission reversed a finding of an initial ALJ decision that the Midwest ISO could collect the Seams Elimination Charge/Cost Adjustment/Assignment ("SECA") transmission-related charges from a retail load-serving entity (Green Mountain) that was not a Midwest ISO transmission customer or market participant.[13] To facilitate this collection, the Midwest ISO had filed with the Commission an unexecuted service agreement with Green Mountain. In reversing the ALJ's finding, the Commission stated:

> We disagree with the Initial Decision's finding that "[s]ince the procurement of network transmission service was for the benefit of Green Mountain and its financial responsibility, Green Mountain is the entity that paid transmission costs and should pay SECAs." Thus, we will reverse the Initial Decision's conclusions that Green Mountain is a "customer" under the Midwest ISO tariff and that Midwest ISO properly filed unexecuted service agreements on

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12 *See Midwest Independent Transmission System Operator, Inc.,* Order on Initial Decision, 131 FERC ¶ 61,173 (2010) ("*Green Mountain*").

13 Transmission service had been made available to Green Mountain by its affiliate, BP Energy, a MISO transmission customer.

> Green Mountain's behalf pursuant to Schedule 22. Consequently, we will also reverse the Initial Decision's conclusion that Midwest ISO properly assessed Green Mountain SECA charges as a customer within a designated subzone under Schedule 22.[14]

The Commission's finding was premised on the lack of privity of contract between the Midwest ISO and Green Mountain:

> Instead, we find that BP Energy is responsible for the SECA charges here. BP Energy and Green Mountain negotiated a business arrangement in which the rights and responsibilities of the parties were established by contract. Under its contractual arrangement, if BP Energy failed to pay Midwest ISO for network transmission service, Midwest ISO would have had no recourse against Green Mountain. Likewise, if Green Mountain failed to pay BP Energy under their separate Energy Services Agreement, BP Energy was still obligated to pay Midwest ISO for network transmission service. Accordingly, we will reverse the Initial Decision's finding that Green Mountain should pay SECA charges based on its contractual arrangements.[15]

In the circumstances of the current proceeding, there is similarly no customer or other contractual arrangement between the NYISO and the Midwest ISO or ITC. The Commission should therefore apply the principles of *Green Mountain* and reject the MISO/ITC Filing.

Consistent with the principles announced by the Supreme Court in *Permian Basin* and followed by the Commission in *Green Mountain*, the Commission rejected in a suspension/hearing order a filing by Commonwealth Edison ("ComEd") – a transmission owner that had departed the Midwest ISO – of a proposed rate schedule to ComEd's own tariff.[16] The rate schedule proposed to assign to another utility (Ameren) credits accruing to ComEd when ComEd took transmission service from the Midwest ISO. The credits that ComEd accrued could

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[14] *Id.* at P 421.

[15] *Id.* at P 422.

[16] *See Commonwealth Edison Co.,* 129 FERC ¶ 61,298 (2009) ("*Commonwealth Edison*"), *on reh'g,* 132 FERC ¶ 61,268 (2010).

be used to offset the capital cost component of future Midwest ISO administrative charges. Section 4 of ComEd's proposed rate schedule stated that the Commission's acceptance would "constitute direction to Midwest ISO to charge its administrative costs to [Ameren] pursuant to Schedule 10-A of the Midwest ISO [Tariff], rather than under Schedule 10 of the Midwest ISO [Tariff]."[17] Protestors, including the Midwest ISO, asserted that this new rate schedule would have the effect of raising rates payable by other transmission customers of the Midwest ISO under a rate schedule of the Midwest ISO tariff. In essence, this filing could have imposed increased charges on entities with which ComEd had no direct contractual or customer relationship.

In its protest, the Midwest ISO stated:

> ComEd cannot compel the modification of the Midwest ISO Tariff by filing a Section 205 application to establish a new Rate Schedule under its own tariff. …ComEd is not a transmission-owning member of the Midwest ISO and therefore is not authorized to make filings that would affect the rates, terms, or conditions of service under the Midwest ISO Tariff. Moreover, it is *ultra vires* the scope of Section 205 for one utility to make a filing to compel the action of a non-filing utility. …Because ComEd's Section 205 Application contains provisions that are not authorized under Section 205 of the FPA, the instant filing should be rejected with prejudice.[18]

The Commission's order summarily rejected Section 4 of ComEd's proposed rate schedule.[19]

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17 *Id.* at P 6.

18 *See Motion to Intervene and Protest of the Midwest Independent Transmission System Operator, Inc.,* Docket Nos. ER10-209-000, EL10-12-000, at 7-8 (filed November 24, 2009) (footnote omitted). The Midwest ISO's protest is Attachment 1 hereto.

19 *See Commonwealth Edison* at P 27.

The *"ultra vires"* conduct protested by the Midwest ISO bears a strong resemblance to the filing submitted by MISO/ITC in the instant proceeding. The Commission should reject the MISO/ITC Filing because it has no basis under Section 205 of the Federal Power Act.[20]

B. None of the Cases Cited in the MISO/ITC Filing Contravene the Foregoing Precedent

The decisions of the Commission and the courts cited in the MISO/ITC Filing as supporting the authority to file tariff revisions that purport to apply to non-customers, and assess charges in the absence of a customer or other contractual relationship are readily distinguishable and do not contravene the principles explained above. In particular, the cited cost allocation orders regarding loop flows involve the allocation of such costs within a contractually bounded region such as the Midwest ISO or the Western Systems Coordinating Council ("WSCC").

The WSCC case cited in the MISO/ITC Filing addressed a filing, accepted after a paper hearing, of a plan developed collaboratively by the signatories to the WSCC Agreement to address a longstanding loop flow problem.[21] The plan called for the use of controllable devices owned by five of its member utilities, and included a cost allocation and compensation methodology. The plan was approved by 57 of the 64 WSCC members. In noting favorably the collaborative development and approval of the plan, the Commission contrasted attempts to impose charges on neighbors through Section 205 filings: "The Commission has consistently

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20 Even if the Commission, nevertheless, believes that it has legal authority under Section 205 to accept and suspend the MISO/ITC Filing, the Commission should instead exercise its discretion to reject the MISO/ITC Filing as unjust, unreasonable, unduly discriminatory and/or preferential, consistent with its longstanding policy requiring a customer or other contractual relationship, or a voluntary arrangement, as a predicate for submitting a Section 205 filing.

21 *See Southern California Edison Company*, 70 FERC ¶ 61,087 (1995) (footnote omitted) (*"WSCC"*), *subsequent order approving loop flow plan,* 73 FERC ¶ 61,219 (1995).

rejected unilateral filings by single utilities proposing to impose charges, terms and conditions on a neighboring utility that, according to the filing utility, is responsible for loop flows."[22]

The judicial decisions offered to support the MISO/ITC Filing do not suggest authority to file or accept charges to parties that are not in a customer/supplier relationship or otherwise in privity of contract with the utility. *Illinois Commerce Commission v. Federal Energy Regulatory Commission* ("*ICC*")[23] and *Midwest ISO Transmission Owners v. Federal Energy Regulatory Commission* ("*MISO TOs*")[24] involved cost allocation disputes within the boundaries of PJM and the Midwest ISO, respectively, among entities that voluntarily became members/customers of those RTOs. The NYISO is neither a member nor a customer of the Midwest ISO or ITC, and therefore these decisions lend no support to the propriety of the MISO/ITC Filing.

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22 *WSCC* at p.61,250. In *WSCC,* the Commission also stated "The Commission's policy is that owners and controllers of interstate transmission facilities attempt to resolve loop flow issues on a consensual, regional basis." *Id.* at 61,241-2. In that context, *WSCC* referred to the Commission's seminal Transmission Pricing Policy Statement, which in turn made clear that loop flow cost allocation in a broader inter-regional context is based on consent: "Of course, such individual utility pricing may be appropriate if there are no objections to the loop flow solution from any affected neighboring utilities or transmission customers." *See* Policy Statement, *Inquiry Concerning the Commission's Pricing Policy for Transmission Services Provided by Public Utilities Under the Federal Power Act*, 59 Fed. Reg. 55031 at p. 55037, n.35 (November 3, 1994).

A unilateral filing was rejected, for example, in *Indiana Michigan Power Co. and Ohio Power Co*., 64 FERC ¶ 61,184, at p.62,554 (1993). The Commission has also rejected a utility's unilateral attempt to charge its two neighbors for "back up" use of its transmission system; the Commission found this a typical consequence of interconnected operations. *See Florida Power & Light Co.,* 81 FERC ¶ 61,055 (1997), *on reh'g*, 81 FERC ¶ 61,337 (1997). *See also Pacific Gas and Elec. Co.; Pacific Gas and Elec. Co.; City of Redding, Calif. v. Pacific Gas and Elec. Co.,* 68 FERC ¶ 61,144 at p. 61,720 (1994) (rejecting rate schedule filed by utility under Section 205 to govern operations with and charges to non-customer (Redding), noting that the utility may not "unilaterally designate a non-interconnected third party to serve as a vehicle for litigation.").

23 576 F.2d 470 (7th Cir. 2009).

24 373 F.2d 1361 (D.C. Cir. 2004).

C. Sound Policy Considerations Require the Section 205 Regulatory Filing Mechanism to be Grounded in a Customer or Other Contractual Relationship

The grounding of the Section 205 regulatory filing mechanism in a customer or other contractual relationship reflects sound policy considerations.

If the authority to allocate costs under Section 205 is not determined to be bounded by the existence of a direct customer or other contractual relationship, the Commission will likely be inundated with filings. In these filings, utilities will seek to shift the costs of transmission facilities to neighboring regions based on "benefits" that those facilities purportedly bestow on their neighbors.[25] A multitude of highly complex cost allocation proceedings will severely tax the resources of the regulators and the regulated alike, but will result in no net societal gain.

IV. REQUEST FOR STAY OF PROCEEDINGS

The NYISO requests the Commission to stay the settlement judge and hearing procedures established by the December 30 Order until the Commission has acted on the NYISO's request for expedited reconsideration or rehearing.

Consistent with the Administrative Procedure Act, the Commission may stay its action "when justice so requires."[26] Specifically, "[t]he test for determining whether a motion for stay should be granted is (1) whether the moving party will suffer irreparable injury without the stay;

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25 The NYISO does not intend, by its position in this proceeding, to suggest any lack of support for voluntary interregional agreements that will facilitate an appropriate allocation of costs of facilities located in multiple regions, such as are proposed in the Commission's Notice of Proposed Rulemaking, *Transmission Planning and Cost Allocation by Transmission Owners and Operating Public Utilities*, 131 FERC ¶ 61,253 (2010) (the "NOPR"). The NYISO notes, however, that the Commission's decision to set this proceeding for hearing is completely at odds with the cost allocation principles enunciated in the NOPR.

26 *Mandatory Reliability Standards for the Bulk Power System*, 131 FERC ¶ 61,231 P 23 (2010) (citing 5 U.S.C. § 705 (2006)).

(2) whether issuing the stay will substantially harm other parties; and (3) whether a stay is in the public interest."[27] The NYISO's stay request meets this test.

The NYISO and others that may seek rehearing will be irreparably injured if the matter proceeds to settlement and hearing procedures. These procedures will waste significant time, money, and resources for the NYISO, the other parties, and the Commission, because the justness and reasonableness of the proposed rates cannot be determined until the Commission has ruled definitively (rather than implicitly, through the failure of the December 30 Order to reject the MISO/ITC Filing) on whether it is even lawful for the Midwest ISO to assess rates against entities that are neither customers receiving jurisdictional service from the Midwest ISO nor willingly agreeing by contract to pay such rates. Settlement judge procedures are highly unlikely to resolve the issues set for hearing, given the far-reaching impacts of modifying the Commission's and courts' longstanding view that Section 205 does not permit filings such as the MISO/ITC Filing. The NYISO's duty to its stakeholders is particularly high here, as it would be inappropriate for it to simply attempt to pass through substantial, new costs to its market participants without a formal Commission determination that such a pass-through is legal.

Participating in hearing procedures under such circumstances would be even more damaging, as it would require parties to participate in a lengthy and costly trial-type hearing that could be rendered moot once the Commission issues an order that addresses the threshold legal question raised in this NYISO Request. The Commission has granted stays under similar

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[27] *Id.* (citing *Ameren Servs. Co.*, 127 FERC ¶ 61,121, at P 44 (2009) (citing *Pinnacle West Capital Corp.*, 115 FERC ¶ 61,064, at P 8 (2006))).

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circumstances when rehearing requests have raised threshold legal questions that, if granted, would moot the underlying processes.[28]

By contrast with the irreparable harm the NYISO and other parties will experience absent a stay, issuing the requested stay until the Commission rules on the NYISO Request will not substantially harm other parties. The Midwest ISO and ITC have stated that the Midwest ISO will not start accruing charges for the Replacement PARs until such facilities are placed in service. This period prior to energization of the Replacement PARs provides the Commission with sufficient time to consider and decide this request for reconsideration or rehearing. The Commission has granted a stay under similar circumstances—*i.e.*, when the Commission had time to address the underlying rehearing question before the jurisdictional agreement at issue would become effective.[29]

V. REQUEST FOR SHORTENED RESPONSE PERIOD

The NYISO respectfully requests that the Commission shorten the period – with answers due on or before January 26, 2011 – for responding to the NYISO's request to stay the proceedings. This will facilitate a Commission decision on that request prior to the initiation of settlement discussions on January 31, 2011.

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28 *Northwest Pipeline Corp.*, 65 FERC ¶ 61,322 (1993) ("Under the circumstances presented here, it appears that a stay would be appropriate under the standard set forth in the [Administrative Procedure Act], in that there is a pending rehearing directed at the validity of the order, and therefore the order's refund directive, and uncertainty on Northwest's part as to how refunds are to be calculated."); *Northeast Utilities Serv. Co.*, 51 FERC ¶ 61,006 (1990) ("*Northeast Utilities*") (granting a stay because a pending rehearing request challenged the Commission's directive in the underlying order requiring the public utility to file a revised version of the contract at issue).

29 *See id. Northeast Utilities* (granting a stay pending rehearing where the agreement at issue was already suspended for over four months, thus providing the Commission the opportunity to decide the rehearing request before the agreement at issue would become effective).

VI. CONCLUSION

Because of the foregoing issues, the NYISO requests that the Commission stay this proceeding, grant this request for expedited reconsideration or rehearing, and reject the MISO/ITC Filing.

Respectfully submitted,

NEW YORK INDEPENDENT SYSTEM OPERATOR, INC.

/s/ Robert E. Fernandez

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Dated: January 21, 2011

ATTACHMENT 1

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Commonwealth Edison Company	)	Docket Nos.	ER10-209-000
	)		EL10-12-000
			(not consolidated)

MOTION TO INTERVENE AND PROTEST OF THE MIDWEST INDEPENDENT TRANSMISSION SYSTEM OPERATOR, INC.

Pursuant to Rules 214 and 211 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("FERC" or "Commission"), 18 C.F.R. § 385.214 and 211 (2009), the Midwest Independent Transmission System Operator, Inc. ("Midwest ISO") hereby moves to intervene in the above-captioned proceedings and to file the protest set forth herein. In its November 3, 2009 application filed pursuant to Section 205 of the Federal Power Act ("FPA") ("Section 205 Application")[1] and its concurrent Petition for Declaratory Order (collectively, "November 3 Filings"), Commonwealth Edison Company ("ComEd") seeks the Commission's imprimatur on an assignment of $20 million of transmission credits created in the MISO Withdrawal Settlement Agreement.[2] ComEd, however, has chosen an inappropriate path to the relief that it seeks. Moreover, the credits at issue were intended to be assignable within the corporate linage of a withdrawing member, and were not created to establish a secondary market for Schedule 10-A rights. Accordingly, the Midwest ISO respectfully requests that the

[1] 16 U.S.C. § 825d .
[2] *Illinois Power Co.,* 95 FERC ¶ 61,183, *reh'g denied*, 96 FERC ¶ 61,026 (2001) ("Settlement Agreement Orders").

Commission find that the tariff amendment proposed by ComEd is unjust and unreasonable, and to reject same.

I. COMMUNICATION AND CORRESPONDENCE

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II. BACKGROUND

In September 1998, the Commission conditionally approved the application of ten transmission-owning utilities to form the Midwest ISO, and to transfer operational control of their jurisdictional transmission facilities to that entity.[3] ComEd was among the applicants. Shortly after leading the effort to establish the Midwest ISO, ComEd and two other transmission owners (Ameren Corporation ("Ameren") and Illinois Power Company ("Illinois Power")) filed notices of withdrawal from the Midwest ISO upon a stated intent to join the nascent Alliance Regional Transmission Organization ("RTO").

The Commission declined to rule on the notices of withdrawal and instead instituted settlement procedures.[4] Those procedures resulted in a settlement agreement pursuant to which ComEd, Illinois Power, and Ameren were permitted to withdraw from the Midwest ISO in

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3 *Midwest Indep. Trans. System Operator, Inc.,* 84 FERC ¶ 61,231 (1998), *order on reh'g*, 85 FERC ¶ 61,372 (1998).

4 *Illinois Pwr. Co.,* 94 FERC ¶ 61,069, *reh'g denied*, 94 FERC ¶ 61,332 (2001).

consideration of the payment of $60 million.[5] The intended purposes of the Settlement Agreement were:

> [T]o afford an opportunity, without the need to issue new debt financing, for the Midwest ISO to remain financially viable and for it to proceed to operations in accordance with Order No. 2000; to preserve the Alliance Companies' business model by providing the regulatory certainty deemed by the Alliance Companies and others to be necessary for Alliance Transco to be formed, financed and become operational in accordance with Order No. 2000; and to create the basis for an arrangement that will preserve the separate organizations and features of the Alliance Regional Transmission Organization ("Alliance RTO") and the Midwest ISO to operate as a seamless market.[6]

Sections 4.7 through 4.9 of the Settlement Agreement "concern credits (to be negotiated with the Midwest ISO) which the Departing Companies may receive in connection with services which the Midwest ISO provides to the Alliance Companies. The Departing Companies are to receive a credit against their combined portion of a service fee for services rendered, if any, by the Midwest ISO to the Alliance RTO. The Departing Companies will also receive a credit to be applied against the amount each pays with respect to the capital cost component of the administration cost adder under Schedule 10 of the Midwest ISO Open Access Transmission Tariff ("OATT")."[7] The credit mechanism relative to Schedule 10 charges was set forth in Section 4.8 of the Settlement Agreement ("Section 4.8 Credits").

The enumerated purposes of the Settlement Agreement succeeded in part and failed in part. The Midwest ISO was able to complete its start-up activities and became operational in April of 2002. The Alliance RTO never got off the ground. In a series of orders issued in December of 2001, the Commission found that the Midwest ISO satisfied the criteria set forth in

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5 *See* March 21, 2001 Settlement Agreement, filed in Docket Nos. ER01-123-002, et al. ("Settlement Agreement").

6 Settlement Agreement, Explanatory Statement at 2.

7 Settlement Agreement, Explanatory Statement at 5.

Order No. 2000[8] to be declared an RTO,[9] but that the proposed Alliance RTO did not.[10] The members of the proposed Alliance RTO were ordered to elect whether they would join the Midwest ISO or PJM Interconnection LLC ("PJM"). Ameren and Illinois Power ultimately elected to return to the Midwest ISO.[11] Upon their return, the Midwest ISO returned their respective portions of the $60 million withdrawal fee, as established in the Settlement Agreement.[12] ComEd elected to join PJM.[13]

III. INTERVENTION

The Midwest ISO is a FERC-approved RTO that currently directs the operation of high voltage electric transmission facilities located in 13 Midwest states and one Canadian province. The Midwest ISO also manages one of the world's largest energy markets using security constrained unit commitment and economic dispatch of electricity, and administers Day-Ahead, Real-Time, Ancillary Services, and Financial Transmission Rights markets as well as Locational Marginal Pricing at over 2,072 pricing nodes.

In its November 3 Filings, ComEd effectively proposes to deprive the Midwest ISO of up to $20 million in Schedule 10 revenue, thereby resulting in a $20 million increase in Schedule 10 fees to all other Transmission Customers. The Midwest ISO has a direct interest in a proposal that would benefit one Transmission Customer to the detriment of all other Transmission Customers. No other party can adequately represent the Midwest ISO's interest in this matter.

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8 Regional Transmission Organizations, Order No. 2000, 65 Fed. Reg. 809 (January 6, 2000), FERC Stats. & Regs. ¶ 31,089 (1999), *order on reh'g*, Order No. 2000-A, 65 Fed. Reg. 12,088 (February 25, 2000), FERC Stats. & Regs ¶ 31,092 (2000), petitions for review dismissed, *Public Utility District No. 1 of Snohomish County, Washington v. FERC*, 272 F.3d 607 (D.C. Cir. 2001).

9 *Midwest Independent Transmission System Operator, Inc.,* 97 FERC ¶ 61,326 (2001).

10 *Alliance Companies,* 97 FERC ¶ 61,327 (2001).

11 *See Alliance Companies, et al.,* 100 FERC ¶ 61,137 (2002).

12 Ameren was reimbursed its entire $18 million withdrawal fee. *See* Settlement Agreement Orders; *Ameren Services Co., et al.*, 101 FERC ¶ 61,320 (2002).

13 *See PJM Interconnection, L.L.C.*, 106 FERC ¶ 61,253 (2004).

Accordingly, the Midwest ISO submits that it has satisfied the criteria for intervention and should be allowed to participate in the captioned proceeding with full rights as a party.

IV. PROTEST

A. The November 3 Filings Are Improper.

1. *The Subject Rate Schedule Is Not a Proper Section 205 Filing Because It Seeks to Amend Schedule 10-A of the Midwest ISO Tariff and Violates the Transmission Owners Agreement.*

To implement Section 4.8 of the Settlement Agreement, the Midwest ISO created Schedule 10-A to its Open Access Transmission, Energy and Operating Reserve Markets Tariff ("Midwest ISO Tariff"), which provides for an administrative cost adder that does not include recovery of capital cost ("Alternate Administrative Cost Adder"). Under the Midwest ISO Tariff, only those utilities that had paid a withdrawal fee reflecting their capital obligations to the Midwest ISO are eligible for participation under Schedule 10-A. Specifically, Schedule 10-A provides:

> The Alternate Administrative Cost adder recognizes prepayment of capital obligations for Transmission Provider start-up costs. Use of this Schedule is restricted to only those Transmission Customers that have paid the capital portion of the Transmission Provider's start-up cost in advance through special arrangements with the Transmission Provider.[14]

Schedule 10-A was initially filed by the Midwest ISO in Docket No. ER02-111-000 on October 16, 2001, and was subject to a settlement agreement that the Commission approved in its order in *Midwest Independent Transmission System Operator, Inc.*, 102 FERC ¶ 61,193 (2003). Section 2.15 of that settlement agreement made it very clear that Schedule 10-A is only available to entities that are eligible to pay Schedule 10-A as opposed to Schedule 10. It provided in pertinent part:

> Notwithstanding the above, the amount of the credit, payable to *the Illinois Companies their affiliates and successors who are entitled to use Schedule 10-A*, shall not be less

[14] Schedule 10-A, Section I, Midwest ISO Tariff, Sheet No. 1970.

> than $.05 per MWh and the Adjusted ISO Cost Adder Rate for Schedule 10-A shall never be less than zero. The denominator for the credit shall be that used to compute the Adjusted ISO Cost Adder Rate for Schedule 10-A. Any refunds due to the Illinois Companies (*or their affiliates or successors entitled to the benefit of Schedule 10-A*), relating to amounts erroneously billed under Schedule 10 instead of Schedule 10-A shall be reflected in the invoicing for the first month following the effectiveness of the Settlement.[15]

In its Section 205 Application, ComEd seeks to amend its jurisdictional tariff to assign its Section 4.8 Credits to Ameren. Among the provisions of the proposed Rate Schedule, however, is the provision that: "FERC's acceptance of this Schedule shall constitute direction to Midwest ISO to charge its administrative costs to the Ameren Entities pursuant to Schedule 10-A of the Midwest ISO OATT (as defined in the Settlement Agreement), rather than under Section 10 of the Midwest ISO OATT . . . ."[16] This provision directly conflicts with Schedule 10-A and improperly attempts to modify the Midwest ISO Tariff without making the twin demonstrations required under FPA Section 206: (1) that Schedule 10-A is no longer just and reasonable, and (2) that ComEd's alternative proposal is just and reasonable.

Although Ameren initially was one of the Departing Companies as defined in the *Illinois Power* settlement, it chose to rejoin the Midwest ISO.[17] Upon rejoining, Ameren's withdrawal fee that was the subject of the *Illinois Power* settlement was returned to Ameren.[18] As a result, Ameren is not eligible to be billed Schedule 10-A because Ameren is not a "successor entitled to the benefit of Schedule 10-A." ComEd's filing is merely a ruse designed to escape the Section 206 strictures by exploiting the fact that the *initial* list of eligible entities set forth in Attachment I of the Midwest ISO Tariff has not been amended to reflect Ameren's subsequent non-

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15 Offer of Settlement, Section 2.15, Docket Nos. ER02-111-000, et al. (April 19, 2002) (emphasis added).
16 *See* Appendix A, Section 4.
17 *Alliance Companies, et al.*, 100 FERC ¶ 61,137 (2002).
18 *Ameren Services Co., et al.*, 101 FERC ¶ 61,320, P 144 (2002).

eligibility. What this clever ploy overlooks, however, is that Attachment I is clerical in nature, seeking to provide additional clarity, and it cannot alter the substantive eligibility requirements of Schedule 10-A and those of its underlying settlement agreements.

ComEd cannot compel the modification of the Midwest ISO Tariff by filing a Section 205 application to establish a new Rate Schedule under its own tariff. Pursuant to Appendix K of the Midwest ISO Transmission Owners Agreement,[19] authority to make Section 205 filings that affect the Midwest ISO's Tariff is apportioned between the Midwest ISO and its Transmission Owners. No entity outside of this class of participants is authorized to make such a Section 205 filing. In order for Ameren to be eligible for the Midwest ISO's Alternate Administrative Cost Adder set forth in Section I of Schedule 10-A of the Midwest ISO Tariff, the Tariff would have to be amended. ComEd is not a transmission-owning member of the Midwest ISO and therefore is not authorized to make filings that would affect the rates, terms, or conditions of service under the Midwest ISO Tariff. Moreover, it is *ultra vires* the scope of Section 205 for one utility to make a filing to compel the action of a non-filing utility.[20] Thus, the only way that Ameren would be eligible to be billed Schedule 10-A instead of Schedule 10 would be for the Midwest ISO to make a Section 205 filing to amend its own Tariff. The Midwest ISO has made no such filing, nor has any transmission-owning member of the Midwest ISO made an authorized Section 205 filing.

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[19] Agreement of Transmission Facilities Owners to Organize the Midwest Independent Transmission System Operator, Inc., a Delaware Non-Stock Corporation (hereinafter "Midwest ISO TOA").

[20] *See* 18 C.F.R. § 35.1(e) (emphasis added):

> No public utility shall, directly *or indirectly*, demand, charge, collect or receive any rate, charge or compensation for or in connection with electric service subject to the jurisdiction of the Commission, or impose any classification, practice, rule, regulation or contract with respect thereto, which is different from that provided in a rate schedule required to be on file with this Commission unless otherwise specifically provided by order of the Commission for good cause shown.

The Commission could direct the Midwest ISO to change its Tariff, but could do so only pursuant to Section 206 of the FPA.[21] ComEd has not made a Section 206 application and has not shown – and could not show (for the reasons set forth in Part D *infra*) – that the existing provisions of Schedule 10-A are unjust and unreasonable in the context of the instant application and that its alternative proposal is just and reasonable.

Because ComEd's Section 205 Application contains provisions that are not authorized under Section 205 of the FPA, the instant filing should be rejected with prejudice.

2. The Petition For Declaratory Order Likewise Is Improper.

Just as the Section 205 Application is an inappropriate vehicle to force a change to the Midwest ISO Tariff, so too is a Petition for Declaratory Order. A Petition for Declaratory Order may be appropriate to address generic legal rights or to clarify legal uncertainties, but here there is no uncertainty as to the scope of entities entitled to participate in Schedule 10-A. Furthermore, there is no ambiguity that Ameren is *not* among the class of authorized participants in Schedule 10-A. The Midwest ISO Tariff would have to be changed in order to make Ameren eligible to be charged under Schedule 10-A rather than Schedule 10 as a result of an assignment of ComEd's Section 4.8 credits. Even if granted, a petition for declaratory relief does not effectuate a compulsory result. As stated above, if ComEd believes that the Midwest ISO Tariff is unjust and unreasonable because it fails to accommodate ComEd's assignment of Section 4.8 Credits, Section 206 of the FPA is the appropriate means to secure the desired result. While ComEd has blanketed the Commission with all manner of pleadings, it has not filed a Section 206 Complaint. It has not shown that Section I of Schedule 10-A is unjust and unreasonable, and it has not proposed a just and reasonable rate to be adopted hereafter. Accordingly, just as

[21] 16 U.S. C. §824e.

ComEd's Section 205 Application is an ineffective vehicle for the relief that ComEd seeks, so too and in like manner is its Petition for Declaratory Order.

B. The Settlement Agreement Does Not Permit the Proposed Assignment and Was Not Intended to Create a Secondary Market for Schedule 10-A Credits.

ComEd's November 3 Filings hang on a single parenthetical phrase in a 26-page Settlement Agreement; *to wit*: "(or their successors and assigns)." ComEd claims that this phrase – solely by use of the term "assigns" – was intended to provide "for ready transferability of the Section 4.8 credits, allowing them to be shared freely among affiliates of the Departing Companies, and provided that they were transferable to the successors or assigns of the Departing Companies."[22] In support of this interpretation, ComEd cites *Ocean State Power*,[23] in which the Commission approved the assignment of power sales contracts to a third party, and a one sentence conclusory statement that the text of the Settlement Agreement is unambiguous. ComEd's proposed interpretation should be rejected because it is inconsistent with the plain meaning of Section 4.8 and is contrary to both the intent of the drafters and the context.

Section 4.8 states in pertinent part: "the Departing Companies will also receive credits against the amounts owed for transmission services provided by the Midwest ISO to the Departing Companies or their current affiliates (or their successors or assigns) up to the Settlement amount of $60 million, which credits will be applied only against the amount each Departing Company or any of their current affiliates (or their successors or assigns) pays with respect to the capital cost component of the Administrative Cost Adder under Schedule 10 of the Midwest ISO OATT and implemented through an alternate Cost adder to the Midwest ISO OATT . . ." ComEd believes that the term "successors or assigns" means that it is entitled to transfer its Section 4.8 Credits to Ameren, and Ameren can then apply those credits against its

[22] Section 205 Application, Transmittal Letter at 3.
[23] 67 FERC ¶ 61,217 (1994).

transmission charges, but Ameren is not a "successor or assign" of ComEd. It neither "succeeded" ComEd in the corporate sense nor acquired or received assignment of ComEd's assets or transmission service. Moreover, even if Ameren were deemed to be an "assign" of ComEd within the meaning of Section 4.8, the credit received thereunder can "be applied only against the amount each Departing Company or any of their current affiliates (or their successors or assigns) pays with respect to the capital cost component of the Administrative Cost Adder under Schedule 10 of the Midwest ISO OATT and implemented through an alternate Cost adder to the Midwest ISO OATT." As discussed above, Ameren is not eligible for any credit "implemented through an alternate Cost adder to the Midwest ISO OATT" because its withdrawal fee was returned by the Midwest ISO. Therefore, the "assignment" would be invalid.

Nor can ComEd's proposed interpretation be squared with the purposes of the Settlement Agreement and the intent of its drafters. As set forth in the attached Affidavit of Stephen Kozey,[24] who participated in the negotiations leading to the Settlement Agreement, the principal focus of Article IV thereof was to provide the Midwest ISO sufficient capital to achieve commercial operations. In fact, the capital requirements of the Midwest ISO were so acute that the Midwest ISO may have been required to initiate bankruptcy proceedings in March 2001 unless it secured assurances of future funding. As is common in settlement negotiations, for each *quid* a *quo* is requested. The Departing Companies argued that it would be unfair for them to pay both a withdrawal fee and to pay the full Schedule 10 rate for services taken from the

[24] Mr. Kozey's Affidavit does not contradict Section 11.4 of the Settlement Agreement inasmuch as it does not reveal any aspect of the settlement negotiations apart from that which was committed to paper and filed with the Commission. Furthermore, inasmuch as ComEd raises the issue of intent (*see, e.g.,* Transmittal Letter at n.33 and Petition for Declaratory Order at 6), it is only appropriate that the Midwest ISO be permitted to respond with the statement of a Midwest ISO officer who participated in the settlement negotiations and who can speak to the issue of the intent of the drafters.

Midwest ISO. They reasoned that because the withdrawal fee was essentially an advance payment of the Midwest ISO's capital cost, and because a substantial portion of the Schedule 10 rate was the recovery of capital cost on an incremental basis, if Departing Companies paid a withdrawal fee and the full Schedule 10 rate, they would be double-paying their capital obligations to the Midwest ISO. In the spirit of compromise, the Midwest ISO and its transmission owners agreed to provide relief.

At the time of the drafting of the Settlement Agreement, the various forms in which the Departing Companies might participate in an RTO were unsettled. The Alliance RTO had been formed, but not approved as an RTO. Various entities were attempting to form Independent Transmission Companies comprised of a collection of transmission assets of several members and spanning two or more RTOs in configuration. The sole purpose of including the parenthetical phrase "(or their successors and assigns)" in Section 4.8 was to recognize that a Departing Company could divest transmission assets, could merge, or could participate in an umbrella organization that could claim Section 4.8 credits on behalf of its member Departing Company. There was no intent – and there is no record support for the contention that the parties so intended – to create a secondary market for Section 4.8 Credits through the use of the single word "assigns."

Chief Judge Wagner, who sat through 13 days of settlement negotiations between up to 135 parties, certainly understood Section 4.8 to be limited in scope. In certifying the Settlement Agreement to the Commission,[25] the Chief Judge described that section as providing "that the Departing Companies will receive a credit against amounts owed for transmission services provided by the Midwest ISO to the Departing Companies <u>or their current affiliates</u> up to the $60

[25] *Illinois Power Company,* 95 FERC ¶ 63,003 (2001).

million Settlement Amount to be applicable against the amount paid by the Departing Company or its current affiliates with respect to the capital cost component of the administrative cost adder in Schedule 10 of the Midwest ISO OATT."[26] Neither ComEd nor Ameren objected to this characterization of the parties' intent under the Settlement Agreement. Chief Judge Wagner's order confirms that the parenthetical phrase "(or their successors and assigns)" in Section 4.8 of the Settlement Agreement was intended to refer to the linear descendants of the parties and not to create a secondary market for Section 4.8 Credits.

ComEd suggests that it is not attempting to create a boundless secondary market, but is only assigning the credits to a sister "Departing Company," which assignment is within the contemplation of Section 4.9 of the Settlement Agreement. Things have changed, however. The Departing Companies are now down to one. Neither Ameren nor Illinois Power is a "Departing Company," since both have secured the return of their withdrawal fees and are, in fact, Midwest ISO members. By the plain terms of Section I of Schedule 10-A, neither party is entitled to a Section 4.8 Credit. Simply because they once were denoted a "Departing Company," such fleeting status did not confer to them a perpetual right to buy unused credits from the other entities. Having secured the return of its withdrawal contribution, Ameren no longer has rights under Schedule 10-A, either in its own right or through the discounted acquisition of the credit of another entity. Schedule 10-A clearly limits its scope to entities that "have paid the capital portion of the Transmission Provider's start-up cost in advance . . . ." That description no longer pertains to Ameren. ComEd has gotten what it bargained for: "credits against the amount owed for transmission services provided by the Midwest ISO." Section 4.8 was not intended to create a separate profit center in ComEd to the extent that it ultimately did not take service from

[26] *Id.* at p. 11 (emphasis added).

the Midwest ISO. While the credit will continue to be available to ComEd and its linear descendents until December 15, 2013, those credits were never intended to be generally alienable beyond the class of Departing Companies, of which there is currently one: ComEd.

The Midwest ISO readily admits that Section 4.8 could have been drafted with greater precision. But, in the context, the corporate care with which complex documents are normally drafted was not a luxury available to the parties to this settlement. In its order mandating settlement negotiations, the Commission established a "drop dead" date of February 28, 2001. The Chief Judge convened settlement procedures beginning on February 1, 2001, and continuing through March 20, 2001. Thirteen days of settlement negotiations were held with an attendance of between 90 and 135 participants each day. The Chief Judge described the negotiations as "extraordinarily difficult and involved a tedious and arduous process."[27] On February 23, 2001, the Chief Judge issued a Report advising the Commission that an agreement in principle had been reached.[28] Additional negotiating sessions were held on March 19, 2001 and March 20, 2001 to draft the actual Settlement Agreement. The final Settlement Agreement was filed with the Commission on March 21, 2001.

In addition to the pressure of the Commission's "drop dead" date, the Midwest ISO was weeks away from bankruptcy. Time was of the essence. Accordingly, the parties strove to get their thoughts and principal provisions down on paper in the quickest way possible. Effectively, two days were devoted to finalizing terms, and the agreement was filed the next day. Were there more time, the intended limited scope of Section 4.8 could have been expressed better. There was, however, no time available for secondary and tertiary verbiage that could have set forth the parties intent, and the limitations thereof, in further detail. In this context, the Commission

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[27] Certification at 29.
[28] *Illinois Power Co.,* 94 FERC ¶ 63,012 (2001).

should construe the Settlement Agreement to accomplish the manifest generic intent of the parties and should not be led astray over a *post hoc* technical definition of a single word.

C. The Settlement Agreement Has Been Overtaken by Events.

The Settlement Agreement had three objectives: (1) afford an opportunity for the Midwest ISO to remain financially available; (2) to preserve the Alliance Companies' business model; and (3) to create an arrangement that would allow the regions served by the Alliance RTO and the Midwest ISO to be operated as a seamless market.[29] Two of the three objectives have not come to pass. In its December 20, 2001 order, the Commission found that the scope and configuration of the Alliance was insufficient to meet the requirements of Order No. 2000.[30] The Alliance RTO model was not preserved, and the seamless market between the Alliance RTO and the Midwest ISO was not established. Instead, the members of the Alliance RTO were directed to select either the Midwest ISO or PJM as their RTO of choice.

It is a fundamental tenet of contract law that a contract is voidable if the object of its execution ceases to exist.[31] The doctrine of "impossibility" or "impracticability" recognizes that if performance of a contract is contingent upon the continued existence of a state of things or set of circumstances, the cessation of existence of such state of things excuses performance of the contract.[32] The doctrine of impossibility or impracticability does not depend on nor is it limited in its application by the specific language of the contract.[33] Corbin expresses the rationale in these words: "The doctrine [of impossibility of performance] is invented by the court in order to

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29 Settlement Agreement at Article I.
30 *Alliance Companies*, 97 FERC ¶ 61,327 (2001).
31 *See* Restatement (Second) of Contracts, Chapter 11.
32 *See, e.g., Khan v. Trans Chem. Ltd.*, 178 Fed. Appx. 419, 425 (5th Cir. 2006).
33 *Florida Power & Light Co. v. Westinghouse Electric Corp.*, 826 F.2d 239, 262 (4th Cir. 1987).

supplement the defects of the actual contract. The parties did not anticipate fully and completely, if at all, or provide for what actually happened."[34]

In 1921, in *Texas Co. v. Hogarth Shipping Co.*, the United States Supreme Court declared:

> [W]here parties enter into a contract on the assumption that some particular thing essential to its performance will continue to exist and be available for the purpose and neither agrees to be responsible for its continued existence and availability, the contract must be regarded as subject to an implied condition that, if before the time for performance and without the default of either party the particular thing ceases to exist or be available for the purpose, the contract shall be dissolved and the parties excused from performing it.[35]

The modern doctrine of impossibility or impracticability[36] has been summarized in Chapter 11 (Impracticability of Performance and Frustration of Purpose) of the Restatement (Second) of Contracts. In the Introductory Note to that chapter, the commentators described the doctrine's justification:

> Even where the obligor has not limited his obligation by agreement, a court may grant him relief. An extraordinary circumstance may make performance *so vitally different from what was reasonably to be expected* as to alter the essential nature of that performance.

Furthermore, in Section 2-615(a) of the Uniform Commercial Code, non-performance of the contract is excused "if performance as agreed has been made impracticable by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made," thus treating impossibility as synonymous with commercial impracticability.

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34 *Id.*, citing CORBIN ON CONTRACTS §1331, at 360 (1962 ed.).

35 256 U.S. 619, 629-30 (1921).

36 *See also* discussion at *U.S. v. Winstar Corp*. 518 U.S. 839, 904-908 (1996) (Petitioner government breached its contract with savings and loan associations, where it failed to indemnify them for damages incurred as a result of legislation enacted subsequent to the parties' contract, where Petitioner expressly contracted to assume the risk of such regulatory change, and where such terms were enforceable.).

Because of the demise of the Alliance RTO, many of the executory provisions of the Settlement Agreement were not effectuated. The settling parties did not implement an Inter-RTO Cooperation Agreement as specified in Article III of the Settlement Agreement. The Departing Companies did not stay in the Alliance RTO until December 31, 2002 as required by Paragraph 4.10. The Alliance RTO and the Midwest ISO did not develop a single rate methodology as required by Article V of the Settlement Agreement. The Alliance RTO did not become operational on or before December 15, 2001 as envisioned under Article VII of the Settlement Agreement. Whereas Section 9.6 provided that Commission approval of the Settlement Agreement would constitute approval of the scope and configuration of the Midwest ISO and the Alliance RTO, the Commission reconsidered this commitment in its December 20, 2001 orders.

Upon the dissolution of the Alliance RTO, a fundamental predicate of the Settlement Agreement ceased to exist. The concept of "Departing Companies" bound for the Alliance RTO was no longer an operative premise. Indeed, ComEd itself has asserted that "as a result of the Alliance VI Order, the Illinois Companies were denied the opportunity to participate in the Alliance RTO, and thus there has been a failure of consideration for the [withdrawal] payment by the Illinois Companies."[37] Consequently, ComEd argued that "if Alliance Grid participates within the Midwest ISO, the Commission should order the Midwest ISO to refund the $60 million, with interest, to the Illinois Companies."[38] There was no provision in the Settlement Agreement providing for a refund of the $60 million withdrawal payment. Hence, ComEd's argument boiled down to the assertion that since the Settlement Agreement failed of its essential

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37 *Illinois Companies, et al.,* 99 FERC ¶ 61,105 at 61,449 (2002).
38 *Id.*

purpose, its commitments thereunder should be obviated if it returned to the Midwest ISO as a member of an ITC.

Section 4.8 is an unexecuted portion of the Settlement Agreement that was intended to govern the economic relationship of the Departing Companies as members of the Alliance RTO and the Midwest ISO. The Midwest ISO cannot provide a Section 4.8 Credit to two of the three original Departing Companies because they no longer have a prepaid capital contribution to offset. With the *raison d'être* of the credits gone, there is no basis for the Midwest ISO to recognize the assignment of an empty economic interest. When two of the Departing Companies returned to the Midwest ISO, their contributions to the withdrawal fee were returned in recognition of the fact that the Settlement Agreement was no longer applicable to their relationship to the Midwest ISO. So too has the crediting provisions of Section 4.8 ceased to have continuing relevance. Ameren is no longer a "Departing Company" entitled to credits. ComEd is not a member of the Alliance RTO, which is why it is not able to utilize the credits to which it is entitled in its own right. Since the Settlement Agreement has failed two of the three essential purposes, there is no reason to preserve arguable rights that have ceased to be relevant to their intended objective.

D. Permitting the Assignment of Credits Would Produce a Result That Would Not be Just and Reasonable.

Stripped to its essence, ComEd proposes a simple wealth transfer from the Midwest ISO to itself and Ameren. Ameren would receive $5 million in free money by paying ComEd $15 million in return for $20 million in credits. ComEd will reduce its withdrawal fee nearly in half without any economic justification. Ameren will over-recover its withdrawal fee by $5 million. Members of the Midwest ISO will be required to contribute an additional $20 million in

Schedule 10 charges to make up for the revenue shortfall created by the credits. There is nothing just or reasonable in this scenario.

In the proceedings following the Settlement Agreement,[39] the Midwest ISO offered, purely on equity grounds, to return the withdrawal fee of Departing Companies, provided: (1) that they participate in the Midwest ISO in some organizational structure; and (2) that they pay the full Schedule 10 rate prospectively. The Commission concluded that refunding the $60 million was inextricably related to the Departing Companies' responsibility to pay the Midwest ISO's embedded cost as represented in Schedule 10. The Commission clarified that the $60 million refund was only relevant to the extent that the Departing Companies opted to join the Midwest ISO, rather than some other RTO.

Thus, to give effect to ComEd's proposed assignment would be directly contrary to the rationale expressed in the Commission's prior orders. ComEd owed the Midwest ISO a minimum of $35.5 million in withdrawal fees as required by Article V of the Midwest ISO Transmission Owners Agreement. ComEd has not taken significant services from the Midwest ISO that would justify the recovery of its withdrawal fee through Schedule 10-A credits. Yet, through the instant application, ComEd would reduce its effective withdrawal fee by $15 million. By assigning credits to Ameren, the Midwest ISO participants would be required to pay the cost of such assignment directly through higher Schedule 10 payments. It is not just and reasonable to abate ComEd's withdrawal fee through an "assignment" that actually works as an unjustifiable cross-subsidization by current Midwest ISO participants to ComEd. ComEd received a bargain when it was permitted to withdraw from the Midwest ISO for a $35.5 million fee. The Midwest ISO was in a precarious financial position at the time – indeed, in dire straits – and thus accepted

[39] *See generally Alliance Companies, et al.*, 99 FERC ¶ 61,105 (2002).

a heavily discounted withdrawal fee from the Departing Companies. For ComEd now to seek to recoup nearly half of its withdrawal fee by exploiting a technicality merely adds insult to injury.

Similarly, it is not just and reasonable to provide Ameren $20 million of Section 4.8 Credits. Ameren received the return of its withdrawal fee of $18 million and has no colorable claim to further participation under Schedule 10-A. To grant ComEd's action would permit Ameren to over-recover costs that have already been returned to Ameren, again at the unjustifiable expense of current Midwest ISO participants.

ComEd claims that: "By transferring the credits for consideration, ComEd will maximize the value of the Section 4.8 Credits it bargained for."[40] This is not an accurate statement of the case. ComEd bargained for credits to ensure that it did not double pay the Midwest ISO's start-up cost. ComEd has only paid those costs once through its withdrawal fee. Since it is not using services for which a Schedule 10 fee would be collected, it does not run a risk of double payment. Instead, ComEd is attempting to misuse the Section 4.8 Credits to under pay its withdrawal fee and to allow Ameren to over collect the recovery of its withdrawal fee. This is <u>not</u> the essence of the Section 4.8 Credits that "it bargained for."

ComEd claims that a refusal to allow its Section 4.8 Credits to be transferred "would raise the prospect of having to start the MISO withdrawal proceedings and related proceedings over from scratch, including return to ComEd of the exit fee payment made by ComEd to MISO."[41] This assertion is totally false. ComEd owed the Midwest ISO an exit fee pursuant to Article V of the Midwest ISO TOA, which ComEd freely executed. That obligation existed separate and apart from the Settlement Agreement. All that the Settlement Agreement did with respect to ComEd's extant obligation was to quantify the amount of the payment ComEd was

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40 Transmittal Letter at 4.

41 Transmittal Letter at 10.

required to make. Since ComEd never returned to the Midwest ISO, it has no colorable claim to a return of its withdrawal fee irrespective of what happens to the Settlement Agreement or the Section 4.8 Credits provided thereunder.

The Midwest ISO will stand behind its bargain irrespective of the duress under which it was exacted. It will provide a credit against the service fee for services rendered, if any, to the Alliance RTO. It will provide a credit against Schedule 10 fees to Departing Companies. There is, however, no Alliance RTO for which the Midwest ISO can provide services, and Ameren is no longer a Departing Company. To the extent that ComEd can use its credits prior to December 2013, the Midwest ISO will honor those credits. The Midwest ISO is disinclined, indeed is strongly opposed, to facilitate a wealth transfer from its members to ComEd and Ameren based upon a strained reading of a Settlement Agreement that has, for all intents and purposes, ceased to exist. Such a wealth transfer would be unjust and unreasonable, and the Commission should not permit it.

V. CONCLUSION

WHEREFORE, upon the grounds stated above, the Midwest Independent Transmission System Operator, Inc., respectfully requests leave to intervene in the above-captioned proceeding and requests that the Commission reject the Section 205 application and the Petition for Declaratory Order of Commonwealth Edison Company.

Respectfully submitted,

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Dated: November 24, 2009

CERTIFICATE OF SERVICE

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

Dated at Washington, D.C., this 24th day of November, 2009.

*_/s/ Stephen L. Teichler_*
Stephen L. Teichler
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CERTIFICATE OF SERVICE

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

Dated at Washington, D.C. this 21st day of January, 2011.

/s/ Pamela S. Higgins

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