

136 FERC ¶ 61,099
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
John R. Norris, and Cheryl A. LaFleur.

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| Midwest Independent Transmission System Operator, Inc. and the Transmission Owners of the Midwest Independent Transmission System Operator, Inc. | Docket Nos. ER08-296-001 ER08-296-002 |
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ORDER DENYING REHEARING AND ACCEPTING COMPLIANCE FILING

(Issued August 11, 2011)

1. On March 3, 2008, in Docket No. ER08-296-001, Union Electric Company (Union Electric) filed a request for rehearing of the Commission's order¹ that conditionally accepted proposed revisions to section 37.3 of Midwest Independent Transmission System Operator, Inc.'s (MISO) Open Access Transmission and Energy Markets Tariff (Tariff).² As discussed below, we deny Union Electric's request for rehearing of the February 1 Order.

2. Also on March 3, 2008, in Docket No. ER08-296-002, MISO Transmission Owner Applicants (MISO TO Applicants) submitted revisions to section 37.3 of the Tariff to comply with requirements in the February 1 Order.³ As discussed below, we accept MISO TO Applicants' compliance filing.

¹ *Midwest Indep. Transmission Sys. Operator, Inc.*, 122 FERC ¶ 61,090 (2008) (February 1 Order).

² The MISO Open Access Transmission and Energy Markets Tariff has been replaced by the MISO Open Access Transmission, Energy, and Operating Reserve Markets Tariff. Throughout this order, however, we refer generically to both the tariffs as the "MISO Tariff."

³ MISO states that it joins the compliance filing exclusively in its administrative capacity and takes no position on the substantive revisions filed. Therefore, and for ease of reference, in this order we will refer to MISO TO Applicants as the filing parties in

(continued...)

I. Background

A. Treatment of Bundled Retail Load, Grandfathered Agreements, and Revenue Distribution Set Forth in the MISO Transmission Owners Agreement

3. The MISO TO Agreement⁴ sets forth the rules governing the relationship between and among MISO and the MISO TOs.⁵ Appendix C of the TO Agreement (Pricing and Revenue Distribution, Return of Start-Up Costs, and Renegotiation Procedures for Grandfathered Agreements) addresses certain transmission pricing and revenue distribution matters. In particular, the TO Agreement establishes two revenue distribution methodologies – one applicable during the six-year transition period ending January 31, 2008, and the second applicable after the end of the transition period.

4. During the transition period, the TO Agreement provides that each MISO TO must take Network Integration Transmission Service (Network Service) or Point-to-Point Transmission Service (PTP Service) under the Tariff to serve its bundled retail load or meet its obligations under Grandfathered Agreements (GFA). However, under the TO Agreement, the MISO TO does not pay the license-plate zonal transmission charges in Schedule 9 (Network Service) of the Tariff for Network Service taken to serve its

reference to all proceedings in Docket No. ER08-296-000. For the purposes of the compliance filing, MISO TO Applicants include: American Transmission Company LLC; American Transmission Systems, Incorporated, a subsidiary of FirstEnergy Corp.; Duke Energy Shared Services for Duke Energy Ohio, Inc., Duke Energy Indiana, Inc., and Duke Energy Kentucky, Inc.; Great River Energy; Indianapolis Power & Light Company; International Transmission Company; ITC Midwest, LLC; Manitoba Hydro; Michigan Electric Transmission Company, LLC; Minnesota Power (and its subsidiary Superior Water, L&P); Montana-Dakota Utilities Co.; Northern Indiana Public Service Company; Northern States Power Company and Northern States Power Company (Wisconsin), subsidiaries of Xcel Energy Inc.; Northwestern Wisconsin Electric Company; Otter Tail Corporation; Southern Indiana Gas & Electric Company; and Wabash Valley Power Association, Inc.

⁴ Agreement of Transmission Facilities Owners to Organize the Midwest Independent Transmission System Operator, Inc., a Delaware Non-Stock Corporation (TO Agreement).

⁵ While we refer generally to the MISO TOs herein, references to the MISO TOs assume that they were as constituted for the purposes of the relevant documents and dockets discussed.

bundled retail load or the charges in Schedule 7 (Long-Term Firm and Short-Term Firm Point-To-Point Transmission Service), Schedule 8 (Non-Firm Point-To-Point Transmission Service), or Schedule 9 of the Tariff for service taken to meet its GFA obligations.⁶ During the six-year transition period, revenues collected for Network Service or PTP Service under the Tariff for load within the MISO are fully distributed to the MISO TO whose facilities comprise the license-plate pricing zone where the network load is located.⁷

5. When the February 1 Order was issued, the TO Agreement provided that after the transition period ends on January 31, 2008, the Tariff “shall be applicable to all transmission service arranged over MISO facilities,” including bundled retail load and load served under GFAs and “[e]ach [MISO TO] shall receive revenues, on a monthly basis, based on its revenue requirement calculated in accordance with a formula filed with the FERC,” and any shortfall or excess in the revenues available for distribution in any year shall be “apportioned on a proportionate basis of revenue requirements”⁸ As discussed in this order, the MISO TOs subsequently filed revisions to the TO Agreement that eliminated the post-transition period revenue distribution provisions described above.

B. Treatment of Bundled Retail Load, Grandfathered Agreements, and Revenue Distribution Set Forth in the Tariff

6. At present, section 37 of the Tariff reflects the above described provisions in Appendix C of the TO Agreement regarding treatment of the MISO TOs’ bundled retail load and GFAs during the six-year transition period. Under section 37.1 of the Tariff, the MISO TOs must take service under the Tariff for deliveries to their bundled retail load and to meet their GFA obligations. Prior to the February 1 Order, section 37.3(a) of the Tariff exempted the MISO TOs from paying the license-plate zonal transmission charges in Schedule 9 for the Network Service they take to serve their bundled retail load. In addition, sections 37.3(b) and 37.3(c) of the Tariff exempted the MISO TOs from paying the license-plate zonal and regional through and out charges in Schedules 7 through 9 for the Network Service and PTP Service that they take under the Tariff to meet their obligations under their GFAs. In practice, this meant that, prior to the February 1 Order, MISO did not collect or distribute any revenues for the majority of the Network Service

⁶ TO Agreement, App. C at §§ II.A.2 and II.A.3.

⁷ TO Agreement, App. C at § III.A.4.

⁸ See February 1 Order, 122 FERC ¶ 61,090 at P 2 (citing the then-effective TO Agreement (App. C at §§ II.B.2, III.B)).

and some of the PTP Service provided under the Tariff. Instead, the MISO TOs collected revenues for such Tariff transmission service directly from their bundled retail and GFA customers.

C. Service Agreement between Union Electric and MISO

7. In 2004, the Commission accepted a service agreement between Union Electric and MISO establishing the terms and conditions under which Union Electric would take Network Service under the Tariff to serve its bundled retail load (Service Agreement).⁹ The Service Agreement was negotiated as part of a settlement among MISO, Union Electric, and the staff of the Missouri Public Service Commission (Missouri Commission) in a Missouri Commission proceeding where Union Electric sought authorization to participate in MISO (Settlement Agreement). To ensure that the Missouri Commission would continue regulating Union Electric's bundled retail rates during the Service Agreement's term, it provides that Union Electric shall not pay the rate set forth in Schedule 9 of the Tariff for the Network Service it takes to serve its bundled retail load. Rather, the parties adopted the transmission component of Union Electric's bundled retail rate as the rate for the Network Service that MISO provides to Union Electric to serve Union Electric's bundled retail load. The settlement, which is still in effect, provides that if the Commission orders any changes to the Service Agreement, the parties must also receive the Missouri Commission's approval for such changes, and, if the Missouri Commission does not approve those changes, its approval of Union Electric's participation in MISO would be revoked.¹⁰

8. The parties acknowledged that, in allowing adoption of the transmission component of bundled retail rates for transmission service provided by a regional transmission organization (RTO), the Commission had previously required that the RTO and transmission owner explicitly state the transmission component of the bundled retail rate in the tariff or service agreement. Nevertheless, they stated that it would be impractical to specify the transmission component of Union Electric's bundled retail rate because Union Electric's bundled retail rate was approved by the Missouri Commission as a "black box" rate without specifying the transmission component. In accepting the Service Agreement, the Commission acknowledged the impracticality of specifying the transmission component of Union Electric's bundled retail rate, and accepted the Service Agreement without requiring that the transmission component of the bundled retail rate

⁹ See *Midwest Indep. Transmission Sys. Operator, Inc.*, 106 FERC ¶ 61,293 (2004) (Service Agreement Order).

¹⁰ See MISO and Union Electric February 19, 2004 Filing, Docket No. ER04-571-000, Transmittal Letter at 4.

be specified in the agreement. However, the Commission stated that “to eliminate any concern about undue discrimination and to satisfy the filing requirements of the [Federal Power Act], we will impute the existing [Tariff] rate to that service.”¹¹

D. Tariff Filing and February 1 Order, Docket No. ER08-296-000

9. On December 3, 2007, in Docket No. ER08-296-000, the MISO TO Applicants filed proposed changes to the Tariff to implement the revenue distribution change in the TO Agreement that was to become effective when the transition period ended (Tariff Filing). As described more fully in the February 1 Order, MISO TO Applicants maintained that if MISO continued to exempt bundled retail load from Network Service charges after the transition period, the revenues collected by MISO would be insufficient to cover the combined revenue requirements of all of the MISO TOs. In addition, they asserted that the change in revenue distribution under the TO Agreement beginning February 1, 2008 would create unfair and unacceptable cross-subsidies among the MISO TOs because the proportion of zonal load representing bundled retail load varies among the MISO TOs (because service to retail customers of some MISO TOs, but not others, has been unbundled). MISO TO Applicants claimed that the cross-subsidies arose due to the interaction of the methodology for distributing revenues under Appendix C of the TO Agreement and the exemption from paying the license-plate zonal transmission charges for the MISO TOs’ bundled retail load in section 37.3(a) of the Tariff.

10. In the Tariff Filing, MISO TO Applicants proposed to modify section 37.3(a) of the Tariff to specify how MISO treats revenues it would have received for Network Service it provided to the MISO TOs for service to their bundled retail load but for the exemption that such service receives from Tariff charges. Under the proposal, MISO included the revenues that it would have received but for the exemption, which it defines as “imputed revenues,” in the total transmission revenues available for distribution to the MISO TOs. MISO then deducts the imputed revenues attributed to any MISO TO from the transmission revenues that MISO would otherwise allocate to that MISO TO.

11. The sole protester to the Tariff Filing, Union Electric, argued that MISO TO Applicants were trying to change the transmission revenue distribution methodology without the unanimous consent of all the MISO TOs, as required by the TO Agreement.

12. In the February 1 Order, the Commission conditionally accepted the Tariff Filing and determined that the proposed Tariff revisions, as modified by the order, were just and reasonable and consistent with the TO Agreement and the Service Agreement. The Commission found that the revisions were necessary to ensure that each MISO TO

¹¹ Service Agreement Order, 106 FERC ¶ 61,293 at P 22.

received revenues consistent with the post-transition revenue distribution methodology in Appendix C of the TO Agreement, i.e., based on its revenue requirement. The Commission added that the proposed revisions did not require Union Electric to pay the license-plate zonal transmission rates for Network Service taken to serve its bundled retail load, consistent with the Service Agreement.¹² The Commission also concluded that the TO Agreement is ambiguous on the question of whether a non-unanimous group of MISO TOs can exercise their section 205 filing rights to revise the Tariff as proposed here. However, the Commission noted that Appendix K to the TO Agreement specifically preserves the rights of a subset of the MISO TOs to make a section 205 filing with regard to rates or other tariff provisions affecting more than one MISO TO. After careful consideration of the whole of the TO Agreement, and the way in which the TO Agreement operates with the Tariff, the Commission found that the proposed tariff revisions, as modified, were consistent with the TO Agreement's provisions for treating bundled retail load under the Tariff and for distributing transmission revenues.¹³ Finally, the Commission found that Union Electric did not raise any issues of material fact that would warrant settlement and hearing procedures.¹⁴

13. The Commission also required MISO TO Applicants to file a compliance filing with further revisions to the Tariff so that GFAs were treated comparably under the proposed changes. Specifically, the Commission ordered revisions to sections 37.3(b) and 37.3(c) of the Tariff to require that MISO, when distributing revenues, impute revenues for GFAs where the load or contract demand is included in the rate denominator.¹⁵

E. TO Agreement Filing and May 12 Order, Docket No. ER08-664-000

14. On March 13, 2008, in Docket No. ER08-664-000, the MISO TOs proposed revisions to Appendix C, section III.B (Revenue Distribution after the Transition Period Ends) of the TO Agreement (TO Agreement Filing).¹⁶ The changes to the TO

¹² February 1 Order, 122 FERC ¶ 61,090 at P 44, 47.

¹³ *Id.* P 48.

¹⁴ *Id.* P 47 & n.42.

¹⁵ *Id.* P 63.

¹⁶ MISO joined in that filing exclusively in its administrative capacity and took no position on the substantive revisions filed. Therefore, in this order, we will refer to MISO TOs as the filing parties in reference to the proceeding in Docket No. ER08-664-000.

Agreement eliminated the post-transition period revenue distribution provisions and replaced them by extending indefinitely the distribution revenue provisions that had applied during the transition period.¹⁷ Even though the changes to the TO Agreement proposed in Docket No. ER08-664-000 may obviate the need for the changes to the Tariff the Commission conditionally accepted in the instant proceeding in Docket No. ER08-296-000, the MISO TOs stated in the TO Agreement Filing that they were *not* filing to withdraw the Tariff changes proposed in Docket No. ER08-296 at that time.¹⁸ They explained that the MISO TOs agreed that voting to support the changes to the TO Agreement would not prejudice the rights of a MISO TO to take any position or pursue any action regarding the changes to the Tariff filed in the instant proceeding. In addition, the effectiveness of the revisions to the TO Agreement was subject to any order that the Commission subsequently issued in this proceeding.¹⁹ By order issued on May 12, 2008, the Commission accepted the revisions to the TO Agreement that were filed in Docket No ER08-664-000.²⁰

II. Request for Rehearing of February 1 Order, Docket No. ER08-296-001

15. On March 3, 2008, Union Electric filed a request for rehearing of the February 1 Order. Union Electric argues that the Commission erred in: (1) finding that the TO Agreement is ambiguous and construing it to permit the MISO TO Applicants to file the proposed tariff revisions; (2) construing the Service Agreement by failing to give effect to its plain language and instead relying on the transmittal letter to interpret the parties' intent and objectives in a manner contrary to its actual requirements; and (3) failing to recognize that there is a dispute of material fact where the parties have made an issue of the signatories' intent in reconciling the provisions of the TO Agreement and the Service Agreement.

¹⁷ The MISO TOs unanimously approved the proposed changes to the TO Agreement. Union Electric voted to approve the proposed changes to the Transmission Owners Agreement even though it initially voted against the same changes before the Commission issued the February 1 Order. See "Motion In Favor Of Filing Revisions To The Post Transition Period Revenue Distribution Provisions In Appendix C of the TO Agreement" (MISO TOs' March 13, 2008 filing at Attachment C).

¹⁸ MISO TOs' March 13, 2008 Transmittal Letter, Docket No. ER08-664-000, at 3, n.5.

¹⁹ *Id.* at 4-5.

²⁰ *Midwest Indep. Transmission Sys. Operator, Inc.*, 123 FERC ¶ 61,142 (2008) (May 12 Order).

16. On March 17, 2008, MISO TO Applicants filed a motion for leave to answer and an answer to Union Electric's request for rehearing.

A. Procedural Matters

17. We deny MISO TO Applicants' motion for leave to answer Union Electric's request for rehearing. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2011), prohibits answers to requests for rehearing.

B. Substantive Matters

1. Whether the Commission Erred in Finding that the TO Agreement Is Ambiguous and Then Construing It to Permit MISO TO Applicants to File the Proposed Tariff Revisions

a. February 1 Order

18. In the February 1 Order, the Commission found that the TO Agreement was ambiguous on the question of whether a non-unanimous group of MISO TOs can exercise their section 205 filing rights to revise the Tariff as proposed here. The Commission stated that Appendix C to the TO Agreement does not define specific rates, terms and conditions of service applicable to Network Service used to serve the MISO TOs' bundled retail load, nor does it define the revenue requirements or revenues to be used for distributing revenues to the MISO TOs, or the manner in which the MISO TOs receive or collect revenues for Tariff service. Moreover, the Commission noted that Appendix K to the TO Agreement specifically preserves the rights of a subset of the MISO TOs to make a section 205 filing with regard to rates or other tariff provisions affecting more than one MISO TO. The Commission found that the rates, terms, and conditions of transmission service, as well as the revenue requirements used to derive the rates, the resulting revenues, and the manner in which revenues are received or collected by the MISO TOs, are defined by the Tariff. Thus, the Commission stated that after careful consideration of the whole of the TO Agreement, and the way in which the TO Agreement operates with the Tariff, the proposed tariff revisions, as modified, were consistent with the TO Agreement's provisions for treating bundled retail load under the Tariff and for distributing transmission revenues.²¹

²¹ February 1 Order, 122 FERC ¶ 61,090 at P 48.

b. Request for Rehearing

19. On rehearing, Union Electric argues that the Commission erroneously relied on an incomplete reading of the TO Agreement and that, when read as a whole, there is no ambiguity about how parties may modify revenue distribution and the revenue distribution methodology established by the TO Agreement. According to Union Electric, MISO TO Applicants stated that the purpose of the Tariff Filing is to alter MISO's distribution to MISO TOs of revenues it receives for transmission services provided under the Tariff (i.e., to alter transmission revenue distribution).²² Union Electric argues that Article 2, section IX.6 of the TO Agreement makes clear that changes to revenue distribution and revenue distribution methodology must be approved by a unanimous vote of the MISO TOs. Union Electric asserts that the proposed tariff changes are an end-run around this requirement and must be rejected because the underlying vote of the MISO TOs was not unanimous.

20. Union Electric also argues that the Commission erred when it neglected to consider Article II, section IX.C.6 of the TO Agreement and relied solely on Appendix K of the TO Agreement. Union Electric asserts that, applying the contract interpretation tenets the Commission correctly cited in the February 1 Order, the amendment provisions of the TO Agreement should be read to be consistent, if possible,²³ and the more specific clause should prevail over the more general clause.²⁴ Union Electric claims that the Appendix K filing rights govern the MISO TOs' rights to make filings under section 205 of the Federal Power Act, as stated in Article 2, section IX.7 (the general clause), except in the specific cases of revenue distribution, revenue distribution methodology and start-up costs, which further require unanimous vote of the MISO TOs for any change as stated in Article 2, section IX.6 (the specific clause). Thus, Union Electric asserts there is no

²² Union Electric's Request for Rehearing at 6 (citing December 3, 2007 Transmittal Letter at 2).

²³ *Id.* at 7 (citing February 1 Order, 122 FERC ¶ 61,090 at P 48 n.45 (citing *Southwest Power Pool, Inc.*, 109 FERC ¶ 61,010, at P 25 (2004)) ("A fundamental tenet of contract interpretation is that a contract provision should be interpreted, where possible, as consistent with the contract as a whole and that contract must be interpreted as a whole.")).

²⁴ *Id.* ("Our ruling conforms to the generally accepted canons of contract interpretation; which require that: (1) a contract should be interpreted as an integrated whole; (2) provisions of a contract should normally not be interpreted as being in conflict; and (3) a more particular and specific clause of contract should prevail over a more general clause.").

conflict and no ambiguity, and consequently no need to consult extraneous documents such as the Tariff to aid in interpreting the terms of the TO Agreement.

c. Commission Determination

21. We disagree with Union Electric. Although Appendix C of the TO Agreement provides that the distribution of transmission service revenues collected by MISO and the methodology for determining such distribution shall not be changed except by unanimous vote of the Owners,²⁵ Appendix C to the TO Agreement does not define the revenue requirements or revenues to be used for distributing revenues to the MISO TOs, or the manner in which the MISO TOs receive or collect revenues for Tariff service. On the other hand, Appendix K of the TO Agreement specifically preserves the rights of a subset of the MISO TOs to make a section 205 filing with regard to rates or other tariff provisions affecting more than one MISO TO.²⁶ Thus, we find that the relevant provisions in Appendix C and Appendix K of the TO Agreement conflict on whether a non-unanimous group of TOs can file proposed changes to the Tariff to implement a revenue distribution change, i.e., to specify how the MISO treats revenues it would have received for Network Service but for the exemption that such services receives from Tariff charges.

22. It is well-settled that an ambiguity may be found where, as here, the contract or tariff is susceptible to different constructions or interpretations.²⁷ When a contract or tariff provision is found to be ambiguous, the ambiguity must be resolved by reference to

²⁵ See TO Agreement, Art. II at § IX.C.6 (“The distribution of transmission service revenues collected by the MISO and the methodology for determining such distribution, as set forth in Appendix C to this Agreement, . . . shall not be changed except by unanimous vote of the Owners.”).

²⁶ See TO Agreement, App. K at § II.D (Rates Affecting More Than One Zone and Through and Out Rates) (“the Owners shall possess the full and exclusive right to submit filings under FPA section 205 with regard to transmission rate design associated with rates affecting more than one zone”), and § II.K (Other Provisions Affecting Transmission Revenues) (“With regard to any other tariff provision affecting transmission revenues, the MISO and the Owners shall each have filing rights under FPA section 205.”).

²⁷ *Duquesne Light Co.*, 122 FERC ¶ 61,039, at P 85, *clarified*, 123 FERC ¶ 61,060 (2008).

the contract or tariff as a whole.²⁸ In addition, extrinsic evidence of interpretation or intent may be considered to prove a meaning to which the tariff language is reasonably susceptible.²⁹

23. Because we find that the two provisions conflict, we consider extrinsic evidence to resolve this ambiguity, i.e., the Tariff. After reviewing the Tariff, we find that the amendment to section 37.3 does not alter the post-transition period transmission revenue distribution methodology set forth in the TO Agreement under which revenues associated with Tariff transmission service are to be distributed on the basis of the MISO TOs' revenue requirements. Instead, we find that the Tariff amendment implements the TO Agreement methodology by specifying the treatment of both the revenues MISO has available to distribute to each MISO TO and the revenues that the MISO TO recovers directly from its bundled retail and GFA customers. Specifically, the TO Agreement provides each MISO TO with a right to receive revenues based on its revenue requirement,³⁰ and the Tariff amendment clarifies that the revenues MISO has available to fulfill each MISO TO's right to receive such revenues does not include revenues attributable to transmission service that the MISO TO takes under the Tariff but for which it does not have to pay Tariff charges. The revenues MISO has available to distribute to each MISO TO does not include revenues attributable to transmission service the MISO TO takes under the Tariff but does not pay for because the MISO TO instead receives revenue for that transmission service directly from its bundled retail and GFA customers. By taking into account the revenues that the MISO TO recovers directly from its bundled retail and GFA customers, the Tariff amendment ensures that each MISO TO receives revenues for Tariff service, both from MISO and directly from its

²⁸ *Id.* P 85 & n.70 quoting *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995) (“[It is a] cardinal principal of contract construction[] that a document should be read to give effect to all its provisions and to render them consistent with each other.”); *see also Ark. Elec. Coop. Corp. v. Entergy Ark., Inc.*, 119 FERC ¶ 61,314, at P 19 (2007) (contract provisions should be interpreted as consistent with the contract as a whole).

²⁹ *See N.Y. Indep. Sys. Operator, Inc. v. Astoria Energy LLC*, 118 FERC ¶ 61,216, at P 34 (2007); *see also Miss. River Transmission Corp.*, 96 FERC ¶ 61,185, at 61,819 (2001) (citing *Consolidated Gas Transmission Corp.*, 771 F.2d 1536, 1554 (D.C. Cir. 1985)).

³⁰ TO Agreement, Appendix C, Section III.B.1 (Revenue Distribution After the Transition Period Ends) (“Each owner shall receive revenues, on a monthly basis, based on its revenue requirement calculated in accordance with a formula filed with the FERC.”).

bundled retail and GFA customers, based on its revenue requirement. Accordingly, we find that the amendment to section 37.3 of the Tariff does not modify the revenue requirement-based distribution methodology specified in Appendix C of the TO Agreement, which, if it did, would require a unanimous vote.

24. In the February 1 Order, the Commission properly construed the TO Agreement in its entirety to give effect both to Appendix C and Appendix K of the TO Agreement. The Commission applied the fundamental principle that a contract should be considered as a whole, and that all parts of it reconciled, if possible, in order to avoid an inconsistency.³¹ Consequently, we also find that Union Electric's argument that the Appendix C provision should surmount the Appendix K provision is inconsistent with this principle.

25. Moreover, under our interpretation, no MISO TO would be required to subsidize another. Revenues associated with Tariff transmission service would be distributed on a basis that provides all the MISO TOs an opportunity to receive revenues, either directly from bundled load and GFA customers, or indirectly from other Tariff customers through MISO, on a comparable basis to fully recover their revenue requirements.

2. Whether the Commission Erred in Construing the Service Agreement

a. February 1 Order

26. In the February 1 Order, the Commission found that the proposed Tariff revisions did not violate the Service Agreement between Union Electric and MISO. The Commission stated that Article III of the Service Agreement provides that "in accordance with [s]ection 37.3 of the [Tariff]," Union Electric "shall not pay charges pursuant to Schedules 1 through 6 and Schedule 9" of the [Tariff] for its bundled retail load. The Commission found that section 37.3, even with the proposed revisions to impute revenues for service for the TOs' bundled retail load, still provides that MISO TOs taking service under the [Tariff] to serve their bundled retail load shall not pay these license-plate zonal charges. The Commission added that the Missouri Commission's regulation of the bundled retail rate would remain intact under the proposed revisions accepted in that order. Moreover, the Commission noted that when it originally accepted the Service Agreement, the Commission specifically stated that "to eliminate any concern about undue discrimination and to satisfy the filing requirements of the [Federal Power Act], we will *impute* the existing [Tariff] rate to that service." Therefore, in the February 1 Order, the Commission found that the MISO TO Applicants' proposal to impute revenues

³¹ February 1 Order, 122 FERC ¶ 61,090 at P 48 & n.45.

for service to bundled retail load at the existing Schedule 9 rate was consistent with this determination.³²

b. Request for Rehearing

27. On rehearing, Union Electric argues that the Commission's reliance on extrinsic evidence instead of considering the terms of the Service Agreement is arbitrary and capricious and does not give due consideration to the plain language of the Service Agreement. Union Electric claims that under the Service Agreement, Union Electric "shall not pay charges pursuant to Schedules 1 through 6 and Schedule 9 of the MISO [Tariff]." ³³ Union Electric argues that the imputing of transmission revenue collections and distributions for Schedules 7, 8, and 9 using the Tariff rates has the effect of requiring that Union Electric pay that rate and, thus, eviscerates the terms of the Service Agreement.

28. Union Electric maintains that the starting point in interpreting a contract is the contract's plain language.³⁴ It also states that, under traditional contract interpretation principles, "extrinsic evidence is inadmissible to interpret, vary or add to the terms of an unambiguous integrated written instrument."³⁵ Union Electric argues that section 3.1 of the Service Agreement is unambiguous on its face, and the Commission makes no finding of ambiguity with respect to this provision. Thus, according to Union Electric, there is no reason to look beyond section 3.1 and the "four corners" of the Service Agreement to assess Union Electric's argument. Union Electric argues that the Commission should give effect to the plain language of the Service Agreement, which requires that Union Electric shall not pay the MISO transmission rates to serve its native load retail customers.

c. Commission Determination

29. We affirm the finding in the February 1 Order that the amendment to section 37.3 of the Tariff does not violate the Service Agreement. Union Electric is correct that the Service Agreement unambiguously states that Union Electric shall not pay charges

³² *Id.* P 56-57.

³³ Union Electric's Request for Rehearing at 9 (citing Service Agreement, Art. III Rate for Transmission Service to Serve Bundled Retail Load at § 3.1).

³⁴ *Id.* at 9.

³⁵ *Id.*

pursuant to Schedules 1 through 6 and Schedule 9 of the Tariff for its bundled retail load. However, as the Commission stated in the February 1 Order, even with the changes to the Tariff, MISO TOs taking service under the Tariff to serve their bundled retail load shall not pay these license-plate zonal charges. Accordingly, Union Electric will not pay any of these charges, either directly or indirectly, and the modification to section 37.3 of the Tariff is consistent with the language of the Service Agreement. In addition, as we noted above, imputing revenue under the Tariff parallels the Commission's original approval of Union Electric's Service Agreement, in which the Commission specifically stated that it would "impute the existing [Tariff] rate" to such services.³⁶

30. Moreover, we find that there is nothing in the Service Agreement that is inconsistent with the amendment to section 37.3 of the Tariff. The amendment ensures that revenue attributable to Tariff network service taken by the MISO TO for its bundled retail load, which MISO does not receive but is instead received by the MISO TO directly from its bundled retail customers, is taken into account when MISO determines the transmission revenues due to the MISO TO on the basis of its revenue requirement.

3. Whether the Commission Erred in Finding That There Was No Dispute of Material Fact Regarding the Signatories' Intent

a. February 1 Order

31. In the February 1 Order, the Commission found that Union Electric did not raise any issues of material fact that would warrant settlement and hearing procedures.³⁷

b. Request for Rehearing

32. In its request for rehearing, Union Electric argues that, if the Commission intends to rely on the parties' intent in reconciling the provision of the TO Agreement and the Service Agreement, then a hearing is necessary. Union Electric states that the Commission has previously held, where a party raises issues of this nature, those issues "are more appropriately addressed in the hearing and settlement judge procedures"³⁸ Union Electric claims that in the February 1 Order the Commission

³⁶ Service Agreement Order, 106 FERC ¶ 61,293 at P 22.

³⁷ February 1 Order, 122 FERC ¶ 61,090, at P 47 & n.42.

³⁸ Union Electric's Request for Rehearing at 10-11 (citing *El Paso Elec. Co. v. Tucson Elec. Power Co.*, 117 FERC ¶ 61,017, at P 12 (2006); *Columbia Gas Transmission Co. v. Tenn. Gas Pipeline Co.*, 109 FERC ¶ 61,055, at P 15 (2004)).

erroneously reaches conclusions based on intent despite conflicting claims of the parties. Union Electric contends that the Commission should order hearing procedures to further address the factual disputes on the interpretation of relevant documents.

c. Commission Determination

33. We disagree with Union Electric that we should order an evidentiary hearing based on the facts before us. It is well-settled that a formal trial-type hearing is unnecessary where there are no material facts in dispute.³⁹ Even where there are disputed issues, the Commission need not conduct a hearing if they may be adequately resolved on the written record.⁴⁰ In addition, “mere allegations of disputed facts are insufficient to mandate a hearing; petitioners must make an adequate proffer of evidence to support them.”⁴¹ The Commission is only required to provide a trial-type hearing if the material facts in dispute cannot be resolved on the basis of written submissions in the record.⁴² Union Electric argues that the Commission relied on the parties’ intent in reconciling the provision of the TO Agreement and the Service Agreement, and that a hearing is necessary. We disagree. We were able to resolve Union Electric’s claims that the Tariff amendment at issue conflicted with the TO Agreement and Union Electric’s Service Agreement by examining the provisions of those agreements, and we did not need to rely on the parties’ intent in reaching our determinations.⁴³ Moreover, we reasonably

³⁹ *Startrans IO, L.L.C.*, 133 FERC ¶ 61,154, at P 23 & n.24 (2010); *Natural Gas Pipeline Co. of Am.*, 43 FERC ¶ 63,040, at 65,424 (1988).

⁴⁰ *Pioneer Transmission, LLC*, 130 FERC ¶ 61,044, at P 35 (2010).

⁴¹ *Id.* P 35 & n.73 (citing *Cerro Wire and Cable Company v. FERC*, 677 F.2d 124, 129 (D.C. Cir. 1982)).

⁴² *Startrans IO, L.L.C.*, 133 FERC ¶ 61,154 at P 23 & n.26.

⁴³ See February 1 Order, 122 FERC ¶ 61,090 at P 50-54 (finding no conflict with Tariff); P 56 (section 37.3, even with the proposed revisions to impute revenues for service for the TO’s bundled retail load, still provides that MISO TOs taking service under the Tariff to serve their bundled retail load shall not pay these license-plate zonal charges). Therefore, we find that the cases Union Electric cites in support of its position are inapposite since those cases involved a finding that there were issues of material fact relating to the parties’ intent.

exercised our discretion to find that an evidentiary hearing was not required to resolve the issues before us.⁴⁴

34. Based on the determinations above, we deny Union Electric's request for rehearing of the February 1 Order.

III. Compliance Filing, Docket No. ER08-296-002

35. To properly account for revenues that a MISO TO receives directly from its GFA customers, in the February 1 Order the Commission directed MISO TO Applicants to revise sections 37.3(b) and 37.3(c) of the Tariff so that when distributing revenues, MISO would impute revenues for GFAs where the load or contract demand is included in the rate denominator.⁴⁵

36. On March 3, 2008, in Docket No. ER08-296-002, MISO TO Applicants submitted a filing to comply with the Commission's directive above. MISO TO Applicants propose to add a new subsection 37.3(e) to the Tariff to ensure that the revenues that MISO would have received but for the exemptions in sections 37.3(b) and 37.3(c) for transmission service associated with GFAs are treated in the same manner as the revenues associated with transmission service for bundled load that are exempt under section 37.3(a). MISO TO Applicants note that they are proposing a new subsection 37.3(e) to avoid the need to make duplicative revisions to subsections 37.3(b) and 37.3(c).

37. Specifically, MISO TO Applicants state that the proposed subsection 37.3(e) requires MISO to take "GFA imputed revenues" into account in distributing transmission revenues to the MISO TOs. They explain that "GFA imputed revenues" are revenues that MISO would have received for service under Schedules 7, 8, or 9 of the Tariff, but for the exemption from such charges for transmission service associated with a GFA under subsections 37.3(b) or 37.3(c), but excluding revenues associated with any GFA with respect to which the MISO TO credits payments it receives to its revenue requirement pursuant to Attachment O. MISO TO Applicants request an effective date of February 1, 2008 for the proposed revisions, consistent with the effective date the Commission provided in the February 1 Order.

⁴⁴ *Pub. Utilities Comm'n of the State of California, v. Sellers of Long Term Contracts to the California Dep't of Water Resources*, 100 FERC ¶ 61,098 at n.7 (2002) (The decision as to whether to conduct an evidentiary hearing is in the Commission's discretion. *See, e.g., Woolen Mill Associates v. FERC*, 917 F.2d 589, 592 (D.C. Cir. 1990)).

⁴⁵ February 1 Order, 122 FERC ¶ 61,090 at P 63.

A. Notice of Filing and Responsive Pleadings

38. Notice of MISO TO Applicants' compliance filing was published in the *Federal Register*, 73 Fed. Reg. 14,791 (2008), with comments due on or before March 24, 2008. On March 24, 2008, Integrys Energy Group (Integrys) filed comments, a motion to intervene, and a request that the Commission consolidate the instant proceeding in Docket No. ER08-296-002 and the proceeding in Docket No. ER08-664-000.⁴⁶ On April 8, 2008, MISO TO Applicants and Union Electric filed answers.

39. In its comments, Integrys argues that the Tariff revisions at issue in the instant proceeding should be withdrawn or otherwise terminated.⁴⁷ Integrys states that the Tariff revisions filed in this proceeding served a useful purpose when there was not unanimity on amending the TO Agreement, but unanimity has since been achieved and the revisions to the TO Agreement were filed in Docket No. ER08-664-000.⁴⁸

40. Integrys also asserts that the TO Agreement revisions submitted in Docket No. ER08-664-000 are preferable to the Tariff revisions filed in the instant proceeding and, therefore, the Tariff revisions in this case should be terminated. Integrys claims that the TO Agreement revisions filed in ER08-664-000 are preferable to the Tariff revisions submitted in the instant proceeding because: (1) the TO Agreement revisions are more concise; (2) the TO Agreement revisions provide for the distribution of transmission service revenues in a less complicated fashion and effectively deal with over- and under-recoveries of transmission service revenues; and (3) the TO Agreement revisions remove provisions that would be required if MISO had moved to a postage stamp pricing regime, which it did not.

41. In its answer, Union Electric states that it opposes Integrys' request for withdrawal or termination of the Tariff revisions filed in the instant proceeding. Union Electric notes that in the TO Agreement filing in Docket No. ER08-664-000, MISO TO Applicants

⁴⁶ As discussed below, the Commission denied Integrys' motion to consolidate Docket Nos. ER08-296-002 and ER08-664-000 in the May 12 Order.

⁴⁷ Integrys acknowledges that Commission review of compliance filings is generally limited to compliance with the Commission's directives in the underlying order. However, Integrys argues that the changes being proposed in the compliance filing and the unusual circumstances of this proceeding warrant the Commission's consideration of its comments.

⁴⁸ As discussed above, the Commission accepted the changes to the TO Agreement in the May 12 Order.

specifically stated that they were not filing to withdraw the Tariff revisions accepted in the February 1 Order.⁴⁹ Therefore Union Electric argues that termination or withdrawal of the revisions filed in the instant proceeding and accepted in the February 1 Order is contrary to MISO TOs' intentions. Furthermore, Union Electric states that MISO TOs explicitly acknowledged that the TO Agreement revisions filed in ER08-664-000 would be subject to the Commission's order in the instant proceeding, and that Union Electric agreed to vote for the TO Agreement revisions filed in Docket No. ER08-664-000 because of that "subject to" clause. Union Electric adds that withdrawal or termination of the Tariff revisions in response to the TO Agreement filing would essentially void Union Electric's pending request for rehearing in the instant proceeding, contrary to Union Electric's right to have its request considered on its merits.

42. MISO TO Applicants also oppose Integrys' request for withdrawal or termination of the Tariff revisions filed in the instant proceeding. MISO TO Applicants acknowledge that acceptance of the TO Agreement revisions filed in Docket No. ER08-664-000 may ultimately obviate the need for the Tariff revisions filed here. They argue, however, that the MISO TOs who voted unanimously for the revisions to the TO Agreement filed in ER08-664-000 reserved their rights to seek rehearing of the February 1 Order in the instant proceeding and should, therefore, be allowed to do so.

B. Discussion

1. Procedural Matters

43. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure prohibits an answer to a protest, unless otherwise ordered by the decisional authority.⁵⁰ We will accept the answers of Union Electric and MISO TO Applicants because they have provided information that has assisted us in our decision-making process.

44. In the May 12 Order accepting the revisions to the TO Agreement, the Commission denied Integrys' motion to consolidate Docket No. ER08-664-000 with the instant proceeding in Docket No. ER08-296.⁵¹ We address in this order Integrys' request that the Tariff revisions submitted in the instant proceeding be withdrawn or otherwise terminated.

⁴⁹ Union Electric's Answer at 4-5 (citing the TO Agreement Filing Transmittal Letter at 3, n.5).

⁵⁰ 18 C.F.R. § 385.213(a)(2) (2011).

⁵¹ 123 FERC ¶ 61,142 at P 22.

2. Substantive Matters

a. Request to Require Withdrawal or Termination of Tariff Filing

45. We deny Integrys' request to terminate or require withdrawal of the Tariff revisions. As MISO TO Applicants and Union Electric note in their answers, the MISO TOs who voted unanimously in favor of the revisions to the TO Agreement that were submitted in Docket No. ER08-664-000 reserved their right to pursue further action in the instant proceeding.⁵² The motion on which the MISO TOs voted also explicitly stated that the effectiveness of the revisions to the TO Agreement submitted in Docket No. ER08-664-000 are subject to any order issued by the Commission in the instant proceeding.⁵³ In addition, MISO TOs specifically stated, when they filed the changes to the TO Agreement in Docket No. ER08-664-000, they were not filing to withdraw the changes filed here in Docket No. ER08-296. Furthermore, while the changes to the Tariff and the TO Agreement may serve similar purposes, Integrys does not allege that allowing both sets of changes to take effect creates an inconsistency or conflict between the TO Agreement and the Tariff. Therefore, we deny Integrys' request to terminate or withdraw the Tariff revisions.

b. Compliance Filing

46. We find that proposed new subsection 37.3(e) of the Tariff complies with the directive in the February 1 Order to revise the Tariff to require MISO, while distributing revenues, to impute revenues for GFAs where the load or contract demand is included in the rate denominator. Although the Commission in the February 1 Order referenced sections 37.3(b) and 37.3(c), we agree with MISO TO Applicants that their proposal to instead add new subsection 37.3(e) is appropriate to avoid having to make duplicative revisions to both subsections 37.3(b) and 37.3(c). Therefore, we will accept the proposed Tariff revisions, effective February 1, 2008.

The Commission orders:

(A) Union Electric's request for rehearing of the February 1 Order is hereby denied, as discussed in the body of this order.

⁵² See "Motion In Favor Of Filing Revisions To The Post Transition Period Revenue Distribution Provisions In Appendix C of the TO Agreement" (March 13, 2008 Filing in Docket No. ER08-664-000 at Attachment C).

⁵³ *Id.*

(B) MISO TO Applicants' compliance filing is hereby accepted, effective February 1, 2008, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.