

40. While we named the through and out rates under the Midwest ISO and PJM OATTs as the rates subject to investigation in Docket No. EL02-111-000, we expected that the inter-RTO seam would be the only seam remaining at the close of Docket No. EL02-111-000. When we conditionally accepted the former Alliance Companies' RTO choices a year ago, we relied upon their express intentions and commitments so that, by acting expeditiously in allowing each company to proceed to join the RTO of its choosing, those choices would be implemented, and the resulting benefits would be realized—quickly. The timely elimination of rate pancaking in this region of the country, which, as we discuss above, is critical to achieving competitive and efficient electric markets, was fundamental to our decision to accept the former Alliance Companies RTO choices.

41. Even with elimination of the Midwest ISO and PJM RTORs, in the near term the region will still be riddled with seams, with the through and out rates under the individual-company tariffs of AEP, Ameren Services Companies on behalf of certain public utility affiliates⁵⁹ (collectively, Ameren), ComEd, First Energy Corp. on behalf of certain public utility affiliates (collectively, First Energy),⁶⁰ Illinois Power, Northern Indiana Public Service Company (NIPSCO), and DP&L acting as toll gates that impede the realization of more efficient and competitive electricity markets in the region and that preserve a competitive advantage for the non-RTO participants' merchant functions. We find that the through and out rates under the tariffs of these individual former Alliance Companies,⁶¹ for transactions sinking in the proposed Midwest ISO/PJM footprint, may be unjust, unreasonable, and unduly discriminatory or preferential, and, pursuant to section 206 of the FPA, we will initiate an investigation and hearing in Docket No. EL03-212-000. We will provide for a "paper" hearing⁶² to determine

pancaking over their transmission systems for transactions sinking within the proposed Midwest ISO/PJM footprint will be eliminated.

⁵⁹ Union Electric Co. and Central Illinois Public Service Co.

⁶⁰ American Transmission Systems, Inc., Cleveland Electric Illuminating Power Co., Ohio Edison Co., Pennsylvania Power Co., Toledo Edison Co.

⁶¹ AEP, Ameren, ComEd, First Energy, Illinois Power, NIPSCO, and DP&L. See *supra* note 58.

⁶² The use of a "paper" hearing, rather than a trial-type, evidentiary hearing, has been addressed in previous cases. See, e.g., Public Service Company of Indiana, 49 FERC ¶ 61,346 (1989), *order on reh'g*, 50 FERC ¶ 61,186, *opinion issued*, Opinion 349, 51 FERC ¶ 61,367, *order on reh'g*, Opinion 349-A, 52 FERC ¶ 61,260, *clarified*, 53 FERC ¶ 61,131 (1990),

whether the through and out rates contained in the tariffs of AEP, Ameren, ComEd, First Energy, Illinois Power, NIPSCO, and DP&L are just, reasonable, and not unduly discriminatory or preferential. Given our statutory responsibility to ensure these rates are just and reasonable, we believe that expeditious resolution of this proceeding is critical. Accordingly, the Commission will provide AEP, Ameren, ComEd, First Energy, Illinois Power, NIPSCO and DP&L, and interested parties, with an opportunity to file, explaining why the rates are or are not unjust, unreasonable or unduly discriminatory or preferential, on or before August 15, 2003.

42. Where, as here, the Commission initiates a section 206 investigation on its own motion, section 206(b) requires that the Commission establish a refund effective date anywhere from 60 days after publication in the **Federal Register** of notice of its initiation of a proceeding to five months after the expiration of the 60-day period. In order to give maximum protection to customers, and consistent with our precedent, we will establish the refund date at the earliest date allowed. This date will be 60 days from the date on which notice of the initiation of the investigation in Docket No. EL03-212-000 is published in the **Federal Register**.

43. Section 206(b) also requires that if no final decision is rendered in the Commission's investigation by the refund effective date or by the conclusion of the 180-day period commencing upon the initiation of a proceeding pursuant to section 206, whichever is earliest, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such a decision. The Commission expects to issue its final decision in Docket No. EL03-212-000 by October 31, 2003.

SECA Issue

Presiding Judge's Ruling

44. The Presiding Judge stated that if the Commission were to order the elimination of the RTORs, he would recommend that the Commission adopt, without requiring the filing of new rate

appeal dismissed, Northern Indiana Public Service Company v. FERC, 954 F.2d 736 (DC Cir. 1992). As the Commission noted in Opinion No. 349, 51 FERC at 62,218-19 & n.67, while the FPA and the case law require that the Commission provide the parties with a meaningful opportunity for a hearing, the Commission is required to reach decisions on the basis of an oral, trial-type evidentiary record only if the material facts in dispute cannot be resolved on the basis of the written record, i.e., where the written submissions do not provide an adequate basis for resolving disputes about material facts.

cases, a mechanism such as one of the SECAs proposed by the parties to prevent cost shifting between customers of the two RTOs.⁶³ The various SECAs proposed by the parties are generally designed as non-by-passable surcharges to license plate zonal rates for delivery to load within the RTOs.⁶⁴ The Presiding Judge found that eliminating the RTORs without a SECA would improperly shift costs from Midwest ISO's native load to PJM's native load.⁶⁵ The Presiding Judge took the position that inappropriate cost shifting will occur if RTORs are eliminated absent a lost revenue recovery mechanism because "the through and out revenues are no longer credited against the cost of service and native load customers assume the burden previously carried by importing customers in the form of an increase in their own rates."⁶⁶

Briefs on Exceptions

45. Many parties objecting to a lost revenue recovery mechanism challenge the Initial Decision's position that transmission owners are entitled to a specific amount of revenue related to through and out transactions.⁶⁷ The Michigan Agencies assert that the concept of "lost revenues" is also faulty since transmission owners are not legally guaranteed any particular stream of revenues. They note that the FPA only allows them to recover costs plus a reasonable return. WEPCO states that, if there is any question as to whether a transmission owner is over-recovering its revenue requirement, then the Commission should review the transmission owners' actual cost of service. WEPCO continues that a SECA-type mechanism would be appropriate for use (for a short period of time) only if the transmission owner can establish that it will be unable to recover its current cost of service without

⁶³ Initial Decision at P 7.

⁶⁴ The proposed SECAs reflect the historical test-year transmission charges that customers in a given pricing zone in one RTO paid for transmission service over the facilities in the other RTO to serve load within the pricing zone, and are designed to collect revenue from each zone in proportion to the benefits that customers serving load within the zone will realize when they no longer pay pancaked rates for transmission service over the facilities in the other RTO.

Transactions under Grandfathered Agreements and transactions that sink outside the combined region are not included in these calculations.

NERC tag data would be used to identify the loads benefitting from particular through and out transactions, and lost through and out service revenues would be assigned to loads on the basis of such analysis.

⁶⁵ Initial Decision at P 82.

⁶⁶ Initial Decision at P 71.

⁶⁷ See, e.g., Michigan Agencies, Michigan Commission, TRRG, WSPC and UPPC, Maryland and Pennsylvania Commissions.