

STATE OF NORTH DAKOTA

PUBLIC SERVICE COMMISSION

Northern States Power Company Case No. PU-400-00-91
Transfer Control of Transmission Facilities to MISO
Application

Otter Tail Power Company Case No. PU-401-01-643
Transfer Control of Transmission Facilities to MISO
Application

Montana Dakota Utilities Co., A Division of MDU Case No. PU-399-01-651
Resources Group, Inc.
Transfer Control of Transmission Facilities to MISO
Application

ORDER

January 31, 2002

On March 3, 2000, Northern States Power Company (NSP) (now d/b/a Xcel Energy) filed a petition for approval, to the extent required, to transfer functional control of certain transmission facilities to the Midwest Independent System Operator, Inc. (MISO), Case No. PU-400-00-91. On May 10, 2000, the Commission issued a Notice of Opportunity for Hearing and Notice of Informal Hearing. No comments or requests for hearing were received and an informal hearing was held as scheduled on June 19, 2001.

On December 18, 2001, Otter Tail Power Company (OTP) filed a petition with the Commission for approval, or in the alternative for a finding by the Commission that approval is not necessary, to transfer functional control of certain transmission facilities to MISO, Case No. PU-401-01-643. OTP filed revisions to its list of facilities to be transferred contained in Attachment 3 of its petition on January 18, 2002.

On December 20, 2001, the Federal Energy Regulatory Commission (FERC) issued an order granting Regional Transmission Organization (RTO) status to the MISO, FERC Docket Nos. RT01-87-000 et al.

On December 21, 2001, Montana-Dakota Utilities Co., a Division of MDU Resources Group, Inc. (MDU), submitted an informational filing with the Commission regarding transfer of functional control of certain transmission facilities to MISO, Case No. PU-399-01-651.

On December 23, 2001 the Commission issued a combined Notice of Opportunity for Hearing and Notice of Informal Hearing in all three proceedings. The

notice provided until January 23, 2002 for receiving written comments or hearing requests and scheduled an informal hearing for January 25, 2002. The issues identified in the notice were whether transfer of functional control is compatible with the public interest and under what conditions, if any, should the transfers be approved. No comments or hearing requests were received.

On January 25, 2002, an informal hearing in all three proceedings was held as scheduled. Commission staff recommended approval of the transfers subject to certain conditions. At the informal hearing, MDU provided a written memorandum explaining its assertion that approval of the transfer of control is not required because the transfer is not a jurisdictional transfer. NSP and OTP concurred. The companies had previously voiced concerns over the necessity of Commission approval which was addressed by a memo dated December 14, 2001, from the Commission's Chief Counsel.

Each company subsequently filed on January 29, 2002, in response to a request from the Commission, a list indicating the specific staff recommended conditions to which each company would agree. Also on January 29, 2002, NSP filed descriptions that had not been included in its original filing of each specific facility to be transferred.

On January 30, 2002, the Commission's Chief Counsel filed a memorandum responding to the jurisdictional arguments raised by the companies at the informal hearing.

MDU, NSP and OTP are each investor owned electric utilities serving customers in North Dakota. Each company has entered into operating agreements under which MISO will assume functional control of each company's electric transmission lines with operating voltages greater than or equal to 100 kV and network transformers where the two highest tap voltages are greater than or equal to 100 kV. Each company intends to continue to operate and maintain these facilities under the direction of MISO, which will assume ultimate authority and control over facility operations. Each company states that control is being transferred to comply with FERC Order 2000.

Jurisdiction:

On December 14, 2001, by memorandum in response to concerns raised initially in NSP's petition, the Commission's Chief Counsel concluded that the Commission has jurisdiction over transfers of control under N.D.C.C. §49-04-05 because a transfer of control of transmission assets constitutes an encumbrance under that statute. Counsel wrote:

Although a transfer of control, as I understand it, might not transfer possession of the property, it certainly does transfer an interest in the property because it transfers the right of control, and the right of control of the property would result in the diminution of the value of the property. It is my opinion that "transfer of control" constitutes an encumbrance on the

property, and therefore N.D.C.C. Section 49-04-05 requires that the utility obtain Commission approval prior to such transfer.

At the informal hearing, MDU filed a memorandum specifying its objection to the Commission's assertion of jurisdiction over MDU's transfer of functional control of transmission facilities to the MISO. NSP and OTP concurred in MDU's objection.

MDU asserts that the lines involved are subject to the FERC's exclusive jurisdiction, and cites *Northern States Power Co. v. Hagen*, 314 N.W.2d 32 (N.D. 1981) to support its position. MDU asserts that N.D.C.C. § 49-21.1-01.1 provides the demarcation between federal and state jurisdiction over transmission in interstate commerce and local distribution for purposes of N.D.C.C. Title 49 in that lines designed to operate at a voltage of 41.6 kilovolts or more are transmission lines and lines designed to operate at a voltage of less than 41.6 kilovolts are distribution lines. MDU further asserts that the Commission's general jurisdiction pursuant to N.D.C.C. §49-02-01(4) is over electric utilities engaged in generation and distribution and does not include transmission.

The Commission's Chief Counsel filed a memorandum on January 30, 2002, responding to MDU's assertions. Commission Counsel points out that MDU's interpretation that N.D.C.C. § 49-21.1-01.1 establishes for N.D.C.C. Title 49 the demarcation between transmission lines that are interstate in nature and distribution lines that are local is inaccurate. The statute reads as follows:

Electricity transmission and distribution lines – Differentiation.

Except for purposes of transmission siting under chapter 49-22 and regulatory accounting including the determination of the demarcation between federal and state jurisdiction over transmission in interstate commerce and local distribution, for purposes of this title and chapters 57-33 and 57-33.1, lines designed to operate at a voltage of 41.6 kilovolts or more are transmission lines, and lines designed to operate at a voltage of less than 41.6 kilovolts are distribution lines.

Counsel states:

It is important to note that the statute provides an exception that excludes that differentiation and demarcation for purposes of "regulatory accounting including the determination of the demarcation between federal and state jurisdiction over transmission in interstate commerce and local distribution." This law was enacted during the 1999 legislative session. I reviewed the legislative history of this statute, and it is clear that the purpose of the statute was to create a differentiation between transmission and distribution lines for taxation purposes. There is no apparent intent to distinguish between transmission and distribution for state and federal jurisdictional purposes.

Prior to 1999, North Dakota law did not specifically make any specific distinction between transmission and distribution. However, because determination of the demarcation point for regulatory accounting purposes is not established by N.D.C.C. §49-21.1-01.1, the fact that N.D.C.C. §49-02-01(4) does not mention transmission is not particularly relevant for these purposes.

MDU cites the North Dakota Supreme Court, in *Northern States Power Company v. Hagen*, 314 N.W.2d 32 (N.D. 1981), as authority that the lines involved in this filing are subject to the FERC's exclusive jurisdiction. However, the portion of that case relied upon by MDU for its position relates to FERC authority to regulate interstate wholesale utility rates and not for the determination of FERC jurisdiction over transmission lines. The court stated at page 37 that:

Congressional enactments that do not exclude all state legislation in the same field nevertheless override state laws with which they conflict. U.S. Const., Art. VI. The criterion for determining whether or not there is a conflict is whether the state's law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Because MDU did not cite any federal law that would preempt state law that requires Commission approval for the transfer of control of transmission assets, I don't believe it is necessary to delve into an inquiry about whether there is a conflict between N.D.C.C. §49-04-05 and federal law to determine this issue. Therefore, it remains my opinion Commission approval is required for the transfer of the control of transmission assets to MISO.

The Commission agrees with Counsel that North Dakota law requires the companies to obtain Commission approval prior to the transfer of control contemplated by the filings in this case, and the law requiring such approval has not been federally preempted.

Public Interest:

Maintaining reliable service at reasonable rates is paramount to the public interest. MDU, NSP and OTP each forecast some initial increase in transmission expense due to implementation of a volumetric adder to recover MISO administrative expenses under Schedule 10 of the MISO Open Access Transmission Tariff (OATT). The companies further expect some initial loss of revenue from discontinuance of wholesale transmission transactions presently being conducted through the Mid-Continent Area Power Pool (MAPP). However, these expected costs do not outweigh the potential benefits of a regional transmission system. Potential benefits include gains in market efficiencies from the elimination of rate pancaking and the

establishment of one-stop shopping for regional transmission services. Further gains in operating efficiencies may result from improved congestion management practices, internalized parallel path flows and more regionalized transmission planning.

The FERC found MISO in conformance with Order 2000 short-term reliability requirements when granting RTO status in Docket Nos. RT01-87-000 et al. MISO will have exclusive authority to receive, confirm and implement all interchange schedules and to order redispatch of any generator connected to transmission facilities it operates. MISO will approve or disapprove all scheduled outages of transmission facilities to ensure regional accommodation within established reliability standards. MISO will honor and monitor compliance with reliability standards established by MAPP and other NERC regional reliability councils. MISO will also coordinate transmission planning throughout the region and will continue using MAPP sub regional planning groups.

Generally, centralizing grid operations over a larger region should enhance overall system reliability. However, increased wholesale transactions resulting from increases in market efficiency could lead to more problems with transmission constraints, redispaches and curtailments.

Any abuse of market power within MISO could result in reduced reliability and increased costs. The FERC, in an order issued September 16, 1998 in FERC Docket No. EC98-1438-000, required MISO, on an ongoing basis, to monitor the competitive and reliability effects of allowing current control area operators to continue to perform some control area functions. The FERC required MISO to file an 18-month assessment of control area operations. The FERC further required MISO to include, in its ongoing as well as its 18-month assessments, a report on the effectiveness of the proposed system of fines and penalties and its ability to ensure compliance with the ISO's orders and instructions.

The FERC accepted a market monitoring plan filed by MISO in Docket Nos. RT01-87-000 et al. The plan provides that MISO will enlist an *independent market monitor* to monitor energy markets and provide annual reports to the FERC and state regulatory agencies regarding the competitive performance and efficiency of markets and services.

The Commission finds that the overall effect of the proposed transfers on rates and reliability is not fully known at this time. Preliminary indications are generally positive, but many issues on future impact remain unresolved.

Commission staff recommended approval of the transfers subject to conditions designed to address areas of concern over potential future impacts. All three companies objected to staff's recommendation that approval be conditioned on each company's agreement to not assert federal preemption as a defense challenging a Commission decision disallowing costs from MISO as unreasonable or imprudent. Each company agreed to all remaining staff recommended conditions. The

Commission finds those remaining conditions reasonable and necessary to facilitate the transition to MISO while still protecting the public interest.

Order

The Commission Orders:

1. Transfer of functional control of MDU's transmission facilities to the MISO, as described in MDU's filing of December 21, 2001, is approved subject to the conditions listed in ordering paragraph 4 below.
2. Transfer of functional control of NSP's transmission facilities to the MISO, as described in NSP's filings of March 3, 2000 and January 29, 2002, is approved subject to the conditions listed in ordering paragraph 4 below.
3. Transfer of functional control of OTP's transmission facilities to the MISO, as described in OTP's filings of December 21, 2001 and January 18, 2002, is approved subject to the conditions listed in ordering paragraph 4 below.
4. Approval of each transfer is subject to the following conditions:
 - a. MDU, NSP and OTP shall provide the Commission with notice of all MISO tariff filings and report to the Commission on any proposed changes that may ultimately affect retail rates to North Dakota customers.
 - b. MDU, NSP and OTP shall notify the Commission when tariff or other changes are proposed that may reasonably be construed as having the potential to negatively affect the transmission service priority of native load or otherwise hamper reliability to North Dakota customers.
 - c. Each company shall include in its annual report to the Commission a report and analysis of:
 - i. How MISO membership has affected overall transmission costs and revenues and overall energy costs, including the ability to use least-cost generation and access low-cost power on the wholesale market; and
 - ii. Each instance where MISO directed redispatch of generation owned by each respective company for reliability reasons, including an explanation of financial impact on rates and the reason for redispatch if known.
 - d. MDU, NSP and OTP shall work with the Commission to promote MISO policies that allow each company to continue to meet its obligations to provide least-cost power to retail customers.
 - e. MDU, NSP and OTP shall work with the Commission to address through FERC or the MISO stakeholder advisory process, any reliability concerns that result from the transfer of functional control of transmission facilities to MISO.

- f. MDU, NSP and OTP shall report to the Commission each instance where MISO directed actions result in an interruption of firm retail electric service to retail customers in North Dakota.
 - g. MDU, NSP and OTP shall provide to the Commission a copy of any Form EIA-417R Power System Emergency Report submitted to the United States Department of Energy.
 - h. MDU, NSP and OTP shall provide to the Commission a copy of any MISO report to the FERC regarding competitiveness or reliability of control area operations.
5. MDU, NSP and OTP may coordinate the above reporting requirements with each other or with the MISO to avoid duplicative reporting.
 6. This decision does not reach the issue of reasonableness of any costs associated with the transfer of functional control of transmission facilities to the MISO, the MISO's operation of those facilities, the services taken from the MISO by each company, or each company's MISO membership.

PUBLIC SERVICE COMMISSION

Anthony T. Clark
Commissioner

Susan E. Wefald
President

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