

131 FERC ¶ 61,286  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Midwest Independent Transmission System Operator, Inc. Docket No. ER08-1486-001

ORDER DENYING REHEARING

(Issued June 29, 2010)

1. American Municipal Power – Ohio, Inc. (AMP-Ohio) requests rehearing of the Commission’s finding that the ability of Midwest Independent Transmission System Operator, Inc.’s (Midwest ISO) Blackstart Unit Owners to pass through to customers fines imposed by the North American Electricity Reliability Corporation (NERC) or related NERC compliance insurance costs associated with their blackstart activities should be addressed on a case-by-case basis.<sup>1</sup> As discussed below, we deny AMP-Ohio’s request for rehearing.

**I. Background**

2. Midwest ISO Transmission Operators are required by NERC, among other things, to coordinate with Midwest ISO to reliably and promptly restore power to the Midwest ISO Region in the event of a power system restoration event (i.e., a blackout). One key element of the power system restoration plan is the ability of certain facilities to independently begin to produce electricity and to “restart” larger Generation Resources that cannot commence operations without the aid of external power sources (Blackstart

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<sup>1</sup> *Midwest Independent Transmission System Operator, Inc.*, 125 FERC ¶ 61,106 (2008) (October 28 Order).

Service). NERC procedures assign primary responsibility for providing Blackstart Service to Transmission Operators.<sup>2</sup>

## **II. October 28 Order**

3. The October 28 Order accepted, subject to modification, the proposed revisions to Midwest ISO's Open Access Transmission and Energy Markets Tariff (Tariff) designed to compensate facilities that enable a Generation Resource that cannot be restarted without the aid of an external station power source to be restarted during blackout conditions.

4. In its filing, Midwest ISO noted that new entities were entering Midwest ISO's Energy Market that did not have an obligation to provide Blackstart Service and that in fact some of the new entities were not including Blackstart Unit capability in their plans. Midwest ISO stated that a financial recovery mechanism was needed to compensate entities that supply Blackstart Service because otherwise many new Generation Resources proposed for construction would have no incentive to incur potentially non-recoverable costs associated with the inclusion of Blackstart Service capabilities in their proposed units.

5. Therefore, Midwest ISO proposed, among other things, a new Schedule 33, "Blackstart Service" that describes terms, conditions (including eligibility requirements),

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<sup>2</sup> NERC describes Transmission Operator in its Reliability Functional Model – Version 4 at page 36, as the following:

The Transmission Operator is responsible for the real-time operating reliability of the transmission assets under its purview, which is referred to as the Transmission Operator Area. The Transmission Operator has the authority to take certain actions to ensure that its Transmission Operator Area operates reliably.

The Transmission Operator and Reliability Coordinator have similar roles with respect to transmission operations, but different scopes. The Transmission Operator scope is narrower than the Reliability Coordinator, and the Transmission Operator does not necessarily "see" very far beyond its own boundaries. Therefore, the Transmission Operator can calculate System Operating Limits, but the Model does not require the Transmission Operator to calculate Interconnection Reliability Operating Limits, which requires the wider scope of the Reliability Coordinator.

and a compensation mechanism for providing the service. As relevant here, Schedule 33 provides a general formula describing categories of costs that the Blackstart Unit owner may propose to recover (i.e., Fixed Blackstart Service Costs, Variable Blackstart Service Costs, and Training and Compliance Costs). Specific compensation however is based on the Commission-approved revenue requirements associated with each Blackstart Unit where the Blackstart Unit Owner possesses the unilateral right under section 205 of the Federal Power Act to file with the Commission its annual cost-based revenue requirement. As to the potential for recovery of NERC penalties or related costs, the proposal was silent.

6. The Commission found that overall Midwest ISO's proposal would ensure that all eligible Blackstart Service providers are able to seek cost recovery in a clear and transparent manner. Additionally, the Commission found that the proposal improved the ability of Midwest ISO Transmission Operators to meet their Blackstart Service obligations pursuant to NERC requirements, by ensuring that entities that provide Blackstart Service are able to obtain compensation.<sup>3</sup> With regard to the treatment of NERC penalties and related insurance costs, the Commission stated:

The Commission's decision to forego a blanket prohibition on, or blanket approval of, RTOs passing through to customers the costs of NERC penalties was based in part on the not-for-profit status of RTOs. In that instance, the Commission decided to address this issue on a case-by-case basis. At this time we will not prejudge the issues of what type of entity or under what circumstances the cost of NERC penalties or the cost of insurance covering those penalties may or may not be recovered. Those issues are best considered on a case-by-case basis by filings made before the Commission. [<sup>4</sup>]

### **III. Rehearing Request**

7. AMP-Ohio argues that the Commission erred by failing to rule in this proceeding that Blackstart Unit Owners compensated by Midwest ISO for blackstart capability should not be permitted to pass through as costs any fines or penalties imposed by NERC or insurance against such fines or penalties related to blackstart services. AMP-Ohio asserts that the Commission's decision to defer such consideration for resolution "on a case-by-case basis" imposes a nearly impossible burden on customers to determine the

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<sup>3</sup> See October 28 Order, 125 FERC ¶ 61,106 at P 12.

<sup>4</sup> *Id.* P 49 (footnotes omitted).

makeup of claimed costs related to every application of the compensation mechanism set forth in Subsection V.3 of Schedule 33.

8. AMP-Ohio states that Midwest ISO's Tariff should preclude any passing through of either NERC penalties or related insurance. To permit either, according to AMP-Ohio, would not only be unfair to customers, who would have no responsibility for the violations and are paying rates reflecting the "risks" incurred by utilities, but would also be against public policy. AMP-Ohio maintains that the purpose of reliability requirements and the potentially steep fines associated with violations thereof is not to collect dollars but to assure reliability.

9. AMP-Ohio also notes that the Blackstart Unit Owners are for-profit entities, so imposing fines where they belong raises none of the issues applicable to RTOs, as suggested by the Commission in the October 28 Order. AMP-Ohio affirms that no good reason has been advanced to support the notion that Blackstart Unit Owners, who will be well-compensated for their capabilities, should be permitted to pass through fines and penalties as part of the "cost" of NERC compliance. AMP-Ohio believes that this cost of non-compliance, like other fines and penalties, should be borne by the entity that incurs them, just as it should incur the costs associated with related insurance.

#### **IV. Discussion**

10. We will deny AMP-Ohio's rehearing request. We disagree with AMP-Ohio's argument that the Commission, in the October 28 Order, erred in its determination that this matter should be addressed "on a case-by-case basis" and that this imposes a nearly impossible burden on customers. As the Commission explained in the October 28 Order, "[a]t this time we will not prejudge the issues of what type of entity or under what circumstances the cost of NERC penalties or the cost of insurance covering these penalties may or may not be recovered."<sup>5</sup> We are simply unable at this time to make the generic policy call that AMP-Ohio seeks and, instead, have chosen to address these matters on a case-by-case basis.<sup>6</sup> Moreover, as with any application to recover costs, AMP-Ohio will have a full opportunity to challenge any recovery sought of fines or penalties imposed by NERC or insurance against such fines or penalties. This is no more burdensome than any other challenge to costs that an entity may seek to recover, i.e., rate of return or depreciation expense.

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<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

11. Further, our reference to not-for-profit RTOs in the October 28 Order was merely to emphasize that the Commission chose, in the *Guidance Order*<sup>7</sup> addressing RTOs passing through the costs of NERC penalties, to follow a case-by-case approach<sup>8</sup> and that the Commission was choosing to do the same here.<sup>9</sup> Finally, a case-by-case review of proposals by Blackstart Service providers, to include the proposed treatment of the cost of NERC penalties or the cost of insurance covering these penalties, is consistent with the Commission's mandate to ensure that the rates, terms and conditions of service are just and reasonable, and not unduly discriminatory.

The Commission orders:

The rehearing request of AMP-Ohio is hereby denied, as discussed in the body of this order.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.

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<sup>7</sup> See *Order Providing Guidance on Recovery of Reliability Penalty Costs by Regional Transmission Organizations and Independent System Operators*, 122 FERC ¶ 61,247 (2008) (*Guidance Order*). In the *Guidance Order*, the Commission indicated that it would not allow RTOs and ISOs to adopt tariff mechanisms that provide *automatic* recovery of penalties incurred for Reliability Standard violations and would instead require that proposals to recover any such penalties be filed on a case-by-case basis. See *Guidance Order*, 122 FERC ¶ 61,247, at P 16. In a more recent order, we note, the Commission conditionally accepted Midwest ISO's Schedule 34, which permits Midwest ISO to *seek* recovery of the costs of a monetary penalty assessed against Midwest ISO for a Reliability Standard violation. See *Midwest Independent Transmission System Operator, Inc.*, 128 FERC ¶ 61,229, at P 35 (2009) (*Midwest ISO*). Thus, in proposing to recover penalties or insurance costs, a Blackstart Service provider will have to support its proposed cost recovery on a case-by-case basis.

<sup>8</sup> See *Guidance Order*, 122 FERC ¶ 61,247.

<sup>9</sup> See October 28 Order, 125 FERC ¶ 61,106 at P 49.