138 FERC ¶ 61,141
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Midwest Independent Transmission System Operator, Inc. Docket No. ER12-747-000

ORDER ACCEPTING PROPOSED TARIFF REVISIONS

(Issued February 28, 2012)

1. In this order we accept for filing Midwest Independent Transmission System Operator, Inc.'s (MISO) proposed revisions to Schedule 10-FERC (FERC Annual Charges Recovery) of its Open Access Transmission, Energy and Operating Reserve Markets Tariff (Tariff). We deny MISO's request for waiver of the 60-day prior notice requirement, and accept the revisions effective February 29, 2012, after 60 days' notice.

I. Background

2. The Commission is required by section 3401 of the Omnibus Budget Reconciliation Act of 1986[1] to recover its costs through, among other means, its annual charges (FERC Annual Charge).[2] Public utilities that provide transmission service are subject to these annual charges and must submit FERC Reporting Requirement No. 582 (FERC 582) to the Office of the Secretary by April 30 of each year, providing data for the previous calendar year.[3] The Commission uses that data to allocate its costs among the public utilities that provide transmission service. The Commission issues bills for the

[1] 42 U.S.C. § 7178 (2000).

[2] 18 C.F.R. Part 382 (2011).

[3] 18 C.F.R. § 382.201.

FERC Annual Charge, and the affected public utilities must pay those bills within 45 days from the date on which the bills are issued.[4]

3. As a public utility that provides transmission service in interstate commerce, MISO is subject to the FERC 582 reporting requirements and FERC Annual Charge. Schedule 10-FERC establishes the formula by which MISO recovers its obligation to the Commission for the FERC Annual Charge. The charge under Schedule 10-FERC is assessed monthly to MISO transmission customers based on their megawatt-hours (MWh) of transmission service used in a month. The assessment is a rate per MWh derived from a forecast of the upcoming FERC Annual Charge divided by a forecast of the MWh of transmission service to be used over the twelve month period of time associated with the upcoming FERC Annual Charge. The annual rate per MWh includes a true-up component to account for any difference between the amount owed and the amount collected over the previous twelve month period.[5]

II. Filing

4. On December 30, 2011, MISO submitted proposed revisions to Schedule 10-FERC. MISO explains that, once a transmission owning member of MISO has withdrawn from MISO, MISO is no longer authorized to invoice the transmission customers of that Transmission Owner for their applicable *pro rata* Schedule 10-FERC charge. MISO states that once a Transmission Owner withdraws from MISO, the Transmission Owner and its customers are removed from MISO's billing systems, so MISO is unable to generate invoices to the applicable transmission customers. Accordingly, MISO explains that the instant filing provides a mechanism for MISO to invoice a withdrawing Transmission Owner in order to recover the *pro rata* portion of the charges for the period during which its transmission customers received transmission service from MISO before the Transmission Owner withdraws from MISO.[6] According

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[4] *Id.; see also* 18 C.F.R. Part 382; *see Revision of Annual Charges Assessed to Public Utilities*, Order No. 641, *FERC Statutes and Regulations, Regulations Preambles July 1996-December 2000* ¶ 31,109 (2000), *order on reh'g*, Order No. 641-A, 94 FERC ¶ 61,290 (2001); *Midwest Indep. Transmission Sys. Operator, Inc.*, 105 FERC ¶ 61,144, at P 3 (2003), *reh'g denied*, 106 FERC ¶ 61,255 (2004).

[5] MISO Filing at 1-2.

[6] *Id.* at 2.

to MISO, this is necessary because the Commission bills in arrears and bases the FERC Annual Charge on the previous year's MWh data.[7]

5. MISO states that these charges will be considered part of the exit obligations of Transmission Owners that withdraw from membership in MISO pursuant to Article V of the Transmission Owners Agreement.[8] MISO presumes that the withdrawing Transmission Owner will make its own arrangements with its transmission customers to account for its payment on their behalf of their *pro rata* share of the FERC Annual Charge. According to MISO, it must invoice withdrawing Transmission Owners for applicable Schedule 10-FERC charges after the Transmission Owner withdraws from MISO because the Commission invoices FERC Annual Charges in arrears.[9]

6. MISO proposes to calculate the amount due from a withdrawing Transmission Owner by using the applicable transmission customers' MWh reported in its FERC 582 prior to the Transmission Owner's withdrawal and applying the rate from the FERC Annual Charge invoice for the period when the transmission customers obtained transmission service. The total amount due associated with those transmission customers' share of the FERC Annual Charge will be the amount calculated minus a credit for the assessment amounts collected by MISO from the transmission customers prior to the Transmission Owner's withdrawal.[10]

7. MISO proposes to deliver an invoice to the withdrawing Transmission Owner no later than July 31 in the year after the Transmission Owner withdraws which sets forth the total amount owed for its transmission customers' portion of the FERC Annual Charge. The withdrawing Transmission Owner will then have 30 calendar days after delivery of the invoice to pay the applicable portion of the FERC Annual Charge on behalf of its transmission customers. Finally, the proposed revisions to Schedule 10-FERC provide that any controversy, claim or dispute arising out of or in connection with

[7] *Id.*, Biggers Testimony at 3-4.

[8] The Agreement of Transmission Facilities Owners to Organize the Midwest Independent Transmission System Operator, Inc., designated as Rate Schedule No. 1 under the Tariff.

[9] MISO Filing at 2.

[10] *Id.*

the FERC Annual Charge, or its calculation, will be resolved pursuant to the dispute resolution procedures outlined in Attachment HH of the Tariff.[11]

8. MISO requests waiver of the 60-day prior notice requirement[12] for an effective date of December 31, 2011 because Duke Energy Ohio, Inc. and Duke Energy Kentucky, Inc. (collectively, Duke Entities) withdrew from membership in MISO as of that date. MISO states that the proposed tariff revisions will allow it to recover applicable Schedule 10-FERC charges from the Duke Entities for 2011 transmission service when MISO receives an invoice from the Commission in June 2012 for its share of the FERC Annual Charge, in the event insufficient amounts have been collected by MISO from transmission customers in the Duke Entities' zones for their proportionate share of the assessment prior to withdrawal. MISO maintains that, without this change in Schedule 10-FERC, it will distribute among the transmission customers of the remaining Transmission Owners any shortfall in the *pro rata* share of the FERC Annual Charge properly attributable to the transmission customers of the Duke Entities.

III. Notice of Filing and Responsive Pleadings

9. Notice of MISO's Filing was published in the *Federal Register*, 77 Fed. Reg. 1481 (2011), with interventions and comments due on or before January 20, 2012. The Detroit Edison Company, Dairyland Power Cooperative, Wisconsin Electric Power Company, and Duke Energy Corporation filed timely motions to intervene. The MISO Transmission Owners[13] filed a timely motion to intervene with comments supporting the

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[11] *Id.* at 3.

[12] 18 C.F.R. § 35.3(a).

[13] The MISO Transmission Owners for this filing consist of: Ameren Services Company, as agent for Union Electric Company d/b/a Ameren Missouri, Ameren Illinois Company d/b/a Ameren Illinois and Ameren Transmission Company of Illinois; American Transmission Company LLC; Big Rivers Electric Corporation; Central Minnesota Municipal Power Agency; City Water, Light & Power (Springfield, IL); Dairyland Power Cooperative; Great River Energy; Hoosier Energy Rural Electric Cooperative, Inc.; Indiana Municipal Power Agency; Indianapolis Power & Light Company; Michigan Public Power Agency; MidAmerican Energy Company; Minnesota Power (and its subsidiary Superior Water, L&P); Montana-Dakota Utilities Co.; Northern Indiana Public Service Company; Northern States Power Company, a Minnesota corporation, and Northern States Power Company, a Wisconsin corporation, subsidiaries of Xcel Energy Inc.; Northwestern Wisconsin Electric Company; Otter Tail Power Company; Southern Illinois Power Cooperative; Southern Indiana Gas & Electric Company (d/b/a Vectren Energy Delivery of Indiana); Southern Minnesota Municipal

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filing. American Municipal Power, Inc. (AMP), on behalf of itself and its members; and International Transmission Company, Michigan Electric Transmission Company, LLC, ITC Midwest LLC, and Green Power Express LP (collectively, ITC) filed timely motions to intervene with protests. On February 6, 2012, MISO filed an answer to the protests.

A. **Protests and Comments**

10. MISO Transmission Owners state that they support MISO's proposed revisions to Schedule 10-FERC. They explain that the proposed revisions are a just and reasonable means to protect the remaining transmission customers from having to pay costs related to a departing Transmission Owner's decision to withdraw from MISO.

11. ITC objects to the proposed revisions to Schedule 10-FERC because independent transmission companies have no load and do not pay transmission rates or charges under the MISO Tariff. ITC asserts that the proposed revisions to Schedule 10-FERC are inconsistent with the Transmission Owners Agreement and the Tariff in that the proposed revisions assign costs due from transmission customers to a withdrawing Transmission Owner. Therefore, ITC argues, the withdrawing Transmission Owner would incur new financial obligations upon exit, resulting in a breach in the Transmission Owners Agreement.

12. ITC also states that MISO does not cite any examples of previous Transmission Owner withdrawals where there was an issue regarding a shortfall from FERC Annual Charges. ITC further argues that MISO's difficulty in generating invoices for previous transmission customers is not sufficient reason to assign costs to the withdrawing Transmission Owner.

13. ITC argues that if revised Schedule 10-FERC is approved, at a minimum, the cost responsibility should remain with the transmission customer for load within an independent transmission company's footprint. ITC argues that independent transmission companies have no load, do not pay transmission rates and charges under the MISO Tariff, and thus should not be held responsible for FERC Annual Charges that are assigned to transmission customers.

14. In its protest, AMP states that the Duke Entities have withdrawn from MISO and become members of PJM Interconnection, L.L.C. (PJM). AMP argues that if MISO's proposal is accepted the Duke Entities will be subject to the FERC Annual Charge as invoiced by both PJM and MISO. AMP argues that, under the proposed revisions to

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Power Agency; Wabash Valley Power Association, Inc.; and Wolverine Power Supply Cooperative, Inc.

Schedule 10-FERC, MISO would invoice the Duke Entities their *pro rata* share of the June 2012 invoice to MISO for its share of the FERC Annual Charges; that is, MISO's proposal would allow it to bill the associated Schedule 10-FERC charges to the Duke Entities based on their MWh of transmission service during 2011. AMP argues that PJM allocates the FERC Annual Charge based on the MWh of energy provided to a transmission customer during each month.[14] Therefore, argues AMP, while PJM will allocate responsibility for the FERC Annual Charge among all entities that are PJM members at the time that FERC assesses the fee, MISO proposes to invoice any withdrawn Transmission Owners that previously were members of MISO based on their MWh of transmission service used during the prior twelve-month period.

15. AMP argues that MISO's proposed Schedule 10-FERC revisions are based on a misunderstanding of the Commission's allocation of the FERC Annual Charge to all public utilities that provide transmission service. According to AMP, the Commission, contrary to MISO's assertions, does not actually invoice MISO (or any public utility that provides transmission service) in arrears. Rather, the FERC Annual Charge recovers current year costs, while the allocation of that assessment is based on past usage. Thus, AMP asserts, the Commission does not invoice utilities for 2011 costs in 2012, but rather the Commission invoices utilities in 2012 for 2012 costs that are allocated based on 2011 usage data. Thus, AMP maintains, MISO's Filing should be rejected because it results in the Duke Entities paying twice for the same 2012 costs.

16. AMP suggests that, in the interest of fairness, the Commission allocate to PJM, rather than to MISO, the 2012 FERC Annual Charge attributable to the load in the Duke Entities' zones. AMP argues that, if the Commission were to adjust its allocation in this manner, the Duke Entities' zones will not be subject to a share of MISO's FERC Annual Charge, but will pay the charge invoiced by PJM. AMP states that, as a result, neither MISO nor PJM customers will be left paying for any shortfall in the *pro rata* share of the FERC Annual Charge properly attributable to the transmission customers of the Duke Entities. AMP explains that then, the Duke Entities' customers will pay only for those charges that were assessed to an regional transmission organization based on the Duke

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[14] AMP Protest at 5 (citing PJM Open Access Transmission Tariff, Schedule 9-FERC). PJM's Schedule 9-FERC states:

> PJM will charge each user of this service each month a charge equal to the FERC Charge Recovery Rate defined below times the total quantity in MWhs of energy delivered during such month by such user as a transmission customer under this Tariff for Point-to-Point Transmission Service or Network Integration Transmission Service.

Entities' 2011 MWh of transmission service, and no other entity will pick up any portion of the charges that would otherwise properly be assessed to the Duke Entities.

17. Finally, AMP objects to the waiver request because MISO's proffered reason for a December 31, 2011 effective date does not amount to "good cause" that would warrant granting the request for waiver of the 60-day notice requirement. AMP recognizes that it may be beneficial to MISO for this provision to be placed into effect on December 31, 2011, however, AMP notes, MISO has indicated no reason why it could not have made its filing 60 days prior to the December 31, 2011 deadline.

18. AMP asserts that MISO had ample notice of the Duke Entities' withdrawal to make a timely filing if it wanted the December 31, 2011 effective date. AMP points out that the Commission conditionally approved the Duke Entities' realignment, including the December 31, 2011 withdrawal date, on October 21, 2010, 17 months prior to MISO's December 30, 2011 Filing to implement the Schedule 10-FERC revisions.[15] Further, AMP notes that the Commission has stated previously that "it will not grant waiver for contested filings, even if they do not have an impact on rates." [16] Therefore, AMP argues that by virtue of its protest, MISO's Filing is contested, and the Commission should deny the request for a waiver of the 60-day notice requirement and reject the proposed December 31, 2011 effective date.[17]

B. MISO Answer

19. In its answer to protests, MISO states that the protests fail to demonstrate that the proposed revisions to Schedule 10-FERC are either unjust or unreasonable. MISO also notes that the Duke Entities have not offered comments on the proposed revisions, and that the MISO Transmission Owners, who will potentially be subject to charges under the proposed Schedule 10-FERC, have expressed their support for the filing.

[15] AMP Protest at 8, (citing *Duke Energy Ohio, Inc.*, 133 FERC ¶ 61,058 (2010). AMP also points out that the Duke Entities have made numerous filings related to their withdrawal since the Commission's acceptance of the Duke Entities' realignment, including their rate filing in Docket Nos. ER12-91 and ER12-92, a proceeding to which MISO is a party). *Id.* at 8-9.

[16] AMP Protest at 9 (citing *PacifiCorp*, 131 FERC ¶ 61,043, at P 25 (2010), *reh'g denied*, 134 FERC ¶ 61,099 (2011)).

[17] *See* AMP Protest at 9.

20. MISO states that, contrary to ITC's assertion, it has shown a sufficient basis for the allocation of costs. MISO argues that the withdrawing Transmission Owner is in a more reasonable position than MISO to make up for any shortfall in the FERC Annual Charge and make appropriate arrangements with their own transmission customers for recovery of these costs. In response to ITC's request that the Commission, if it accepts the revisions, clarify that cost responsibility remains that of the transmission customer for load served by independent transmission companies, MISO reaffirms its position that Schedule 10-FERC should apply to the departing Transmission Owner. MISO states that Schedule 10-FERC should apply to any departing Transmission Owner because MISO will no longer have privity of contract with their transmission customers.

21. In response to AMP's concern that Transmission Owners withdrawing from MISO and joining PJM could be subject to duplicative charges for the same FERC Annual Charges, MISO argues that (1) that is not necessarily the case, and (2) such allegations are speculative. MISO states that a departing Transmission Owner is better suited than MISO to address these concerns with its new regional transmission organization (if any), based upon whatever FERC Annual Charge cost recovery mechanism will be applicable following their withdrawal from MISO. MISO further states that the Duke Entities should work directly with PJM to resolve any concerns regarding PJM's payment of the 2012 FERC Annual Charge.

22. With regard to MISO's request for a waiver of the 60-day prior notice requirement, MISO agrees with AMP that has been on notice of the withdrawal of the Duke Entities for over a year, but asserts that it has demonstrated good cause for waiver. MISO explains that it has discussed the proposed changes to Schedule 10-FERC and the problem of the Annual FERC Charge shortfall with its stakeholders, including the Duke Entities. MISO states that it tried to resolve the concerns of stakeholders and also had direct discussions with the Duke Entities, which continued until near the end of the year. According to MISO, it was unable to achieve a resolution of the issue without making the instant filing. MISO further explains that it was necessary for MISO to seek waiver of the notice requirement to try to accommodate these discussions and still complete the filing in 2011, prior to the Duke Entities' withdrawal.

IV. Discussion

A. Procedural Matters

23. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2011), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2011), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept MISO's answer because it has provided information that assisted us in our decision-making process.

B. Commission Determination

24. We find that MISO's proposed revisions to Schedule 10-FERC are just and reasonable. The proposed revisions to Schedule 10-FERC clarify that the transmission customers' share of FERC Annual Charges are a part of a withdrawing Transmission Owner's exit fee obligation and describe how MISO will charge a withdrawing Transmission Owner for that obligation.

25. We find that Article Five, section II.B of the Transmission Owners Agreement specifies that transmission owners withdrawing from MISO must honor financial obligations incurred prior to the effective date of withdrawal, but does not specify what financial obligations consist of. Therefore, we find that Schedule 10-FERC, with the proposed modifications we accept herein, specifies under the Tariff what financial obligations, in part, are to be honored upon withdrawal.[18] We find it appropriate that Schedule 10-FERC charges will be assessed to a withdrawing Transmission Owner, not the withdrawing Transmission Owner's transmission customers. We disagree with ITC's assertion that Schedule 10-FERC improperly shifts cost responsibility from the transmission customers to the withdrawing Transmission Owner. This responsibility is triggered by the Transmission Owner's decision to leave MISO, and it would be inappropriate to automatically shift costs related to a Transmission Owner's decision to withdraw from MISO to its transmission customers. For the same reasons, we also disagree with the assertion that Schedule 10-FERC should not apply to transmission owners, such as ITC, that do not have load and do not pay transmission rates under the MISO Tariff. We therefore reject ITC's argument.

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[18] *See Midwest Indep. Transmission Sys. Operator, Inc.*, 101 FERC ¶ 61,221, at P 53 (2002), *reh'g denied*, 103 FERC ¶ 61,035, at P 9 (2003). Schedule 16 (Financial Transmission Rights (FTR) Administrative Service Cost Recovery Adder) provides for the recovery of the costs associated with administering MISO's FTR market. Schedule 17 (Energy Market Support Administrative Service Cost Recovery Adder) provides for the recovery of the costs associated with administering MISO's energy markets. Schedules 16 and 17 did not exist at the time the MISO Transmission Owners Agreement became effective. The Commission later accepted MISO's proposal to modify the Tariff to include the cost allocations created by Schedules 16 and 17 in the obligations incurred by a transmission owner prior to withdrawal. The Commission found that Article Five, section II.B, of the MISO Transmission Owners Agreement requires withdrawing transmission owners to settle their financial obligations and interpreted this obligation to include new obligations created under Schedules 16 and 17 of the Tariff. In light of this interpretation, the Commission found that the transmission owners' rights were unchanged with new obligations created under Schedules 16 and 17.

26. We do not find that MISO has sufficiently demonstrated that a waiver of the 60-day prior notice requirement is warranted. MISO had ample notice of the Duke Entities' withdrawal, and could have acted accordingly by making the filing 60 days before the date set for withdrawal**.** We find that this filing creates a new obligation not already provided in the Tariff, and we note that, absent a strong showing of good cause, the Commission's policy is to "deny requests for waiver of notice for rate increases that do not implement a contract requirement, such as increases in requirements, coordination or transmission rates."[19] We therefore deny waiver of the 60-day prior notice requirement, and consistent with section 205 of the FPA and section 35.3 of our regulations, we accept MISO's proposed revisions to Schedule 10-FERC, effective February 29, 2012. Finally, because we are denying waiver, of the prior notice requirement, the proposed revisions to Schedule 10-FERC are effective after the effective date of the Duke Entities' withdrawal from MISO, and therefore not applicable to the Duke Entities. Accordingly, we do not address the other concerns raised in AMP's protest.

<u>The Commission orders</u>:

(A) MISO's proposed revised Schedule 10-FERC is hereby accepted for filing, effective February 29, 2012.

(B) MISO's request for waiver of the 60-day prior notice requirement is hereby denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

[19] *Central Hudson*, 60 FERC ¶ 61,106, at 61,339, *order on reh'g*, 61 FERC ¶ 61,089 (1992).