

147 FERC ¶ 61,022  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Acting Chairman;  
Philip D. Moeller, John R. Norris,  
and Tony Clark.

Midcontinent Independent System Operator, Inc.

Docket No. ER14-1290-000

ORDER CONDITIONALLY ACCEPTING IN PART AND REJECTING IN PART  
TARIFF REVISIONS AND DIRECTING COMPLIANCE FILING

(Issued April 8, 2014)

1. In this order, we conditionally accept in part and reject in part proposed tariff revisions that Midcontinent Independent System Operator, Inc. (MISO) submitted to Schedule 34 – Allocation of Costs Associated with Compliance Penalty Assessments (Schedule 34) to the MISO Open Access Transmission, Energy and Operating Reserve Markets Tariff (Tariff), to be effective April 8, 2014, subject to a compliance filing.

**I. Background**

2. Section 1211 of the Energy Policy Act of 2005 (EPAct 2005) added section 215 to the Federal Power Act (FPA),<sup>1</sup> which provides for the development and enforcement of mandatory reliability standards by an electric reliability organization to be certified by the Commission. The electric reliability organization and Regional Entities may impose penalties for violations of reliability standards, subject to Commission approval.<sup>2</sup> On July 20, 2006, the Commission certified the North American Electric Reliability Corporation (NERC) as the electric reliability organization.<sup>3</sup>

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<sup>1</sup> 16 U.S.C. § 824o (2012).

<sup>2</sup> The Commission, on its own motion, may also investigate violations of the reliability standards and impose penalties. 16 U.S.C. § 824o(e)(3) (2012).

<sup>3</sup> *North American Electric Reliability Corp.*, 116 FERC ¶ 61,062, *order on reh'g*, 117 FERC ¶ 61,126 (2006).

3. Order Nos. 672 and 672-A<sup>4</sup> implemented the requirements of EPCA 2005 regarding the selection, standard-setting procedures, and operational aspects of the electric reliability organization. In these orders, the Commission denied requests to: (1) exempt non-profit regional transmission operators (RTOs) and independent system operators (ISOs) from monetary penalties for violations of the reliability standards; or (2) authorize RTOs and ISOs to recover such monetary penalties from their customers on an automatic basis. Rather, the Commission stated that it would consider proposals to recover the costs of any such penalties imposed on RTOs and ISOs under section 205 of the FPA on a case-by-case basis.<sup>5</sup>

4. On March 20, 2008, the Commission issued an order to provide the RTOs and ISOs with guidance outlining how RTOs and ISOs seeking to recover costs they incur for reliability penalties assessed under section 215 of the FPA could provide notice of such potential recovery in their tariffs or contracts.<sup>6</sup> In the Guidance Order, the Commission noted that, because RTOs and ISOs are typically member-supported non-profit organizations, they do not have an independent source of funds with which to pay monetary penalties assessed to them for violation of Reliability Standards. The Commission recognized, however, that granting blanket authority to pass through monetary penalties to their customers automatically could significantly reduce the incentives for RTOs and ISOs to maintain strict compliance with reliability standards. As a result, the Commission concluded that it would only accept penalty recovery mechanisms under which the Commission could review the appropriateness of each penalty on a case-by-case basis in filings under section 205 of the FPA. In the order, the Commission contemplated the recovery of penalty costs via the direct assignment of costs to the responsible market participant or by spreading the costs among all members or customers of the organization.

5. After the issuance of the Guidance Order, MISO filed a proposed Schedule 34 (Allocation of Costs Associated with Reliability Penalty Assessments) to its Tariff. The

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<sup>4</sup> *Rules Concerning Certification of the Electric Reliability Organization; and Procedures for the Establishment, Approval, and Enforcement of Electric Reliability Standards*, Order No. 672, FERC Stats. & Regs. ¶ 31,204, at PP 634-635, *order on reh'g*, Order No. 672-A, FERC Stats. & Regs. ¶ 31,212 (2006).

<sup>5</sup> Order No. 672, FERC Stats. & Regs. ¶ 31,204 at PP 634-635; Order No. 672-A FERC Stats. & Regs. ¶ 31,212 at PP 55-58 (citing 16 U.S.C. § 824d (2012)).

<sup>6</sup> *Reliability Standard Compliance and Enforcement in Regions with Regional Transmission Organizations or Independent System Operators*, 122 FERC ¶ 61,247 (2008) (Guidance Order).

Commission conditionally accepted MISO's Schedule 34, subject to a compliance filing, finding that it provided a reasonable mechanism for the recovery of a monetary penalty assessed against MISO by the Commission, NERC, or a Regional Entity for violations concerning Reliability Standards.<sup>7</sup>

6. Under the current Schedule 34, MISO may seek to directly assign penalty costs to Tariff Customers or Members if, as the result of NERC's Compliance Monitoring and Enforcement Program, NERC or a Regional Entity finds that such Tariff Customers or Members<sup>8</sup> directly contributed to or were a root cause of a confirmed violation. Where penalties cannot be directly assigned to a particular, identifiable Tariff Customer or Member or are the fault of MISO itself, MISO may seek Commission approval to recover penalty costs from all Tariff Customers and/or Members pursuant to a Commission-approved methodology for allocation of penalty costs. MISO has only invoked Schedule 34 twice to recover limited reliability-related penalties, both of which were accepted by the Commission.<sup>9</sup>

## **II. MISO's Filing**

7. On February 7, 2014, MISO proposed the instant revisions to Schedule 34, which it re-names "Allocation of Costs Associated with Compliance Penalty Assessments." MISO explains that, in response to its own experiences and discussions with Transmission Owners and Members, MISO developed proposed revisions in order to provide: (1) greater certainty regarding cost allocation for penalties; (2) efficient, cost-effective administration and payment of penalty costs; and (3) greater certainty regarding the costs of the administration and payment of penalty costs.

8. MISO describes the proposed revisions as fourfold: (1) to set forth the specific methodologies that MISO will use to allocate penalty costs among its Tariff Customers where such penalty costs cannot be directly assigned; (2) to clarify that Schedule 34 encompasses penalty costs associated with issues arising under all the Commission's regulations, and not just those incorporating NERC Reliability Standards; (3) to permit MISO enhanced flexibility and authority to negotiate settlements and pay limited penalties, not to exceed \$80,000 in a single calendar year, subject to Commission review

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<sup>7</sup> *Midwest Indep. Transmission Sys. Operator, Inc.*, 128 FERC ¶ 61,229 (2009).

<sup>8</sup> All capitalized terms not defined herein are as identified in the MISO Tariff or the NERC Rules of Procedure.

<sup>9</sup> See *Midwest Indep. Transmission Sys. Operator, Inc.*, 135 FERC ¶ 61,118 (2011); *Midwest Indep. Transmission Sys. Operator, Inc.*, 139 FERC ¶ 61,038 (2012).

at the end of each Calendar Year; and (4) to clarify the process that MISO will use to directly assign a penalty to one or more Tariff Customers. Additionally, MISO has modified Schedule 34 to acknowledge the addition of section 5.11 of Appendix 4C to the NERC Rules of Procedures, which provides specific guidance and procedures for when an ISO seeks to allocate to other entities responsibility for a violation leading to imposition of a monetary penalty.

### **III. Notice, Intervention, and Responsive Pleadings**

9. Notice of MISO's filing was published in the *Federal Register*, 79 Fed. Reg. 9461 (2014), with interventions and protests due on or before February 28, 2014.

10. Exelon Corporation, the NRG Companies,<sup>10</sup> Wisconsin Electric Power Company, and the MISO Transmission Owners<sup>11</sup> filed timely motions to intervene. Xcel Energy Services, Inc. (Xcel) and MidAmerican Energy Company (MidAmerican) filed timely

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<sup>10</sup> The NRG Companies for this filing consist of: Bayou Cove Peaking Power LLC, Big Cajun I Peaking Power LLC, Cottonwood Energy Company LP, Louisiana Generating LLC, NRG Power Marketing LLC, NRG Sterlington Power LLC, NRG Wholesale Generation LP, and GenOn Energy Management, LLC.

<sup>11</sup> 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; Duke Energy Corporation for Duke Energy Indiana, Inc.; Entergy Arkansas, Inc.; Entergy Louisiana, LLC; Entergy Gulf States Louisiana, L.L.C.; Entergy Mississippi, Inc.; Entergy New Orleans, Inc.; Entergy Texas, Inc.; Great River Energy; Hoosier Energy Rural Electric Cooperative, Inc.; Indiana Municipal Power Agency; Indianapolis Power & Light Company; International Transmission Company d/b/a ITC Transmission; ITC Midwest LLC; Michigan Electric Transmission Company, LLC; MidAmerican Energy Company; Minnesota Power (and its subsidiary Superior Water, L&P); Missouri River Energy Services; 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; Prairie Power Inc.; South Mississippi Electric Power Association; Southern Illinois Power Cooperative; Southern Indiana Gas & Electric Company (d/b/a Vectren Energy Delivery of Indiana); Southern Minnesota Municipal Power Agency; Wabash Valley Power Association, Inc.; and Wolverine Power Supply Cooperative, Inc.

motions to intervene and protests. On March 18, 2013, MISO submitted a motion for leave to answer and answer in response to Xcel's and MidAmerican's protests.

#### **IV. Discussion**

##### **A. Procedural Matters**

11. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,<sup>12</sup> the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

12. Rule 213 of the Commission's Rules of Practice and Procedure<sup>13</sup> 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 has assisted us in our decision-making process.

##### **B. Substantive Matters**

#### **1. Cost Allocation Methodology for Where Costs Cannot be Directly Assigned**

##### **a. Filing**

13. MISO proposes to amend Schedule 34 to include a defined cost allocation methodology in circumstances where it cannot directly assign a penalty to one or more Tariff Customers. Under the current Tariff provisions, MISO must propose a cost allocation methodology for penalties each time it files for penalty recovery. MISO states that, rather than continue with this *ad hoc* approach to cost allocation, it seeks to include a defined cost allocation methodology based on the allocation methodology used in Schedule 17.<sup>14</sup>

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<sup>12</sup> 18 C.F.R. § 385.214 (2013).

<sup>13</sup> 18 C.F.R. § 385.213(a)(2) (2013).

<sup>14</sup> Schedule 17 is the rate schedule that MISO uses to recover its costs of operating the MISO Energy and Operating Reserve Markets (Markets) and to allocate to Market Participants the costs of operating the MISO Markets using each Market Participant's share of an aggregate set of billing determinants that reflects megawatt-hours injected into and withdrawn from the transmission system.

14. Under the proposed methodology, MISO will divide each Tariff Customer's Schedule 17 billing determinants by the aggregate Schedule 17 billing determinants to arrive at the share of penalty costs to be borne by each Tariff Customer. MISO proposes to identify the Tariff Customers to be allocated penalty amounts by first attempting to identify the Operating Day(s) on which the underlying alleged violation occurred. Where feasible to identify such days, MISO will allocate the penalty to those Tariff Customers that participated in the MISO Markets under Schedule 17 on the identified Operating Day(s). If MISO cannot identify the Operating Day(s) on which the alleged violation occurred, then MISO will allocate the penalty to those Tariff Customers who participated in the MISO Markets under Schedule 17 during the last calendar month in which the alleged violation or confirmed violation occurred.

**b. Protests**

15. Xcel raises concerns relating to actions taken and responsibilities conferred under a Coordinated Functional Registration agreement (CFR). Xcel explains that MISO has developed or executed CFRs that allow a responsible entity to assign compliance actions and obligations related to Reliability Standards to MISO. Xcel is concerned that, if MISO is assessed penalties related to actions under a CFR, those penalties may be uplifted through Schedule 34 instead of being restricted to the entities who are signatories to a CFR. Accordingly, Xcel recommends that any penalties associated with MISO performing its role under a CFR be allocated solely to parties to that CFR.

16. MidAmerican argues that MISO's proposed allocation would be administratively easier to determine and no less reasonable in allocating penalties if it were based over some period of time without regard to the specific days on which the alleged violation occurred. According to MidAmerican, there is no reason to attempt to identify the Operating Day(s) on which alleged violations occurred because MISO's proposed allocation would apply only where direct assignment is not feasible. Moreover, MidAmerican states that MISO's proposed use of billing determinants derived from specific Operating Days runs the risk of assigning an unusually high or unusually low share of the penalty to specific entities based on their chance behavior on specific days.<sup>15</sup>

**c. MISO Answer**

17. MISO answers that Xcel's arguments ignore the fact that the responsibilities set forth in MISO's CFRs are for the benefit of MISO's entire footprint, rather than the narrow benefit of the CFR parties.<sup>16</sup> MISO states that Xcel further ignores that the

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<sup>15</sup> MidAmerican Protest at 7-8.

<sup>16</sup> MISO Answer at 4.

development of CFRs is consistent with the Guidance Order and allows MISO to align its Tariff responsibilities with any companion Reliability Standards requirements. MISO also states that the subjects of CFRs are over-arching functions that MISO provides and has provided for the benefit of its entire footprint since incorporation and that, therefore, the responsibility for penalties arising out of performance of the activities should reasonably be shared by MISO's entire footprint as are the benefits.<sup>17</sup>

18. MISO further argues that Xcel's protest ignores the concept of causality set forth in the Guidance Order and that its suggested approach would amount to directly assigning penalties associated with CFR responsibilities wholly assigned to MISO to the CFR parties without a finding that such parties "contributed" to the root cause of the violation.<sup>18</sup> The CFRs provide that, if MISO is assigned responsibility for a particular requirement, then MISO must be responsible for any and all penalties associated with a violation of that requirement. In the exception to that rule where the acts or omissions of a party to a CFR are the underlying cause of the violation, MISO is permitted to look to that party for indemnification of penalties.<sup>19</sup> MISO states that the structure of Schedule 34 is set in a similar fashion and that these principles of causation are rooted in the Commission's Guidance Order.<sup>20</sup>

19. In response to MidAmerican's protest, MISO states that it believes its proposal is administratively feasible and appropriate. MISO argues that its method is less arbitrary than MidAmerican's proposal and achieves more precision and fairness in proportionately allocating penalty costs among all users.<sup>21</sup> MISO states that the Commission has found that, where a cost allocation mechanism is both administratively feasible and precise, it is just and reasonable.<sup>22</sup>

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<sup>17</sup> *Id.* at 4.

<sup>18</sup> *Id.* at 7.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 8.

<sup>21</sup> *Id.* at 16.

<sup>22</sup> *Id.*

**d. Commission Determination**

20. We will accept MISO's proposed cost allocation methodology as just and reasonable. Having a predetermined methodology for assigning penalty costs will serve to increase efficiency and provide transparency for MISO's Tariff Customers, Transmission Owners, and Members. While an alternative methodology, such as that proposed by MidAmerican, may be more administratively efficient, MidAmerican has not shown that MISO's proposed methodology is unjust or unreasonable. We also note that the majority of violations processed by NERC and the Regional Entities are deemed to last for months or sometimes years. Therefore, we find that MidAmerican's concern that specific entities would be burdened with penalties based on their chance behavior on specific dates is unfounded.

21. Regarding Xcel's protest, in the Guidance Order, the Commission recognized the importance for the RTOs and ISOs to include provisions regarding the appropriate responsibility for reliability-related monetary penalties in their contracts with their members and customers and/or in their tariffs, including provisions regarding the appropriate responsibility for such penalties on the RTOs and ISOs.<sup>23</sup> The Commission further stated that it is the responsibility of registered entities in general, and certainly RTO/ISOs as registered entities, to comply with Reliability Standards for which they are registered and to ensure, contractually or otherwise, that other entities that may be partly or wholly responsible for such compliance will perform in compliance with the applicable Reliability Standards, and that any contract and/or tariff mechanisms to reassign penalty responsibility must not be unduly discriminatory.<sup>24</sup> Here, parties that have delineated compliance responsibility between MISO and themselves pursuant to a CFR are responsible for penalties based on the delineation in the CFR, but, per the terms of the CFR, MISO retains the right to seek direct assignment of penalties to such parties, pursuant to Schedule 34, if their actions cause MISO to incur the penalty. For penalties that MISO incurs due solely to its actions taken pursuant to the terms of a particular CFR, MISO is solely responsible for such penalties which it would then uplift to its Tariff Customers. If an entity that is not a signatory to a CFR is responsible for MISO being assessed a penalty, then the penalty can be directly assigned if the party has already been identified. This procedure is consistent with the Guidance Order. Therefore, Xcel's concern that penalty costs will be unjustly uplifted is unfounded.

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<sup>23</sup> See Guidance Order, 122 FERC ¶ 61,247 at P 24.

<sup>24</sup> *Id.* n.40.

## 2. Scope of Penalty Costs to be Assessed Under Schedule 34

### a. Filing

22. MISO proposes to revise Schedule 34 to include not only reliability-related penalties assessed to MISO by NERC or a Regional Entity, but other Commission-imposed penalties including those arising out of violations of any Commission regulation, Tariff and/or MISO rate schedules, and any of the Commission's orders, rules, or policies. MISO submits that its proposed expanded scope of Schedule 34 is consistent with the Guidance Order, which recognizes the limited ability of RTOs such as MISO to pay penalties, and the need for a mechanism that allows RTOs the opportunity to ask for penalty recovery.<sup>25</sup>

23. MISO acknowledges that the Commission rejected tariff language that would have allowed the California Independent System Operator Corporation (CAISO) to seek recovery of non-reliability based penalties, but attempts to distinguish its filing from CAISO's filing. Specifically, MISO emphasizes that it is not seeking broad authorization to include penalties from other regulators or associated with regulations beyond those administered and/or delegated by the Commission. MISO also maintains that its proposed changes are motivated by its cost structures and funding schedules as well as its non-profit status. Accordingly, MISO states, whether reliability-related or not, it would be unable to provide payment to the Commission, NERC, or a Regional Entity without first receiving Commission authorization to recover the penalty from its Tariff Customers.

### b. Commission Determination

24. We will reject MISO's proposal to include non-reliability related penalties. In 2012, the Commission rejected a similar proposal by CAISO, noting that the recovery of non-reliability penalties was beyond the scope of the Commission's Guidance Order.<sup>26</sup> MISO argues that, in rejecting CAISO's proposed revision, the Commission "focused substantially on the fact that the provision would have applied to any penalty from any regulator."<sup>27</sup> We disagree. The Commission did not reject CAISO's proposal based on

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<sup>25</sup> MISO Transmittal Letter at 8 (citing Guidance Order, 122 FERC ¶ 61,247 at P 26).

<sup>26</sup> *California Indep. Sys. Operator Corp.*, 138 FERC ¶ 61,156, at P 17 (2012) (CAISO).

<sup>27</sup> MISO Transmittal Letter at 8 (citing CAISO, 138 FERC ¶ 61,156 at P 17).

its request to recover penalties by other regulatory agencies but instead on CAISO's request to recover non-reliability penalties. Therefore, MISO's attempt to distinguish the CAISO order is unavailing.

25. The recommendations in the Guidance Order are specific to how violations of Reliability Standards are investigated and, if necessary, prosecuted.<sup>28</sup> The Guidance Order does not contemplate the recovery of non-reliability penalty costs. For example, recovery of costs associated with a violation of a Tariff provision or the Commission's Anti-Manipulation Rule may not be appropriately socialized or assigned through the procedures set forth in the Guidance Order. MISO provides no explanation for expanding on the Guidance Order's recommendations other than to note the need for a mechanism allowing RTOs the opportunity to seek penalty recovery. Therefore, MISO should continue to submit a case-specific filing under section 205 if the need to collect funds to pay non-reliability penalties ever arises.

26. Consistent with our determination, we will direct MISO to submit a compliance filing revising the heading of Schedule 34 and revising the new proposed term, "Compliance Penalties" to only include reliability penalties. These revisions are necessary to clarify that Schedule 34 applies solely to reliability related penalties.

**C. Recovery of Penalties not to Exceed \$80,000**

**a. Filing**

27. MISO seeks a "controlled deviation" from the Commission's general policy prohibiting the automatic recovery of penalty costs from ratepayers.<sup>29</sup> The proposed deviation would allow MISO to recover penalty costs under Schedule 34 not to exceed \$80,000 in a single Calendar Year, to be followed by a section 205 filing at the end of the year. MISO asserts that the proposed revisions would allow it the flexibility to negotiate small settlements without incurring transactional and administrative costs associated with separate section 205 filings that could actually be greater than the penalty costs for which recovery is being requested.<sup>30</sup>

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<sup>28</sup> See Guidance Order, 122 FERC ¶ 61,247 at P 17.

<sup>29</sup> MISO Transmittal Letter at 9 (citing Guidance Order, 122 FERC ¶ 61,247 at P 16; *Entergy Services, Inc.*, 133 FERC ¶ 61,136, at P 39 (2010)).

<sup>30</sup> *Id.* at 10.

28. The proposed deviation would apply only where MISO does not directly assign penalty costs. MISO maintains that its proposed modifications affect only the timing of the Commission's review of the proposed penalty recovery, noting that MISO would still be required to justify all penalty collections through an after-the-fact section 205 filing at the end of each Calendar Year in which MISO collected and paid out penalty amounts less than \$80,000 in the aggregate.<sup>31</sup> In addition, MISO would continue to notify its Tariff Customers of impending penalty costs in advance of an assessment under Schedule 34.

**b. Protest**

29. While MidAmerican does not object to MISO's proposed elimination of case-by-case filings for certain penalty allocations, it seeks clarification regarding MISO's proposed after-the-fact section 205 filing. MidAmerican remarks that the proposed Tariff language states that "the Transmission Provider must submit a filing under section 205 of the Federal Power Act *requesting recovery* of such Compliance Penalties" (emphasis added), even though the recoveries would have been achieved prior to the submittal.<sup>32</sup> MidAmerican seeks confirmation of its understanding that MISO's proposed section 205 filings would not provide for Commission review of the allocation mechanism, and that the Commission could only accomplish such review via a proceeding under section 206 of the FPA.<sup>33</sup> MidAmerican seeks further confirmation that the Commission's review of MISO's section 205 filings would be limited to whether the penalty at issue meets the Tariff definition of a "Compliance Penalty" and whether the allocation calculation is mathematically consistent with the terms of Schedule 34.

**c. MISO Answer**

30. In its answer, MISO states that its end-of-year post-allocation filings would provide justifications for the pass-through of penalties pursuant to the criteria in the Guidance Order and would be subject to the same evaluation that the Commission performs under the current Tariff.<sup>34</sup> MISO argues that the evaluation provided by the Commission at the end of the year would fully incorporate the criteria set forth in the Guidance Order.

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<sup>31</sup> *Id.* at 11.

<sup>32</sup> *Id.* at 9 (citing revised Schedule 34, Section 3.C).

<sup>33</sup> 16 U.S.C. § 824e (2012).

<sup>34</sup> MISO Answer at 11-12.

**d. Commission Determination**

31. We will accept MISO's proposal to allow for automatic recovery of penalties not to exceed \$80,000 in a Calendar Year. The proposal reasonably minimizes transactional and administrative costs without compromising MISO's incentives to proactively comply with Reliability Standards. Further, MISO has established reasonable limits on its proposal, including a threshold and a commitment to make section 205 filings no less than annually to justify its penalty collections. Such after-the-fact section 205 filings would continue to be subject to the Commission's approval.<sup>35</sup> Further, the proposed Tariff language cited by MidAmerican regarding a request for recovery is appropriate and does not need further clarification. The Commission will review MISO's after-the-fact section 205 filings to ensure that the penalty issue meets the Tariff definition of a "Compliance Penalty" and that MISO's recovery of the penalty is just and reasonable, and to verify that the penalty was allocated and recovered from Tariff Customers consistent with the Tariff.

**D. Direct Assignment Procedure**

**a. Filing**

32. MISO proposes to amend Schedule 34 to clarify the direct assignment procedures for circumstances in which the exact apportionment of responsibility is in question. MISO explains that, in these circumstances, it will meet with Tariff Customers to attempt to informally resolve any apportionment disputes. MISO's proposed revisions remove MISO Members from the direct assignment procedures. MISO states that, if the parties are able to reach agreement on the apportionment of the penalty, MISO will submit a section 205 filing with the executed agreement. If the parties are unable to reach an agreement, MISO will submit a section 205 filing with the proposed apportionment and the applicable Tariff Customers will have the opportunity to challenge that apportionment.

**b. Protest**

33. MidAmerican is concerned that MISO's proposal unfairly limits the number of entities that would ultimately fund direct assignment of MISO's penalty costs, noting that entities that bear responsibility for the penalty could escape allocation of penalty costs if they do not fit within the definition of a "Tariff Customer." MidAmerican is also

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<sup>35</sup> MISO did not make a commitment in the filing to provide refunds consistent with the Commission's after-the-fact findings. However, the Commission would have the authority to require such refunds.

concerned that the proposal would prohibit the direct assignment of penalty costs to stand-alone transmission companies that do not participate in MISO's markets, even when they are responsible for penalties that MISO incurs. Additionally, MidAmerican asserts that MISO's proposal offers no discussion or justification for its proposal to exempt MISO Members from future direct assignments.

**c. MISO Answer**

34. In its answer, MISO explains that it sought to eliminate the term "Member" from Schedule 34 for three reasons: (1) to eliminate confusion over whether entities that do not participate in MISO's markets are subject to payment of Schedule 34 assessments since certain entities that do not participate in MISO's markets may be deemed "Members" for the purpose of participating in stakeholder groups but are not "Members" for the purpose of cost allocation under Schedule 34; (2) the term "Tariff Customer" covers most (but not all) entities that participate in MISO's markets; and (3) where a Member that is not a Tariff Customer has caused or contributed substantially to a violation, MISO may directly seek to allocate the penalty to the applicable Member under Section 5.11 of Appendix 4C of the NERC Rules of Procedure. Furthermore, MISO states, it could pursue recovery from that Member in accordance with Article 4, section II.D., of the MISO Transmission Owners Agreement,<sup>36</sup> which provides that Transmission Owners will indemnify MISO for issues arising out of a Transmission Owner's nonperformance of its obligations. MISO adds that it would not object to re-inserting the term "Member" into Schedule 34, or to adopting equivalent language that makes clear MISO has the ability to directly assign a penalty to an entity that is not a Tariff Customer.<sup>37</sup>

**d. Commission Determination**

35. We will conditionally accept MISO's proposed revisions to its direct assignment provisions, subject to a compliance filing as discussed below. We agree that MISO's clarifications will improve the processing and allocation of penalties that may be directly assigned, thereby increasing efficiency of operations while providing transparency to MISO's transmission customers.

36. However, we agree with MidAmerican that MISO's proposal to exempt MISO Members from future direct assignments could unfairly limit the number of entities that

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<sup>36</sup> Agreement of Transmission Facilities Owners to Organize the Midwest Independent Transmission System Operator, Inc., a Delaware Non-Stock Corporation.

<sup>37</sup> MISO Answer at 15.

would ultimately fund MISO's penalty costs through direct assignment if it is limited to "Tariff Customers." While MISO indicates that the term "Tariff Customer" includes "virtually all" entities that participate in MISO's markets or are signatories to the MISO Transmission Owners Agreement, MISO also acknowledges that there are some, albeit very few, Members that are not included. Further, MISO has indicated a willingness to restore the term "Member" or to adopt equivalent language.<sup>38</sup> Accordingly, to avoid the incidental exclusion of any potentially responsible entity from the direct assignment procedure, we will direct MISO to restore the term "Member." Further, MISO may develop additional language to distinguish between entities subject to potential direct assignment and those entities that participate in the MISO stakeholder groups but are not participants in MISO Markets and not subject to direct assignment.<sup>39</sup>

37. Accordingly, we will conditionally accept these proposed revisions subject to a compliance filing providing that MISO will include in the direct assignment procedures any Tariff Customer or Member that bears direct responsibility for the reliability penalty that MISO incurs.

The Commission orders:

(A) MISO's filing is hereby conditionally accepted in part and rejected in part, as discussed in the body of this order.

(B) MISO is hereby directed to submit a compliance filing in this docket within 30 days of the date of this order, as discussed in the body of this order.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.

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<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 14.