

148 FERC ¶ 61,158  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Chairman;  
Philip D. Moeller, Tony Clark,  
and Norman C. Bay.

Midcontinent Independent System  
Operator, Inc.

Docket No. OA08-14-000

ORDER DENYING PRIVILEGED TREATMENT, NOTIFYING OF RELEASE OF  
DOCUMENTS, AND PROVIDING FOR COMMENTS

(Issued August 29, 2014)

1. On April 15, 2014, as amended on April 21, 2014, and supplemented on April 28, 2014, in Docket No. OA08-14-000, Midcontinent Independent System Operator, Inc. (MISO) submitted an informational filing relating to unreserved use and late study penalties for the period January 1, 2013 – December 31, 2013 (Reporting Period) pursuant to Order No. 890-A<sup>1</sup> (Informational Report).<sup>2</sup> MISO requested privileged treatment for the Informational Report under section 388.112 of the Commission's regulations.<sup>3</sup> As discussed below, we deny MISO's request for privileged treatment of the Informational Report.

**Background**

2. Order No. 890-A requires transmission providers to annually submit a compliance report describing any unreserved use and late study penalties imposed by the transmission

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<sup>1</sup> *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, 72 Fed. Reg. 12,266 (2007), FERC Stats. & Regs. ¶ 31,241 (March 15, 2007) (Order No. 890), *order on reh'g*, Order No. 890-A, 73 Fed. Reg. 2,984 (January 16, 2008), FERC Stats. & Regs. ¶ 31,261, at P 472 (2007) (Order No. 890-A), *order on reh'g*, Order No. 890-B, 73 Fed. Reg. 39,092 (2008), 123 FERC ¶ 61,299 (July 8, 2008).

<sup>2</sup> We note that other filings related to MISO's compliance with Order No. 890, including a proposed methodology for distributing unreserved use penalty revenues filed on May 30, 2014 in Docket No. OA08-14-000, are also pending but are not at issue here.

<sup>3</sup> 18 C.F.R. § 388.112 (2014).

provider. MISO states that the Informational Report provides total unreserved use penalties, by transmission customer, assessed by MISO during the Reporting Period. MISO states that it had no late study penalties during the Reporting Period.

### **Responsive Pleadings**

3. On June 16, 2014, Mr. Eric Morris (Mr. Morris), asserting an interest as a retail ratepayer, filed an intervention and protest, in Docket No. OA08-14-000. Mr. Morris states that he submitted a Freedom of Information Act Request (FOIA) request seeking a copy of the privileged information contained within MISO's Informational Report. Mr. Morris states that on June 9, 2014, the Commission, by letter from the Office of External Affairs, withheld the Informational Report and thereby denied his request. Mr. Morris requests that the Commission reconsider its determination that the Informational Report remain privileged. Mr. Morris argues that Order No. 890 did not contemplate informational filings related to unreserved use and late study penalties being filed as privileged. In addition, Mr. Morris states that Southwest Power Pool, Inc. (SPP) filed with the Commission its unreserved use and late study penalty filing with the Commission publicly.

4. On July 1, 2014, MISO filed a motion to deny intervention and an answer to Mr. Morris's protest. MISO states that the Commission should deny Mr. Morris's intervention and protest because he has failed to identify his interests in the proceeding. In the alternative, MISO objects to releasing the Informational Report, asserting that the material should be withheld pursuant to FOIA Exemption 4 (5 U.S.C. § 552(b)(4) (2012) (protecting trade secrets and commercial or financial information)).

5. On July 11, 2014, MISO filed an additional motion to deny intervention reiterating its claim that the Commission should deny Mr. Morris intervenor status, submitting that being a retail ratepayer alone is not sufficient justification to grant intervention. MISO adds that the individual transmission customer settlement data contained in the Informational Report is confidential pursuant to Appendix A of the MISO Transmission Owners Agreement and MISO tariff.

6. On July 15, 2014, Mr. Morris filed an answer to MISO's motions and answers, reiterating his position that he is an interested party and should be granted intervenor status. Mr. Morris adds that the transmission customer settlement data MISO claims should remain confidential in the Informational Report appears to be of similar nature to the transmission customer settlement data on pages 331 through 331.4 of the FERC Form No. 1 that MISO submitted to the Commission on April 17, 2014.

### **Discussion**

7. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2014), we will grant Mr. Morris's opposed motion to intervene in

this proceeding given his interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay. Notwithstanding MISO's objection, we find that Mr. Morris has articulated an interest in this proceeding that warrants his intervention as a party.<sup>4</sup>

8. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2), prohibits an answer to a protest or answer unless otherwise ordered by the decisional authority. We will accept the answers filed by MISO and Mr. Morris because they provided information that assisted us in our decision-making process.

9. We will deny MISO's request for privileged treatment. MISO generally asserts that its Informational Report contains customer-specific settlement data relating to each transmission customer's share of total reserved transmission capacity which, if disclosed publicly, would cause competitive harm to both MISO and its customers, or undermine customer confidence and willingness to participate in MISO markets. However, MISO has not explained how the information at issue may be used in the alleged specified manner nor how it would result in competitive harm if so used. Beyond its conclusory statements, MISO has not justified how disclosing the Informational Report is likely to cause substantial competitive harm to MISO or its member entities.<sup>5</sup> Moreover, we find that the customer-specific settlement data contained in the Informational Report (reflecting the level of transmission capacity reserved by each customer) is already required to be filed publicly on pages 328 through 330, Transmission of Electricity for Others (Account 456.1), of the FERC Form No. 1 for other (non-Regional Transmission Organization (RTO)/Independent System Operator (ISO)) transmission providers.<sup>6</sup>

10. In addition, because Order No. 890-A requires transmission providers to submit annual compliance reports, the information of concern to MISO is already required to be

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<sup>4</sup> E.g., *PJM Interconnection, LLC*, 137 FERC ¶ 61,251, at PP 21-22 (2011).

<sup>5</sup> See *Pub. Citizen Health Research Group v. Food and Drug Admin.*, 704 F.2d 1280, 1291 (D.C. Cir. 1983) (stating that "conclusory and generalized allegations of substantial competitive harm" do not suffice to withhold information).

<sup>6</sup> In Order No. 668, the Commission allowed RTOs/ISOs to report aggregated, rather than customer-specific, settlement data for transmission services provided because of the potential need for costly software changes. See *Accounting and Financial Reporting for Public Utilities Including RTOs*, Order No. 668, FERC Stats. & Regs. ¶ 31,199 at PP 28-29, *reh'g denied*, Order No. 668-A, FERC Stats. & Regs. ¶ 31,215, *reh'g denied*, 117 FERC ¶ 61,066 (2006). Thus, although MISO's FERC Form No. 1 does not provide such customer-specific settlement data on pages 328 through 330, RTOs/ISOs are not exempt from reporting customer-specific settlement data because of concerns about commercial sensitivity, but rather due to potential reporting burdens.

filed publicly in the FERC Form No. 1, and MISO has not demonstrated that disclosure is likely to cause substantial competitive harm, there is no indication that disclosing the information will impair the Commission's ability to obtain the data in the future or that the quality or reliability of the material provided will be diminished. Accordingly, the Informational Report fails to satisfy the requirements for withholding records under FOIA Exemption 4.

11. The Commission gives notice pursuant to section 388.112(e) of the Commission's regulations that it will make the Informational Report public 10 days after the issuance of this order. In light of the delay in public disclosure of the Informational Report, MISO's filing is subject to further Commission action, following an opportunity for review and comments, once it has been made public. Comments on the released information will be due ten days from the date the Informational Report is made public.

The Commission orders:

(A) The opposed motion to intervene of Mr. Morris is hereby granted.

(B) MISO is hereby on notice that the Commission intends to release the Informational Report for which privileged treatment was sought 10 days from the date of issuance of this order.

(C) MISO's request for privileged treatment of its Informational Report is hereby denied, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.