

152 FERC ¶ 61,101
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Midcontinent Independent System
Operator, Inc.

Docket No. ER15-1767-000

ORDER GRANTING WAIVER

(Issued July 31, 2015)

1. On May 21, 2015, Midcontinent Independent System Operator, Inc. (MISO) filed a request for a limited, one-time waiver of certain provisions of Section 64.1.4 of MISO's Open Access Transmission, Energy and Operating Reserve Markets Tariff (Tariff), which provide the process MISO's Independent Market Monitor (IMM) uses to establish cost-based Reference Levels for generation resources in MISO. MISO's requested waiver is intended to implement the resolution of a dispute initiated by Wolverine Power Supply Cooperative, Inc. (Wolverine) under MISO's alternative dispute resolution (ADR) process. As discussed below, we grant MISO's waiver request, effective May 22, 2015, as requested.

I. Background

2. MISO states that Wolverine initiated a dispute with MISO pursuant to Attachment HH of MISO's Tariff, which establishes MISO's ADR process, asserting that Wolverine was due additional make-whole payments related to MISO's commitment and dispatch of Wolverine's Gaylord natural gas Generation Resource (Gaylord) on February 24, 2014, February 28, 2014, March 3, 2014, and March 6, 2014. MISO explains that MISO and Wolverine reached a resolution to the dispute in the ADR process. MISO states that the details and description of the dispute and its subsequent resolution under MISO's ADR process are contained in Attachment 1 to MISO's waiver request, which MISO has marked as confidential and non-public to preserve the confidentiality of the information provided in the ADR process.¹

¹ Attachment 1 lists the parties who intervened in the ADR process. Attachment 1 also includes, *inter alia*, the affidavit of Mr. Zachary Anderson of Wolverine, which supports the resolution reached.

3. MISO requests waiver of Section 64.1.4 of the Tariff to allow Wolverine's cost-based Reference Level² for Gaylord to be established using information that Wolverine asserts that it attempted to provide to MISO's IMM but was unsuccessful in doing so due to Wolverine's failure to successfully provide the information to the IMM through the IMM's Operational Cost Survey (OCS) website. The Reference Level establishes the basis from which the IMM mitigates Generation Resource Offers under Module D of the Tariff, which establishes MISO's Market Monitoring and Mitigation Measures.³

4. MISO explains that Section 64.1.4 of the Tariff requires the IMM to establish a Reference Level for each component of a Generation Resource's Offer using the first of three methods for which sufficient information is available, following the order in which they appear in the Tariff. Section 64.1.4 states, in relevant part, that Reference Levels are to be established through: (1) the use of the lower of the mean or median of a generator's accepted Offers or Offer components in competitive periods over the previous 90 days for similar Load levels, adjusted for changes in fuel prices; (2) the mean of the Locational Marginal Price or applicable Marginal Clearing Price at the generator's location during the lowest-priced twenty-five percent of the hours that the unit was dispatched over the previous 90 days for similar hours or Load levels, adjusted for changes in fuel prices; or (3) the use of cost data submitted by a Market Participant in consultation with the IMM.⁴

5. MISO requests that the Commission grant a one-time, limited waiver in order to allow the Reference Level for Gaylord to be set at the Reference Level it would have had under the third method, i.e., based upon the information Wolverine attempted to provide to the IMM, but for Wolverine's failure to successfully provide the information to the IMM through the OCS website.⁵ MISO states that the requested waiver is necessary to allow MISO to facilitate the equitable resolution of the Wolverine dispute that was vetted

² MISO explains that a Reference Level is defined as a calculation intended to reflect a Resource's (i.e., generator's) marginal costs, including legitimate risk and Opportunity Costs. *See* Section 1.R of the MISO Tariff.

³ Module D of the Tariff includes Section 64.1.4.

⁴ MISO Waiver Request at 3-4 and MISO, June 26, 2015 Motion for Leave to Answer and Answer (MISO Answer) at 2-3 (both citing Tariff at 64.1.4).

⁵ MISO Waiver Request at 4 and MISO Answer at 3 (citation omitted). Wolverine states that it had sent e-mails to the IMM to provide its unit cost information, and the IMM replied with a link to the OCS website. *See* Wolverine June 26, 2015 Motion to Submit Reply Comments and Reply Comments (Wolverine Answer) at 5. Wolverine explains that it attempted to upload the cost data on the OCS website prior to the dates in question, but learned that its attempt was unsuccessful more than four months later.

through MISO's ADR process. MISO requests that the Commission allow the requested waiver to be effective one day after filing, or May 22, 2015.

6. MISO notes that, in granting tariff waivers, the Commission generally focuses on the following four criteria: (1) the entity seeking the waiver acted in good faith; (2) the waiver is of a limited scope; (3) a concrete problem needs to be remedied; and (4) the waiver will not have undesirable consequences, such as harming third parties.⁶ MISO asserts that its requested waiver meets all four of these criteria. MISO asserts that good cause exists to grant the requested waiver because: (1) MISO is acting in good faith; (2) the waiver is limited in scope; (3) the waiver will remedy the concrete problem of establishing cost-based Reference Levels in a unique circumstance where no other Tariff provisions provide for the equitable outcome of the referenced ADR dispute; and (4) the waiver will not have undesirable consequences, such as harming third-parties.

7. MISO argues that its requested waiver is the most equitable solution in this instance. MISO states that its proposal addresses a unique situation. It states that its resolution of the Wolverine dispute seeks to keep Wolverine whole for actions taken as a result of MISO's requests during extreme weather conditions. MISO explains that the requested waiver is necessary to facilitate the establishment of the Reference Level for Gaylord and to establish the amount of make-whole payments due to Wolverine. MISO states that the requested waiver is limited in duration, as it is a one-time waiver involving unique circumstances. Further, MISO notes that Wolverine has taken steps to prevent similar occurrences in the future.

II. Notice of Filing and Responsive Pleadings

8. Notice of MISO's May 21, 2015 filing was published in the *Federal Register*, 80 Fed. Reg. 31,026 (2015), with interventions and protests due on or before June 11, 2015. Wolverine and the NRG Companies⁷ filed timely motions to intervene. The IMM filed a timely motion to intervene and comments. Answers to IMM's comments were filed by MISO and Wolverine.

A. The IMM's Comments

9. The IMM recommends that the Commission reject MISO's request for waiver and order the adoption of a proposed alternative resolution. The IMM argues that MISO's

⁶ MISO Waiver Request at 3 (citing *ISO New England, Inc.*, 117 FERC ¶ 61,171, at P 21 (2006) (internal citations omitted)).

⁷ For purposes of their filing, the NRG Companies are NRG Power Marketing LLC and GenOn Energy Management, LLC.

proposed resolution of the Wolverine dispute establishes a bad precedent. The IMM asserts that the resolution provides ADR relief, for the first time, for an issue caused exclusively by a mistake or omission by a market participant, including the failures: (1) to successfully upload cost data; (2) to review its reference levels and recognize that they are not reflective of the units' marginal costs in the month prior to the mitigation; and (3) to initiate consultation with the IMM to address the understated reference levels.

10. The IMM notes that MISO's filing describes the "but for" case as using the "updated cost information" provided by Wolverine. The IMM claims that there is no record of the cost data that Wolverine claims to have attempted to upload for the Gaylord units on January 31.⁸ The IMM states that the "but for" case uses Wolverine's first successful OCS upload that occurred after the event on January 31, 2014, which was identical to the cost survey of a different Wolverine plant. The IMM also claims that MISO's May 21, 2015 filing is not completely accurate and makes corrections and clarifications to MISO's description of the issue in the filing.

11. The IMM states that its proposed alternative resolution reflects reference levels that would have been permissible for the IMM to use under Module D of the Tariff. The IMM claims that its proposed alternative resolution would revise the mitigation by applying a fuel price-adjusted, bid-based reference level. The IMM asserts that this method does not require a cost survey or timely consultation from the market participant.

12. The IMM argues that its proposed alternative resolution can be justified on the basis that the Tariff calls for reference levels to be fuel-price adjusted. The IMM explains that, because the mitigated units had no cost data in the IMM system, the IMM had no fuel type in its system, which resulted in the unit's reference levels not being fuel-price adjusted. However, the IMM notes that MISO had other data indicating units' fuel types that the IMM arguably could have accessed in order to adjust the units' reference levels.

13. The IMM states that its proposed alternative resolution results in a revised payment that is approximately \$114,000 lower than the value in the MISO resolution. The IMM acknowledges that this alternative resolution causes Wolverine to not fully recover its production cost; however, the IMM asserts that the alternative resolution would comply with the Tariff.

B. Answers of MISO and Wolverine

14. MISO argues that the IMM's protest is an attack on MISO's ADR process and should be dismissed. MISO notes that the Commission has recognized the value of ADR

⁸ Mr. Anderson's affidavit supporting MISO's resolution of the Wolverine dispute is included in Attachment 1 of MISO's waiver request.

processes and has stated that it is desirable and appropriate, if otherwise consistent with the public interest, for the Commission to adhere to the results of the process.⁹ Further, MISO notes that the Commission has stated that, while it must obviously reserve authority to ensure that decisions reached through ADR process are not contrary to the public interest or inconsistent with statutory requirements, it must, within those broad parameters, give substantial deference to whatever consensus participants reach through the ADR process.¹⁰ MISO asserts that the IMM fails to assert that the waiver or resulting relief provided to Wolverine is contrary to the public interest; MISO notes that the IMM instead expresses concern that the outcome of the Wolverine dispute could merely establish a bad precedent.

15. MISO also asserts that the IMM's concerns regarding the precedential value of the resolution in this instance are unfounded. MISO notes that the informal ADR process evaluates each request for ADR on its unique set of facts and circumstances. MISO explains that the unique facts and circumstances in this instance include multiple communications between Wolverine and the IMM regarding fuel costs and Reference Levels.¹¹ MISO explains that MISO and Wolverine reached a consensus based upon these unique circumstances of the dispute, and that it is equitable and in the public interest to allow a Market Participant to recover its costs when committed and dispatched by MISO. Further, MISO notes that this approach was also presented to the parties that intervened in the ADR dispute, and that those parties did not object to the relief MISO decided to grant. MISO argues that to disallow its requested waiver in favor of the IMM's recommendation would undermine the ADR process and result in Wolverine's failure to recover its production cost for actions taken at MISO's direction.

16. Finally, MISO argues that the IMM does not categorically rebut the concept that "but for" Wolverine's failure to upload data on January 31, 2014, the IMM would have used such data to set the Reference Level. MISO argues that, instead, the IMM predicates its proposal of an alternative approach on what it believes is the lack of any "record of the cost data" that Wolverine tried to upload on January 31, 2014. MISO asserts that it has identified and relied on sufficient evidence of Wolverine's attempt to upload such data.

17. Wolverine states that it strongly supports the resolution of the ADR process it has completed with MISO, and Wolverine urges the Commission to approve MISO's waiver request so that the MISO ADR remedy may be implemented and Wolverine made whole

⁹ MISO Answer at 5 (citing *inter alia*, *Policy Statement Regarding Regional Transmission Groups*, FERC Stats. & Regs. ¶ 30,976, at 30,877 (1993)).

¹⁰ *Id.* (citing *Alternative Dispute Resolution*, Order No. 578, FERC Stats. & Regs. ¶ 31,018, at 31,326 (1995)).

¹¹ *Id.* at 6.

under the unique circumstances of the case. Wolverine argues that the MISO ADR process resulted in an equitable resolution of Wolverine's issue. Wolverine states that the MISO ADR Committee received Wolverine's dispute pursuant to the process set forth in MISO's ADR Business Practice Manual and that the MISO ADR Committee reviewed the ADR process and the involvement of MISO, Wolverine, the IMM, and other participants.

18. Wolverine argues that there is no basis or precedent for the Commission to substitute the IMM's unilateral judgment of its preferred resolution for the best solution according to MISO's ADR process. Wolverine notes that the Commission has determined that alternate dispute resolution processes such as those outlined in the MISO Tariff and the ADR Business Practice Manual should be performed by regional transmission organizations, such as MISO, as part of their independent industry oversight function and to avoid parties from imposing undue burdens on the Commission's resources.¹² Wolverine argues that the Reference Level agreed to in the ADR process should therefore not be revised to mitigate Wolverine after the ADR process has concluded. Wolverine asserts, *inter alia*, that, if the IMM's recommended alternative option is granted, Wolverine will not be able to recover its production costs, resulting in an unduly harsh penalty for running its unit during challenging operational conditions.

19. Further, Wolverine argues that granting MISO's waiver is appropriate in this unique circumstance. It asserts that it acted in good faith under the challenges presented by the Polar Vortex event to submit accurate unit cost information to the IMM in an open and transparent manner. Wolverine explains that historically, it provided its unit cost information to the IMM via e-mail. Wolverine notes that it attempted to provide the information on its cost-based Reference Level for Gaylord to the IMM prior to the dates in question through the IMM's OCS website. Wolverine explains that the OCS website recently was updated to be more transparent and user-friendly, and Wolverine has adopted internal procedures to verify that cost information is successfully uploaded into the IMM's OCS website going forward.

20. Finally, Wolverine asserts that the waiver requested by MISO is limited in scope and does not establish precedent on the applicability of the MISO ADR process to general mistakes and omissions. Wolverine argues that its unsuccessful information upload should not be considered a mistake fatal to its ability to recover its costs for running Gaylord. It reiterates that granting MISO's waiver request will allow for the Reference Level for Gaylord to be set at the Reference Level it would have had based upon the information Wolverine attempted to provide the IMM. Further, Wolverine

¹² Wolverine Reply Comments at 4 (citing *Regional Transmission Organizations*, Order No. 2000, FERC Stats. & Regs. ¶ 31,089, at 31,027 (1999), *order on reh'g*, Order No. 2000-A, FERC Stats. & Regs. ¶ 31,092 (2000), *aff'd sub nom. Pub. Util. Dist. No. 1 of Snohomish County, Washington v. FERC*, 272 F.3d 607 (D.C. Cir. 2001)).

argues that granting MISO's waiver request will not harm any third parties, noting that the only potential harm that the IMM asserts in its comments is the establishment of bad precedent. Wolverine states there is no precedential value to the informal ADR process that can be applied to future MISO ADR cases, because they are each reviewed on the merits of their unique facts.

III. Discussion

A. Procedural Matters

21. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2014), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

22. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2014), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept MISO and Wolverine's answers because they have provided information that assisted us in our decision-making process.

B. Substantive Matters

23. For good cause shown, we will grant MISO's request for waiver. The Commission has granted limited waivers of tariff provisions where: (1) the underlying error was made in good faith; (2) the waiver is of a limited scope; (3) a concrete problem needs to be remedied; and (4) the waiver will not have undesirable consequences, such as harming third parties.¹³ We agree with MISO and Wolverine that MISO's waiver request satisfies the four criteria for granting a tariff waiver. First, Wolverine acted in good faith by attempting to upload its cost data into the IMM's OCS website, and MISO has acted in good faith to implement the resolution vetted through its ADR process and to resolve the Wolverine dispute. Second, the requested waiver is a one-time waiver that is limited in duration and scope, as the waiver applies to specific operating days and Wolverine has taken actions to prevent the problem from reoccurring. Given the limited nature of the waiver and the unique circumstances surrounding it, we disagree with the IMM that granting the waiver will establish a bad precedent on the applicability of the MISO ADR process. Third, the requested waiver is needed to remedy a concrete problem, as the waiver facilitates the establishment of Wolverine's Reference Level and the amount of make-whole payments due to Wolverine consistent with MISO's Tariff. Finally, the waiver does not have undesirable consequences, such as harming third parties, as demonstrated by the facts that: (1) but for the unsuccessful uploading of data, customers would have borne the costs at issue in this proceeding consistent with MISO's Tariff; and

¹³ *E.g., PJM Interconnection, L.L.C.*, 146 FERC ¶ 61,033 (2014) (citations omitted); *ISO New England, Inc.*, 117 FERC ¶ 61,171 at P 21 (citations omitted).

(2) none of the parties that are directly affected and were involved in the ADR process challenged MISO's resolution in the ADR proceeding or protested MISO's filing in this docket.¹⁴

24. We appreciate the IMM's concern and efforts to address what we find herein to be a unique situation. We encourage the parties to continue to review and evaluate procedures both within and outside of MISO's Tariff to ensure that this situation is not repeated.

The Commission orders:

MISO's request for waiver is hereby granted, effective May 22, 2015, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

¹⁴ Additionally, the Commission declines to accept the IMM's proposed alternative resolution. The IMM does not provide a sufficient description of the method to be used in its proposal. For example, the IMM does not derive the fuel price-adjusted, bid-based reference level to be used. Thus, the alternative is not supported.