

153 FERC ¶ 61,371
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Midcontinent Independent System Operator, Inc.

Docket No. ER16-197-000

ORDER ACCEPTING REVISIONS TO FORMULA RATES, SUBJECT TO
CONDITION

(Issued December 30, 2015)

1. On October 30, 2015, Midcontinent Independent System Operator, Inc. (MISO), in its role as administrator of the MISO Open Access Transmission, Energy and Operating Reserve Markets Tariff (Tariff), submitted proposed revisions to the formula rates for certain MISO Transmission Owners (the Certain TOs, and together with MISO, Filing Parties)¹ included in Attachment O of the Tariff. These revisions are proposed in order to comply with section 1.167(l)-1(h)(6)(ii) of the United States Internal Revenue Service (IRS) regulations.²
2. As discussed below, we accept the proposed revisions to the company-specific Attachment O of the Certain TOs, subject to condition. These revisions will be effective on January 1, 2016, as requested.

¹ The Certain TOs for this filing consist of: Ameren Services Company (Ameren), as agent for Ameren Illinois Company d/b/a Ameren Illinois (Ameren Illinois) and Ameren Transmission Company of Illinois (Ameren Transmission); Minnesota Power (and its subsidiary Superior Water, L&P) (collectively, Minnesota Power); Montana-Dakota Utilities Co. (Montana-Dakota); Northern Indiana Public Service Company (NIPSCO); Northern States Power Company, a Minnesota corporation, and Northern States Power Company, a Wisconsin corporation, subsidiaries of Xcel Energy Inc. (collectively, NSP Companies); Otter Tail Power Company (Otter Tail); and Southern Indiana Gas & Electric Company (d/b/a Vectren Energy Delivery of Indiana) (Vectren).

² Treas. Reg. § 1.167(l)-1(h)(6)(ii).

I. Background

3. The Certain TOs use the formula rates set forth in their company-specific Attachments O to calculate their transmission revenue requirements for Commission-jurisdictional services. Each of the Certain TOs employs a forward-looking Attachment O, whereby it inputs a projection for its revenue requirement under its formula rate each year. The projection is then subject to a true-up each year based on actual costs when actual data becomes available.

4. In order to comply with IRS regulations, the Filing Parties propose Tariff revisions to modify the calculation of average Accumulated Deferred Income Tax (ADIT) balances. The IRS procedure for determining the amount of the reserve for deferred taxes to be excluded from rate base is set forth in section 1.167(l)-1(h)(6)(ii) of the IRS regulations.³ The IRS requires, for a utility that solely utilizes a future period (projected test year) to determine depreciation, that “the amount of the reserve account for the period is the amount of the reserve at the beginning of the period and a pro rata portion of the amount of any projected increase to be credited or decrease to be charged to the account during such period.”⁴ The pro rata amount of any increase or decrease during the future portion of the period is determined by multiplying the increase or decrease by a fraction, the numerator of which is the number of days remaining in the period at the time the increase is to accrue, and the denominator of which is the total number of days in the future portion of the period.⁵ According to the Filing Parties, if the IRS were to rule that the Certain TOs were out of compliance with section 1.167(l)-1(h)(6)(ii), they would be ineligible to claim accelerated depreciation, which could result, initially, in a rate increase for customers.

5. The IRS has issued a series of Private Letter Rulings addressing how these provisions apply to utilities that use a projected test year. In the Private Letter Rulings, the IRS has found that utilities utilizing a projected test year, in order to claim accelerated depreciation for utility plant in their income tax filings, must use the formula provided in

³ *Id.*

⁴ *Id.*

⁵ *Id.*

section 1.167(l)-1(h)(6)(ii) of the IRS's regulations to calculate the amount of deferred taxes subject to exclusion from the rate base.⁶

6. To comply with the IRS regulation, Filing Parties propose for each of the Certain TOs to revise Note F of its company-specific Attachment O to provide that the calculation of ADIT in the annual projection will be performed in accordance with section 1.167(l)-1(h)(6)(ii) of the IRS's regulations. In addition, the proposed revised Note F also requires the posting of work papers supporting the ADIT calculations with each Annual True-Up and/or projected revenue requirement and the inclusion of the work papers in their annual Informational Filing submitted to the Commission.

7. For three of the Certain TOs, Ameren Illinois, Ameren Transmission, and NSP Companies, Filing Parties also propose that they comply with the IRS regulation by not only providing the calculation of ADIT in accordance with section 1.167(l)-1(h)(6)(ii) of the IRS's regulations in the annual projection, but also in the true-up calculation performed at the end of the year.

II. Notice of Filing and Responsive Pleadings

8. Notice of the filing was published in the *Federal Register*, 80 Fed. Reg. 68,528 (2015), with interventions and protests due on or before November 20, 2015.

9. Timely motions to intervene were filed by American Municipal Power Inc., NRG Power Marketing LLC and GenOn Energy Management, LLC. Southwestern Electric Cooperative, Inc. (Southwestern) filed a timely motion to intervene and protest. Answers to the protests were filed by Ameren and the Certain TOs. Southwestern filed an answer to the answer of Ameren.

A. Southwestern Protest

10. Southwestern's protest focuses on two areas: (1) the proposed revisions to Attachment O submitted, and (2) general issues related to the Attachment O rate formula.

11. With regard to the proposed Attachment O revisions, Southwestern states that the use of the two referenced Private Letter Rulings for the basis of the proposed revisions is improper. According to Southwestern, a Private Letter Ruling is not an IRS regulation, nor is it precedent applicable to all entities. Rather, a Private Letter Ruling is entity

⁶ See I.R.S. P.L.R. 14324114 (Jul. 6, 2015), <https://www.irs.gov/pub/irs-wd/201541010.pdf>; I.R.S. P.L.R. 14012014 (Apr. 14, 2015), <https://www.irs.gov/pub/irs-wd/201531010.pdf>.

specific. Southwestern questions whether the Private Letter Rulings apply to the Certain TOs.

12. Southwestern objects to the proposed provision in Note F to Attachment O directing the Certain TOs to perform calculations outside their Attachment O rate formula through “ADIT worksheets.”⁷ Southwestern argues that the calculations described in Note F should be incorporated into the Attachment O rate formula itself, as then Attachment O would contain all of the necessary detail to explain how the inputs were determined.

13. In addition to addressing Note F, Southwestern addresses various other components of the formula rate using Ameren Illinois’s formula rate for an example. Southwestern argues that revisions to a single component of a previously-approved formula rate should result in the opening of the entire rate for scrutiny – not only those components revised by the utility but any other inter-related components affected by the proposed change.⁸

14. Southwestern states that the inclusion of ADIT Account No. 190 is inappropriate in the rate base. Southwestern argues that ADIT Account No. 190 amounts are purely book entries that involve no investment, and they allow a utility to earn a return and associated income taxes on amounts that do not represent an actual investment on the part of the utility.⁹

15. In addition, Southwestern believes that Attachment O fails to exclude customer-funded accounts from the rate base.¹⁰ These accounts would include: (1) Injury & Damages Reserves, (2) Account 242 Balance, (3) Accumulated Provision for Pensions and Benefits, (4) Customer Advance for Construction, and (5) Customer Deposits. Southwest argues that all such accounts should be excluded from rate base as the accounts are funded by current rates and transmission customers.

16. Southwestern contends that the calculation of the rate base in Attachment O fails to properly account for plant retirements. Southwestern claims that a defect in the

⁷ Motion to Intervene and Protest of the Southwestern Electric Cooperative, Inc. (Southwestern Protest) at 6-8.

⁸ *Id.* at 8-9.

⁹ *Id.* at 10-13.

¹⁰ *Id.* at 13-15.

Attachment O rate formula results in a zero net effect on rate base when a plant retires.¹¹ According to Southwestern, when plant in service is reduced due to a retirement, then Commission guidelines require that Accumulated Depreciation be reduced by the same amount, resulting in no effect on rate base. Southwestern contends that the Commission should require utilities using formula rates to justify further cost recovery of large facilities after they are retired prematurely.

17. Southwestern additionally claims that other portions of MISO's Attachment O formula rate need to be reconsidered,¹² and the formula rate itself, relating to costs and expenses recovered (i.e. General & Intangible Plant and Administration & General Expenses), should be investigated to assure that the resulting rates are just and reasonable. Additionally, Southwestern argues that Attachment O fails to exclude Corporate Income Taxes and Debt Expenses; and uses an improper Wage and Salaries Allocation Factor and Capital Structure.

18. Southwestern requests that the Commission: (1) direct MISO to revise the Attachment O to include the revised calculation of ADIT, and (2) set the remaining issues for hearing and settlement judge procedures.

B. The Certain TOs Answer

19. The Certain TOs assert that many of the issues raised by Southwestern are not relevant to the filing and are therefore beyond the scope of this proceeding. In particular, the Certain TOs object to Southwestern raising numerous issues with respect to the company-specific Attachment O for Ameren Illinois. The Certain TOs view these arguments by Southwestern as not relevant to the filing, which proposed only discrete revisions to the formula rate for the Certain TOs to ensure compliance with IRS regulations.

20. Further, the Certain TOs claim that this is not the proceeding for Southwestern to bring a Federal Power Act (FPA) section 206 complaint against Ameren Illinois to challenge various components of its formula rate. According to the Certain TOs, the Commission will not consider a protest filed pursuant to FPA section 205 as a complaint filed pursuant to FPA section 206.¹³ These two sections of the FPA are different, they

¹¹ *Id.* at 16.

¹² *Id.* at 17-22.

¹³ Answer of the Certain MISO Transmission Owners (Certain TOs Answer) at 4-5.

allege, so mixing these two sorts of proceedings would be needlessly complex. Further, Southwestern's pleading fails to meet the regulatory requirements for filing complaints.¹⁴

21. Regarding ADIT, the Certain TOs believe Southwestern is incorrect that the Private Letter Rulings cited in the filing are irrelevant because they do not apply to the Certain TOs. The Certain TOs explain that the IRS regulations themselves at section 1.167(l)-1(h)(6)(i) dictate that "a taxpayer does not use a normalization method of regulated accounting if, for ratemaking purposes, the amount of the reserve for deferred taxes" that the utility excludes from rate base "exceeds the amount of such reserve for deferred taxes for the period used in determining the taxpayer's expense in computing cost of service in such ratemaking."¹⁵ The IRS regulation further provides that if a utility uses a projected test year to determine depreciation, "the amount of the reserve account for the period is the amount of the reserve at the beginning of the period and a pro rata portion of the amount of any projected increase to be credited or decrease to be charged to the account during such period."¹⁶

22. The Certain TOs also contend that contrary to Southwestern, the applicable IRS regulation relates to ADIT Account No. 190, and not merely Account Nos. 282, 281, and 283. According to the Certain TOs, the IRS regulations do not reference any account numbers whatsoever. The regulations simply refer to the "reserve for deferred taxes under section 167(l)."¹⁷ Thus, if all or any portion of the balance in any of the four accounts constitutes a portion of the "reserve for deferred taxes under section 167(l)," then the amount must be included in calculating the limitation imposed by the regulation section. The Certain TOs state that the proper accounting for deferred taxes related to accelerated tax depreciation includes Account No. 190 when the company is in a net operating loss as a result of taking accelerated depreciation deductions.

23. Further, the Certain TOs claim that the supporting documentation required by the revisions fully satisfy Commission policy. The Certain TOs have already offered to post the work papers supporting the ADIT calculations with each annual true-up and/or projected revenue requirement and include the work papers in their annual Informational Filing submitted to the Commission.¹⁸ They argue that other parts of the Attachment O

¹⁴ *Id.* at 5.

¹⁵ *Id.* at 6.

¹⁶ *Id.*

¹⁷ *Id.* at 7.

¹⁸ *Id.* at 8.

formula rate likewise use numbers that are not pulled directly from the FERC Form No. 1. For example, the formula rate protocols for the general Attachment O state that “[t]he Annual Update for the Rate Year shall . . . [p]rovide the formula rate calculations and all inputs thereto, as well as supporting documentation and workpapers for data that are used in the formula rate that are not otherwise available in the Applicable Form.”¹⁹ Nearly identical language is found in the company-specific Attachment O for NSP Companies, Otter Tail, Ameren Transmission, and Ameren Illinois, among others.²⁰ Moreover, they state, other examples of numbers used in Attachment O that are based upon calculations in a work paper, as opposed to being reflected in the FERC Form No. 1, include: (a) Material and Supplies; (b) Prepayments (split between gas and electric); (c) Land Held For Future Use; and (d) Transmission related Regulatory Commission expense.²¹ Nevertheless, the Certain TOs offer to include, in a compliance filing, work papers in Attachment O, if the Commission requests.²²

C. Ameren Answer

24. Ameren contends that Southwestern’s protest raises issues that are almost entirely unrelated to the proposed revisions, and are beyond the scope of this proceeding. Additionally, Ameren argues, Southwestern’s complaints should be brought pursuant to FPA section 206, so that Southwestern is subject to the appropriate burden of proof.²³

25. According to Ameren, the IRS regulations concern more than normalization of ADIT. The heading of the IRS regulations at issue is entitled, “Exclusion of normalization reserve from rate base,” which clearly implicates ratemaking in its reference to “rate base.” The text of the regulation also establishes a limitation on the ADIT balance that a taxpayer can use to reduce rate base, and the text contains the

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 8-9.

²² *Id.*

²³ Motion for Leave to Answer and Answer of Ameren Services Company on behalf of Ameren Illinois Company and Ameren Transmission Company of Illinois (Ameren Answer) at 5.

phrases “for ratemaking purposes” and “in such ratemaking.”²⁴ Ameren thus argues that the limit on the ADIT balances described is patently a ratemaking limitation.

26. Ameren also observes that the series of Private Letter Rulings on this topic have similar legal analysis and conclusions, and apply to utilities using the same ratemaking that Certain TOs use, which highlights the need for the Certain TOs’ to revise their company-specific Attachment O to explicitly comply with that IRS regulation.

27. According to Ameren, Account No. 190 contains two types of future tax benefits. The first is the tax benefit that has been provided to ratepayers, but has not yet been recovered from the government. With respect to this type of tax benefit, the utility is, in fact, out of pocket because it has “fronted” the tax benefit to the ratepayer and thus deserves to earn a return on that amount until the utility recovers the amount from the government. The second type of future tax benefit is that of a net operating loss carryforward. This amount is inextricably linked to the deferred tax credit accounts, Nos. 281, 282, and 283. Where a favorable timing difference exists, the tax benefit is recorded in those accounts. Ameren states that this recordation presumes that the relevant tax deductions reduced the utility’s tax liability, thereby producing cost-free capital. However, where there is a net operating loss carryforward, not all of the deductions actually reduced the utility’s tax liability. They will in the future, but have not yet done so due to a shortage of taxable income to offset. The tax benefits of the deductions that failed to reduce taxes are reflected in Account No. 190. Where this is the case, Account Nos. 281, 282, and 283 overstate the quantity of cost-free capital possessed by the utility. It is only by also considering Account No. 190 that the proper level of cost-free capital can be derived.²⁵

28. In response to Southwestern’s concerns, Ameren attaches an illustrative work paper showing the actual proration calculation for the projected 2016 amounts for Account No. 282, as Exhibit No. 1. Also attached, as Exhibit No. 2 to Ameren’s Answer, is the “true-up proration example,” showing how Ameren expects the true-up proration calculation to work, once Ameren has 2016 actual amounts for that calculation. Ameren states that these work papers are specific to Ameren Illinois’ and Ameren Transmission’s Attachment O and are not intended to represent how any other MISO Transmission Owner would perform the proration calculations or true-up proration calculations. If the Commission so directs, Ameren would file such work papers with the Commission in a future compliance filing.

²⁴ *Id.* at 6.

²⁵ *Id.* at 8-9.

29. Ameren asserts that Southwestern's alternative proposal, that the Commission should require Ameren Illinois to exclude amounts from Account No. 190 that are unrelated to transmission service, should be rejected as a collateral attack on Attachment O. Ameren states that Ameren Illinois' Attachment O, like the Attachment Os of the other MISO transmission owners, employs a transmission plant allocator to functionalize particular costs to transmission. Ameren Illinois utilizes the transmission plant allocator to determine the amount of the total account that is attributable to transmission. As such, Southwestern's argument that Ameren Illinois should conduct a line-by-line review of specific entries to determine if they pertain to transmission service, as opposed to employing the transmission plant allocator, is contrary to the accepted methodology set forth in Attachment O.

30. Ameren asserts that the bulk of the Southwestern Protest is outside the scope of this narrow proceeding, which concerns the Certain TOs' limited revisions to Attachment O to modify the manner by which they calculate average ADIT balances. Ameren claims that arguments pertaining to Injury and Damages Reserves, the Account No. 242 Balance, Accumulated Provision for Pensions and Benefits, Customer Advances for Construction, and Customer Deposits have no bearing on Attachment O because these reserves and accounts are not used or referenced in Attachment O. Ameren states that Southwestern's attempt to insert these issues into this proceeding should be rejected.

31. Ameren further contends that many of Southwestern's issues should not be raised here, but in a proceeding to challenge the annual update to the formula rate, such as the ongoing proceedings in Docket No. ER15-1300. Specifically, Ameren contends that the projected transmission revenue requirement of Ameren Illinois for calendar year 2015 is unrelated to this proceeding, but is before the Commission in Docket No. ER15-1300-000. According to Ameren, the correct venue for Southwestern to challenge projected cost data for calendar year 2015 would have been in a challenge before the Commission in the relevant time period. Having failed to raise the issue in an appropriate proceeding, Southwestern should not be permitted to create for itself a second chance in this proceeding.

32. Finally, because Ameren is concerned about the nature of the claims made in the Southwestern Protest, Ameren asks that the Commission award it attorneys' fees for abuse of process.²⁶

²⁶ *Id.* at 16.

D. Southwestern Answer

33. Southwestern observes that it is not opposed to the conceptual revisions proposed by the Certain TOs. Southwestern claims that, since the Commission approved the Certain TOs' Attachment O formula rates in 2003, the rate formulas on file with the Commission have grown considerably, with many more calculations made outside the four corners of the formula. While agreeing with Ameren that several other inputs into the Attachment O formula rate are not specifically tied to values reported in the FERC Form No. 1, Southwestern is nevertheless "displeased" that few inputs are specifically tied to FERC Form No. 1 values.²⁷

III. Discussion**A. Procedural Matters**

34. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2015), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

35. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2015), prohibits an answer to a protest or answer unless otherwise ordered by the decisional authority. We will accept the answers filed by the Certain TOs, Ameren, and Southwestern because they have provided information that assisted us in our decision-making process.

B. Substantive Matters

36. We accept the proposed revisions to the company-specific Attachments O of the Certain TOs, subject to condition, as discussed below.²⁸ We find that these proposed revisions are reasonable to comply with IRS regulations.

37. Specifically, we accept the proposed revisions to Note F to apply the IRS regulations to the annual projected ADIT amounts for Minnesota Power, Montana-

²⁷ Motion for Leave to Answer and Answer of Southwestern Electric Cooperative, Inc. (Southwestern Answer) at 7-8.

²⁸ The Commission can revise a proposal filed under section 205 of the FPA as long as the filing utility accepts the change. *See City of Winnfield v. FERC*, 744 F.2d 871, 875-77 (D.C. Cir. 1984). A utility is free to indicate that it is unwilling to accede to the Commission's conditions in this order by withdrawing its filing.

Dakota, NIPSCO, Otter Tail, and Vectren. However, we direct Filing Parties to revise the proposed Note F for Ameren Illinois, Ameren Transmission and NSP Companies to remove the application of the IRS regulations to the annual true-up ADIT amounts, so that the Note F will only apply to the annual projected ADIT amounts.

38. With respect to the proposed true-up procedures of Ameren Illinois, Ameren Transmission, and NSP Companies, the Filing Parties have not justified these proposed revisions as just and reasonable. In particular, the guidance in the Private Letter Rulings does not require any changes in calculating the true-up amounts, and the filing does not contain any rationale as to why those proposed revisions are needed for the annual true-up. Therefore, we direct Filing Parties, in a compliance filing due within 30 days of the date of this order, to revise the proposed Tariff changes to remove reference to the use of an IRS calculation for the annual true-up, and to provide that annual true-up calculations will continue to use the average of the beginning-of-year and end-of-year balances for all ADIT accounts.

39. To ensure appropriate transparency in calculating formula rates, we direct Filing Parties, in a compliance filing due within 30 days of the date of this order, to include the ADIT worksheets within the company-specific Attachments O of each of the Certain TOs.

40. We disagree with Southwestern's objection that Private Letter Rulings issued by the IRS cannot be a basis for the proposed rate revisions. While Southwestern contends that a Private Letter Ruling is case-specific, applying only to the taxpayer who sought the ruling, and even though the Certain TOs have not received company-specific Private Letter Rulings from the IRS, we believe that the legal and policy rationale behind the Private Letter Rulings which have already been issued to other similarly situated utilities shows how the IRS interprets its regulations.

41. We find no merit to Southwestern's general and specific objections to other, unrelated, parts of the Attachment O formula rate. Southwestern's arguments are beyond the scope of the issues raised in this proceeding. We find nothing in the interaction between Note F and the other rate components that creates an unjust and unreasonable rate, and Southwestern has provided us with no basis for including these unchanged rate components in our review under section 205 of the FPA.²⁹ For some of its objections related to the inputs into the formula rate, Southwestern may have options pursuant to the annual update of the formula rate. In fact, Southwestern has already

²⁹ Southwestern Pub. Serv. Co, 152 FERC ¶ 61,126, at PP 11-14 (2015); 16 U.S.C. § 824d (2012).

requested data pursuant to that process to which Ameren has responded.³⁰ For those arguments that seek changes to the formula itself, or more broadly to Commission policy on formula rates, Southwestern can consider whether to file a complaint under section 206 of the FPA.³¹

42. Finally, Ameren's request for attorneys' fees is denied.

The Commission orders:

(A) The proposed revisions in each Attachment O specific to the Certain TOs are hereby accepted, to be effective as requested, on January 1, 2016, subject to condition, as discussed in the body of this order.

(B) Filing Parties are directed to submit a compliance filing within 30 days of the issuance of this order, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

³⁰ See Southwestern Protest at 11-14, 19-21.

³¹ 16 U.S.C. § 824e (2012).