

156 FERC ¶ 61,128
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. OA08-14-000

ORDER ON COMPLIANCE FILING

(Issued August 23, 2016)

1. On December 4, 2015, Midcontinent Independent System Operator, Inc. (MISO) submitted a compliance filing specifying how it identified non-offending customers and the method for distributing penalty revenue received to the identified non-offending customers to comply with the directives in the Commission's October 5, 2015 order concerning compliance with Order No. 890-A's requirement to propose a methodology for distributing revenues from operational penalties.¹ On April 18, 2016, as amended on April 22, 2016, MISO submitted its 2015 annual informational report regarding the penalty revenue MISO received and distributed for the reporting period from January 1, 2015 through December 31, 2015, including the reallocations for the period from January 1, 2015 through April 30, 2015 to comply with the October 2015 Order. In this order, we accept MISO's compliance filing, subject to condition, and direct MISO to file revised informational reports.

I. Background

2. In Order No. 890, with regard to operational penalties, the Commission required transmission providers to make a compliance filing proposing a mechanism to identify non-offending transmission customers and a method for distributing the unreserved use penalties revenue received to the identified transmission customers, as well as late study

¹ *Midcontinent Indep. Sys. Operator, Inc.*, 153 FERC ¶ 61,016 (2015) (October 2015 Order).

penalties to unaffiliated transmission customers.² Specifically, the Commission explained in Order No. 890-A that “each transmission provider must submit a one-time compliance filing under [Federal Power Act (FPA)] section 206 proposing the transmission provider’s methodology for distributing revenues from late study penalties and, if applicable, unreserved use penalties.”³ The Commission stated that the one-time compliance filing can be submitted at any time prior to the first distribution of operational penalties. The Commission also explained that transmission providers should request an effective date for this distribution mechanism as of the date of the filing and may begin implementing the methodology immediately, subject to refund if altered on Commission review. Finally, the Commission clarified that it requires “all operational penalty revenues to be distributed, with no exception.”⁴ The Commission further clarified that “[i]n the case of unreserved use penalties, we require penalty revenues to be distributed to non-offending customers, and in the case of late study penalties, we require penalty revenues to be distributed to all non-affiliates of the transmission provider.”⁵

3. Moreover, the Commission required each transmission provider to make an annual informational filing with the Commission, which provides information regarding the penalty revenue the transmission provider has received and distributed. Specifically, the Commission required each transmission provider to submit: (1) a summary of penalty revenue credits by transmission customer; (2) total penalty revenues collected from affiliates; (3) total penalty revenues collected from non-affiliates; (4) a description of the costs incurred as a result of the offending behavior; and (5) a summary of the portion of the unreserved penalty revenue retained by the transmission provider.⁶ The Commission

² *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241, at PP 859-861, 1351, *order on reh’g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh’g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh’g*, Order No. 890-C, 126 FERC ¶ 61,228, *order on clarification*, Order No. 890-D, 129 FERC ¶ 61,126 (2009). To the Commission’s knowledge, MISO has not imposed any late study penalties to date and therefore has yet to file a method for distributing late study penalties to unaffiliated transmission customers.

³ Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 at P 472.

⁴ *Id.*

⁵ *Id.* P 475.

⁶ *Id.* P 864.

explained in Order No. 890-A that the annual compliance report must be submitted on or before the deadline for submitting FERC Form No. 1, as established annually by the Commission's Office of Enforcement.⁷

4. On October 11, 2007, MISO made its filing in Docket No. OA08-14-000 to comply with the requirements of Order Nos. 890 and 890-A regarding distribution of operational penalties. MISO proposed its method for imposing certain operational penalties and distributing them through a reduction in charges pursuant to Schedule 10⁸ of the MISO Open Access Transmission, Energy and Operating Reserve Markets Tariff (Tariff). MISO explained that Schedule 10 does not utilize a distribution method that separates offending and non-offending transmission customers. MISO explained that in its experience, operational penalties are very rare, and that in the unusual event of such a case, it proposes to manually adjust the billing of offending customers to assure that an offending customer does not receive the benefits of the penalty revenues.⁹

5. In an order issued on May 15, 2008, the Commission accepted MISO's compliance filing, but determined that its compliance filing did not contain sufficient detail to satisfy the requirements of the one-time section 206 compliance filing required by Order No. 890-A.¹⁰ In the May 2008 Order, the Commission found, among other things, that the distribution of unreserved use penalties and the assessment of penalties for failure to respond to curtailment instructions through the reduction of Schedule 10 charges for non-offending customers is a reasonable distribution mechanism.¹¹ However, the Commission found that while MISO briefly described in its transmittal letter that it will manually adjust the billing of offending customers for unreserved use penalties, MISO did not specify how it will identify non-offending transmission customers and the

⁷ *Id.* P 472.

⁸ Schedule 10 (ISO Cost Recovery Adder) of MISO's Tariff provides for recovery of MISO's costs associated with investment and expenses to run MISO. The ISO Cost Recovery Adder is based on the budgeted expenses to be recovered that month divided by the MWh of transmission service expected to be provided under the Tariff during the same period subject to a true-up.

⁹ MISO October 11, 2007 Transmittal at 13-14.

¹⁰ *Midwest Indep. Transmission Sys. Operator, Inc.*, 123 FERC ¶ 61,154, at P 52 (2008) (May 2008 Order).

¹¹ *Id.*

method for distributing penalties revenue received to the identified non-offending transmission customers. In addition, the Commission stated that with regard to late study penalties, MISO did not propose a method to distribute these penalties.¹² As a result, the Commission directed MISO, prior to the first distribution of its operational penalties, to submit a one-time compliance filing under FPA section 206 providing the additional information required for unreserved use penalties and setting forth its methodology for distributing revenues from late study penalties.¹³ The Commission noted that Order Nos. 890 and 890-A do not require that MISO's penalty revenue distribution methodology be stated in its Tariff.¹⁴ As a result, the Commission directed MISO to file a more detailed methodology prior to the first distribution of operational penalties.¹⁵

6. On April 15, 2013, MISO submitted an informational report relating to operational penalties, stating that for 2010, 2011, and 2012, MISO did not receive any unreserved use penalty revenues, nor was it assessed any late study penalties. MISO's informational report was accepted, noting that future informational reports should be submitted in Docket No. OA08-14-000 and that the Commission will not act on or notice the informational filings.¹⁶

7. On April 15, 2014, as amended on April 21, 2014 and supplemented on April 28, 2014, MISO submitted its first annual informational report regarding the penalty revenue MISO received and distributed for the reporting period from January 1, 2013 through December 31, 2013 (2013 Reporting Period). On May 30, 2014, MISO submitted a filing to comply with the requirement to propose a methodology for distributing revenues from late study penalties and, if applicable, unreserved use penalties. MISO stated that due to an oversight, it did not submit a more detailed methodology prior to the first distribution of penalties (May 2014 Methodology Filing).

¹² *Id.*

¹³ *Id.* P 53.

¹⁴ *Cf. Florida Power & Light Co.*, 122 FERC ¶ 61,079, at P 25 (2008) (noting that Order Nos. 890 and 890-A do not require that the methodology pertaining to the annual informational filings be included in a transmission provider's tariff).

¹⁵ May 2008 Order, 123 FERC ¶ 61,154 at P 53.

¹⁶ *Midwest Indep. Transmission Sys. Operator, Inc.*, Docket No. OA13-4-000 (July 10, 2013) (delegated letter order).

8. On April 17, 2015, MISO submitted its second annual informational report in Docket No. OA08-14-000 regarding the penalty revenue MISO received and distributed for the reporting period from January 1, 2014 through December 31, 2014 (2014 Reporting Period). Also on April 17, 2015 in Docket No. ER15-1529-000 MISO submitted a compliance filing to revise its methodology for distributing revenues from assessed operational penalties that no longer relied on reducing certain administrative cost rates (i.e., Tariff Schedules 10, 23, and 35) (April 2015 Methodology Filing).

9. In the October 2015 Order, the Commission accepted MISO's May 2014 Methodology Filing and April 2015 Methodology Filing, subject to condition. However, the Commission found that MISO's May 2014 Methodology Filing failed to comply with the May 2008 Order because MISO distributed unreserved use penalties to both offending and non-offending customers by reducing certain administrative cost monthly rates of all Tariff customers and/or transmission owners.¹⁷ Thus, the Commission directed MISO to specify how it will identify non-offending customers and the method for distributing unreserved use penalty revenue received to the identified non-offending customers for the 2013 Reporting Period and 2014 Reporting Period, and for the period January 1, 2015 – April 30, 2015.¹⁸ Further, the Commission directed MISO, consistent with Order No. 890-A's determination that transmission providers' distribution of operational penalties are subject to refund should the Commission alter such operational penalty distribution method(s) upon review,¹⁹ to recalculate the unreserved use penalty revenue distribution for the 2013 Reporting Period and 2014 Reporting Period, and for the period January 1, 2015 – April 30, 2015 (2015 Partial Reporting Period).²⁰

10. Therefore, the Commission directed MISO to: (1) submit an additional compliance filing to specify how it will identify non-offending customers and the method for distributing penalty revenue received to the identified non-offending customers, for

¹⁷ October 2015 Order, 153 FERC ¶ 61,016 at P 31.

¹⁸ *Id.*

¹⁹ *See* Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 at P 472.

²⁰ October 2015 Order, 153 FERC ¶ 61,016 at P 31. MISO's April 2015 Methodology Filing, which no longer relied on reducing certain administrative cost adders of non-offending customers as the method of distributing unreserved use penalties, was accepted with an effective date of May 1, 2015 such that the new methodology would not apply to periods prior to that date, including the 2015 Partial Reporting Period (i.e., January 1, 2015 – April 30, 2015). *See id.* n.58.

the 2013 Reporting Period, the 2014 Reporting Period, and the 2015 Partial Reporting Period, consistent with the May 2008 Order; (2) recalculate the unreserved use penalty revenue distribution for the 2013 Reporting Period, the 2014 Reporting Period, and the 2015 Partial Reporting Period, and provide refunds of any excess revenues collected from non-offending customers, with interest, pursuant to section 35.19(a) of the Commission's regulations;²¹ and (3) submit revised informational reports for unreserved use penalties for the 2013 Reporting Period and the 2014 Reporting Period.²²

II. Procedural Matters

11. Notice of MISO's December 4, 2015 compliance filing was published in the *Federal Register*, 80 Fed. Reg. 76,971 (2015), with interventions and protests due on or before December 28, 2015. Entergy Services, Inc. and NRG Companies filed timely motions to intervene.

12. 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.

III. MISO's Filings

13. On December 4, 2015, MISO submitted a compliance filing specifying how it identified non-offending customers and the method for distributing penalty revenue received to the identified non-offending customers for the 2013 Reporting Period, the 2014 Reporting Period, and the 2015 Partial Reporting Period. MISO states that it identified for each month during the respective Reporting Period each Transmission Customer and/or Transmission Owner that paid unreserved use charges during that month and removed them from the list of entities receiving the penalty revenue distributed

²¹ 18 C.F.R. § 35.19(a) (2015).

²² October 2015 Order, 153 FERC ¶ 61,016 at P 32.

through offsets to charges under Schedules 10, 23,²³ and 35.²⁴ MISO states that this approach ensures that only Transmission Customers and/or Transmission Owners that did not pay unreserved use penalties during a given month in the respective Reporting Period are the ones that benefit from the unreserved use revenues collected during that month. MISO states that this approach is consistent with Order No. 890 and the directives of the October 2015 Order.²⁵

14. MISO also states that it submits new unreserved use reports for the 2013 Reporting Period and 2014 Reporting Period to reflect the reallocations for those periods. MISO states that it will submit the unreserved use report for the 2015 Partial Reporting Period in April 2016, reflecting the recalculated unreserved use penalty revenue distribution for the 2015 Partial Reporting Period, when it submits its annual informational report for 2015. With regard to the requirement in the October 2015 Order that MISO recalculate the unreserved use penalty revenue distribution and provide refunds to non-offending customers, with interest, MISO states:

[...] in performing the reallocations, [MISO] is not providing refunds of any excess revenues collected from non-offending customers. Indeed, because the unreserved use penalties were used to offset Schedule 10, 23, and 35 charges, there were no “excess revenues collected from non-offending customers” and MISO’s reallocation does not constitute a refund to those customers. Rather, MISO is merely reallocating to those non-offending customers revenues that they did not otherwise receive during the period from January 1, 2013 through April 30, 2015. Because MISO is not providing refunds of monies improperly collected, MISO has not included interest in the amounts reallocated to non-offending customers.^[26]

²³ Schedule 23 (Recovery of Schedule 10 and Schedule 17 Costs from Certain GFAs) of MISO’s Tariff provides for recovery of MISO’s costs associated with services provided to customers under Carved-Out Grandfathered Agreements (Carved-Out GFAs).

²⁴ Schedule 35 (High-Voltage Direct Current Agreement Cost Recovery Fee) of MISO’s Tariff provides for recovery of MISO’s costs associated with the administrative service provided by the MISO under any High-Voltage Direct Current agreement.

²⁵ MISO December 4, 2015 Transmittal at 3.

²⁶ *Id.* at n.8 (citing October 2015 Order, 153 FERC ¶ 61,016 at P 32).

15. On April 18, 2016, as amended on April 22, 2016, MISO submitted its 2015 annual informational report regarding the penalty revenue MISO received and distributed for the reporting period from January 1, 2015 through December 31, 2015, including the recalculated unreserved use penalty revenue distribution for the 2015 Partial Reporting Period.

IV. Discussion

16. We find that MISO's December 4, 2015 compliance filing partially complies with the October 2015 Order and, therefore, we accept MISO's December 4, 2015 compliance filing subject to condition.²⁷ We find that MISO's explanation of how it will identify non-offending customers and the method for distributing unreserved use penalty revenue received to the identified non-offending customers for the 2013 Reporting Period, the 2014 Reporting Period, and the 2015 Partial Reporting Period satisfies the one-time FPA section 206 compliance filing required by Order No. 890-A. However, we find that MISO fails to comply with the October 2015 Order because MISO did not include interest in the refunds of unreserved use penalties reallocated to non-offending customers for the 2013 Reporting Period, the 2014 Reporting Period, and the 2015 Partial Reporting Period, as discussed below.²⁸

17. As an initial matter, we note that MISO was afforded an opportunity to seek rehearing of the Commission's October 2015 Order if it disagreed with the Commission's directives concerning the requirement to include interest payments in the unreserved use penalty reallocated to non-offending customers, but MISO did not timely seek rehearing, and therefore, its arguments here constitute a late-filed rehearing request.²⁹

18. In any event, we disagree with MISO's assertion that there were no excess revenues collected from non-offending customers and, therefore, MISO's reallocation does not constitute a refund to those customers.³⁰ In the October 2015 Order, the

²⁷ The Commission can revise a proposal 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 filing utility is free to indicate that it is unwilling to accede to the Commission's conditions by withdrawing its filing.

²⁸ October 2015 Order, 153 FERC ¶ 61,016 at P 32.

²⁹ *See* 16 U.S.C. § 825k (2012); 18 C.F.R. § 358.713 (2015).

³⁰ MISO December 4, 2015 Transmittal at n.8 (citing October 2015 Order, 153 FERC ¶ 61,016 at P 32).

Commission accepted, subject to condition, MISO's 2014 Methodology Filing that applied to the 2013 Reporting Period, the 2014 Reporting Period, and the 2015 Partial Reporting Period.³¹ The 2014 Methodology Filing explained that MISO applies any unreserved use penalty revenues collected in a given month towards reducing the next month's Schedule 10, 23, and 35 rates that are charged to transmission customers.³² The Commission previously found that reducing certain administrative cost adders was an acceptable method of distributing unreserved use penalties,³³ but that MISO failed to comply with the May 2008 Order because MISO "distributed unreserved use penalties to both offending and non-offending customers by reducing certain administrative cost monthly rates of all tariff customers and/or transmission owners"³⁴ such that non-offending customers paid excess revenues in the form of higher monthly rates for certain administrative cost adders that would have been reduced further had MISO not also reduced such rates for offending customers. Therefore, we continue to find that non-offending customers paid revenues in excess of what was required due to the allocation of unreserved use penalties to offending customers when MISO calculated the reduction of certain administrative cost adders.

19. Accordingly, we find that MISO failed to include interest payments in the unreserved use penalty revenue reallocated to non-offending customers that was previously used to reduce certain administrative costs of offending customers contrary to the directives of Order No. 890-A that only non-offending customers receive penalty revenue.³⁵ Since MISO failed to comply with the directives of the October 2015 Order and Order No. 890-A, we direct MISO to (1) recalculate the unreserved use penalty revenue distribution for the 2013 Reporting Period, the 2014 Reporting Period, and the 2015 Partial Reporting Period, and include interest payments in the unreserved use penalty revenue reallocated to non-offending customers that was previously used to reduce certain administrative costs of offending customers and (2) submit revised informational reports for unreserved use penalties that include the interest payments for the 2013 Reporting Period, the 2014 Reporting Period, and the 2015 Partial Reporting Period within 30 days of the date of issuance of this order.

³¹ October 2015 Order, 153 FERC ¶ 61,016 at P 29.

³² *Id.* P 22.

³³ *Id.* P 30 (citing May 2008 Order, 123 FERC ¶ 61,154 at P 52).

³⁴ *Id.* P 31.

³⁵ Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 at P 475.

The Commission orders:

(A) MISO's December 4, 2015 compliance filing is hereby accepted, subject to condition, as discussed in the body of this order.

(B) MISO is directed to submit revised informational reports 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.