

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

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

Southern Illinois Power Cooperative

Docket No. EL06-31-002

v.

Midwest Independent Transmission System Operator, Inc.

ORDER DENYING REHEARING

(Issued September 6, 2016)

1. On August 2, 2006, the Commission issued an order denying rehearing of an earlier order requiring the Midwest Independent Transmission System Operator, Inc. (MISO)¹ to make refunds to parties to carved-out grandfathered agreements of Revenue Sufficiency Guarantee charges and Revenue Neutrality Uplift charges (if any) that MISO had assessed since April 1, 2005.² Of relevance here, in that order the Commission also denied a motion to intervene out-of-time filed by Hoosier Energy Rural Electric Cooperative, Inc. (Hoosier).³ On September 1, 2006, Hoosier filed for rehearing solely

¹ Effective April 26, 2013, MISO changed its name from “Midwest Independent Transmission System Operator, Inc.” to “Midcontinent Independent System Operator, Inc.”

² *Southern Illinois Power Cooperative v. Midwest Indep. Transmission Sys. Operator, Inc.*, 116 FERC ¶ 61,117 (2006) (August 2 Order) (denying rehearing of *Southern Illinois Power Cooperative v. Midwest Indep. Transmission Sys. Operator, Inc.*, 114 FERC ¶ 61,234 (2006) (March 2 Order)).

³ *Id.* P 8. The Commission also rejected an accompanying answer objecting to a MISO request for a technical conference. *Id.*; *see infra* note 13.

as to the Commission's denial of Hoosier's motion to intervene out-of-time.⁴ As explained below, the Commission denies rehearing.

Background

2. In moving to intervene out-of-time, i.e., subsequent to the issuance of the Commission's March 2 Order, Hoosier noted that it failed to intervene timely because the proceeding was instituted by a complaint by another party and, according to Hoosier, Hoosier's interest in the proceeding did not become clear until the Commission issued the March 2 Order providing for refunds to, among others, Hoosier.⁵

3. In the Commission's August 2 Order, in denying Hoosier's out-of-time intervention, the Commission explained that, when late intervention is sought after the issuance of a dispositive order, as was the case in this proceeding, the prejudice to other parties and burden upon the Commission of granting late intervention may be substantial, and thus movants bear a higher burden to demonstrate good cause for granting such late intervention.⁶ The Commission concluded that Hoosier had not met this higher burden of justifying its motion to intervene out-of-time and Hoosier's intervention was therefore denied.⁷

4. On rehearing, Hoosier emphasizes that it does not quarrel with the Commission's logic as a statement of general principle, but objects that the Commission did not justify why Hoosier's justification for its intervention out-of-time was inadequate to meet the "admittedly higher burden of demonstrating good cause" for out-of-time intervention.⁸

⁴ Hoosier does not seek rehearing of the Commission's rejection of its answer. Hoosier Request for Rehearing at 3 n.7.

⁵ Hoosier Motion to Intervene and Answer at 3.

⁶ August 2 Order, 116 FERC ¶ 61,117 at P 8 (citing, e.g., *Midwest Indep. Transmission Sys. Operator, Inc.*, 102 FERC ¶ 61,250, at P 7 (2003); *Florida Power & Light Co.*, 99 FERC ¶ 61,318, at 62,358 (2002); *Garnet Energy LLC*, 99 FERC ¶ 61,165, at 61,672 (2002); *Edison Mission Energy*, 96 FERC ¶ 61,032, at 61,082-83 (2001)).

⁷ *Id.*

⁸ Hoosier Request for Rehearing at 4.

Hoosier also notes that questions related to the quantification of refunds and interest remain outstanding, and its intervention is necessary to protect its interests.⁹

Discussion

5. We will deny rehearing. We find Hoosier's justification for awaiting the issuance of the March 2 Order before seeking intervention unpersuasive. As the Commission made clear in its original order in this proceeding, the complainant sought refunds of charges under carved-out grandfathered agreements,¹⁰ and Hoosier was similarly situated;¹¹ there was no reason why it should have expected that the Commission would,

⁹ *Id.* at 5. To the extent that Hoosier also claims a then-contemporaneous Ameren Services Company motion for an extension of time to make refunds warrants a grant of Hoosier's motion to intervene out-of-time here, this argument has been overtaken by intervening events, i.e., years of intervening litigation including litigation in another proceeding referenced below in which Hoosier has participated.

¹⁰ March 2 Order, 114 FERC ¶ 61,234 at PP 1, 6, 25.

¹¹ Hoosier concedes that it is a party to carved-out grandfathered agreements, and has paid the charges at issue here. Hoosier Motion to Intervene and Answer at 2-3.

On rehearing, Hoosier acknowledges that it "arguably might have sought to intervene based on its interest in the general subject matter of [the complainant's] complaint," but Hoosier nevertheless claims that its interests were not directly affected by the complaint. Hoosier Request for Rehearing at 3. We find this claim unpersuasive; Hoosier acknowledges that it is a party to carved-out grandfathered agreements and that it paid the charges at issue here, and thus Hoosier acknowledges that it was similarly-situated to the complainant, yet it chose to take no action. *See, e.g., Natural Gas Pipeline Co. of America*, 20 FERC ¶ 61,126, at 61,279 (1982) (lack of foresight does not constitute good cause for late intervention); *accord California Dept. of Water Resources*, 122 FERC ¶ 61,150, at P 13 & nn.20-21 (2008), *petition for review denied*, 572 F.3d 1003, 1014-26 (9th Cir. 2009); *Central Illinois Public Service Co.*, 59 FERC ¶ 61,219, at 61,754 & nn.36-38 (1992).

To this discussion, we add that Hoosier states both that it "supports [the Commission's] action" in the March 2 Order providing relief to all parties to carved-out grandfathered agreements, including Hoosier, and later that it "strongly supports the Commission's decision in [the March 2] Order." Hoosier Request for Rehearing at 3, 4. Hoosier's interests, therefore, seem directly aligned with the complainant's interests, further challenging Hoosier's claim that it had no direct interest in this proceeding until the issuance of the March 2 Order.

in this proceeding, order refunds only to the complainant and not to other similarly-situated entities such as Hoosier. Others recognized that they were similarly situated, and moved to intervene timely,¹² and we see no reason why Hoosier could not have done the same.¹³

The Commission orders:

Hoosier's request for rehearing is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

¹² March 2 Order, 114 FERC ¶ 61,234 at PP 12, 22.

¹³ In its accompanying answer to MISO's motion for a technical conference, Hoosier stated that it opposes the motion because MISO "is not in fact seeking a forum to explore technical implementation issues, but is rather seeking yet again to relitigate issues upon which the Commission's determinations have been clear for nearly two years." Hoosier Motion to Intervene and Answer at 3-4. This statement reinforces that Hoosier was well and long aware of the pendency of issues that were of interest to it, and likewise demonstrates that Hoosier's participation in litigation over these issues in another proceeding suffices to protect its interest. *See Midwest Indep. Transmission Sys. Operator, Inc.*, 115 FERC ¶ 61,108, at PP 135-36, *order on reh'g*, 117 FERC ¶ 61,113 (2006), *order denying reh'g*, 118 FERC ¶ 61,212 (2007), *appeal dismissed*, 606 F.App'x 586 (D.C. Cir. 2015); *see also Midwest*, 115 FERC ¶ 61,108 at P 9 & Appendix A (noting Hoosier's timely filing) and *Midwest*, 117 FERC ¶ 61,113 at P 6 & Appendix A (noting Hoosier's timely-filed request for rehearing); *accord* Hoosier Motion to Intervene and Answer at 2-3 & n.6 (noting its status as a party to carved-out grandfathered agreements, and citing to *Midwest*, 115 FERC ¶ 61,108 at PP 135-36).