

155 FERC ¶ 61,073
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Ameren Services Company
Northern Indiana Public Service Company

Docket No. EL07-86-012

v.

Midwest Independent Transmission System Operator,
Inc.

Great Lakes Utilities
Indiana Municipal Power Agency
Missouri Joint Municipal Electric Utility Commission
Missouri River Energy Services
Prairie Power, Inc.
Southern Minnesota Municipal Power Agency
Wisconsin Public Power Inc.

Docket No. EL07-88-012

v.

Midwest Independent Transmission System Operator,
Inc.

Wabash Valley Power Association, Inc.

Docket No. EL07-92-012

v.

Midwest Independent Transmission System Operator,
Inc.

ORDER DENYING REHEARING

(Issued April 21, 2016)

1. On June 2, 2010, the Commission issued an order¹ accepting in part and rejecting in part a compliance filing submitted by the Midwest Independent Transmission System Operator, Inc. (MISO) in response to the Commission's Order on Paper Hearing in this proceeding.² In this order, we deny rehearing of the Paper Hearing Compliance Order.

I. Background

2. In 2007, a number of companies (collectively, Complainants) filed complaints against MISO under section 206 of the Federal Power Act (FPA) and Rule 206 of the Commission's Rules of Practice and Procedure.³ These complaints concerned the allocation of real-time Revenue Sufficiency Guarantee charges to market participants under MISO's tariff.⁴ The Complainants alleged that the real-time Revenue Sufficiency Guarantee rate, which is based in part on virtual supply offers, is unjustly and unreasonably assessed on only a subset of market participants making both virtual supply offers and withdrawals of energy.⁵ The Complainants argued that there is no justification

¹ *Ameren Services Company v. Midwest Indep. Transmission Sys. Operator, Inc.*, 131 FERC ¶ 61,210 (2010) (Paper Hearing Compliance Order).

² *Ameren Services Company v. Midwest Indep. Transmission Sys. Operator, Inc.*, 125 FERC ¶ 61,161 (2008) (Order on Paper Hearing), *order on reh'g*, 127 FERC ¶ 61,121 (2009). Effective April 26, 2013, MISO changed its name from "Midwest Independent Transmission System Operator, Inc." to "Midcontinent Independent System Operator, Inc."

³ 16 U.S.C. § 824e (2012); 18 C.F.R. § 385.206 (2015). The Complainants are: Ameren Services Company and Northern Indiana Public Service Company; Great Lakes Utilities, Indiana Municipal Power Agency, Missouri Joint Municipal Electric Utility Commission, Missouri River Energy Services, Prairie Power, Inc., Southern Minnesota Municipal Power Agency, and Wisconsin Public Power Inc.; and Wabash Valley Power Association, Inc.

⁴ For additional background to this proceeding, *see Ameren Services Company v. Midwest Indep. Transmission Sys. Operator, Inc.*, 121 FERC ¶ 61,205, at PP 5-9 (2007) (Order on Revenue Sufficiency Guarantee Complaints), *order on reh'g*, 125 FERC ¶ 61,162 (2008).

⁵ The tariff provision that the Complainants challenged states that the real-time Revenue Sufficiency Guarantee charge is allocated to any market participant that "actually withdraws energy" on a given operating day. Complainants alleged that virtual supply offers and generator deviations cause Revenue Sufficiency Guarantee charges to

(continued...)

for differentiating among virtual supply offers with regard to Revenue Sufficiency Guarantee charge allocation and that the Commission's prior orders have found that there is no basis for doing so. The Complainants asked the Commission to set for hearing the issue of tariff revisions necessary to remedy this alleged discrimination.

3. In the Order on Revenue Sufficiency Guarantee Complaints, the Commission granted in part and denied in part the relief the Complainants requested.⁶ It found that MISO's existing Revenue Sufficiency Guarantee cost allocation methodology may not be just and reasonable, but that the methodologies the Complainants proposed also had not been shown to be just and reasonable. The Commission thus established a refund effective date of August 10, 2007 and set the complaints for paper hearing.

4. In the Order on Paper Hearing, which followed the paper hearing, the Commission found that the Complainants' proposed replacement cost allocation (Interim Rate), which eliminates the "actually withdraws energy" language from section 40.3.3 of the current MISO tariff, would provide the basis for a just and reasonable rate.⁷ The Commission also required that the term "cleared" should be inserted before "virtual offers" in this provision of the current tariff. The effects of the changes were to eliminate the distinction between market participants that conducted both physical and virtual trades, and those that conducted only virtual transactions, and to specify that only cleared virtual supply offers (and not all virtual supply offers) would be assessed Revenue Sufficiency Guarantee charges. The Commission required MISO to submit a compliance filing with revised tariff provisions that delete the "actually withdraws energy" language from the current tariff and inserts "cleared" before "virtual offers" in a compliance filing.⁸ MISO submitted this compliance filing on December 10, 2008.

5. In the Paper Hearing Compliance Order, the Commission accepted in part and rejected in part the December 10, 2008 compliance filing. The Commission accepted the proposed revisions to eliminate the phrase "actually withdraws energy" and to insert the term "cleared" before "virtual offers" in the Revenue Sufficiency Guarantee charge provision of the current tariff, finding these revisions to be in compliance with the

be incurred, but that the provision unjustly and unreasonably assigned such costs only to market participants making physical withdrawals of energy. Order on Paper Hearing, 125 FERC ¶ 61,161 at PP 12-13.

⁶ Order on Revenue Sufficiency Guarantee Complaints, 121 FERC ¶ 61,205.

⁷ Order on Paper Hearing, 125 FERC ¶ 61,161 at P 105.

⁸ *Id.* PP 105, 108, Ordering Paragraph (B).

requirements of the Order on Paper Hearing.⁹ The Commission rejected proposed revisions to address other aspects of the Revenue Sufficiency Guarantee charge and charge rate, as well as various arguments that the Commission erred in accepting the Interim Rate, finding that they are outside the scope of this proceeding.¹⁰ Finally, over protestors' arguments, the Commission indicated there was no need for additional reports and procedures on refunds, noting that MISO is holding stakeholder discussions on refunds and resettlement.¹¹

6. Timely requests for rehearing of the Paper Hearing Compliance Order were submitted by EPIC Merchant Energy, LP, SESCO Enterprises, LLC, CAM Energy Trading, LLC, JPTC, LLC, Jump Power, LLC, Solios Power, LLC and Energy Endeavors, LLC (collectively Financial Marketers), Tenaska Power Services Co. (Tenaska Power) and Westar Energy, Inc. (Westar). DC Energy Midwest, LLC (DC Energy) also filed a request for clarification.

II. Discussion

A. Requests for Rehearing and Clarification

7. Westar argues that the Commission erred in finding that the issue of resettlement is outside the scope of this proceeding. According to Westar, because the Commission required a resettlement in the Order on Paper Hearing and MISO proposed a resettlement – albeit on a different basis – in its December 10, 2008 compliance filing, the Commission should address the resettlement in order to correct the unreasonable and unauthorized resettlement that has already taken place.¹²

8. Westar contends that the Commission incorrectly assumed in the Paper Hearing Compliance Order that MISO recalculated the Revenue Sufficiency Guarantee charge so that any exempted amounts are taken out of the calculation of both the numerator and denominator of the charge.¹³ Based on MISO resettlement documents, Westar asserts that MISO proposed to remove several categories of deviations that MISO had recently

⁹ Paper Hearing Compliance Order, 131 FERC ¶ 61,210 at PP 22-23.

¹⁰ *Id.* P 23.

¹¹ *Id.* P 26.

¹² Westar Rehearing Request at 14.

¹³ *Id.* at 7 (citing Paper Hearing Compliance Order, 131 FERC ¶ 61,210 at P 7).

proposed for the first time should be exempt, and it proposed to remove them only from the denominator of the calculation but not to remove the associated costs from the numerator.¹⁴

9. Westar argues that the MISO resettlement, which is effective for the period between November 5, 2007 and November 9, 2008, is inconsistent with the Order on Paper Hearing and therefore should be rejected. Westar notes that MISO changed the calculation of Revenue Sufficiency Guarantee charges for this time period unilaterally, without filing new tariff sheets with the Commission and without receiving approval from the Commission of its proposal to resettle made in the December 10, 2008 compliance filing. Westar considers the MISO resettlement to be contrary to the tariff and cost causation.¹⁵

¹⁴ Westar notes that MISO identified the following categories of deviations as exempt from the Revenue Sufficiency Guarantee charge in a compliance filing it made on December 8, 2008 in Docket ER04-691:

- (i) Load Imbalance served via GFA Carve-out Schedules;
- (ii) Schedule changes from GFA Carve-Out Schedules and schedule changes associated with dynamically dispatchable schedules that follow [MISO] instructions;
- (iii) Under-generation setpoint deviation volumes from uninstructed deviation exempted units, including intermittent units and those serving GFA Carve-Out Schedules;
- (iv) Over-generation setpoint deviation volumes from uninstructed deviation exempted units including intermittent units and those serving GFA Carve-Out Schedules;
- (v) Derate Volumes from uninstructed deviation exempted units, including intermittent units and those serving GFA Carve-Out Schedules;
- (vi) Must-Run Volumes from uninstructed deviation exempted units, including intermittent units and those serving GFA Carve-Out Schedules; and
- (vii) Virtual Supply Offers of Market Participants that did not actually withdraw energy.

Westar Rehearing Request at 3-4 (citing MISO December 8, 2008 Compliance Filing at 7-8, Docket ER04-691-091).

¹⁵ Westar Rehearing Request at 6.

10. Tenaska Power argues that the Commission erred by failing to order MISO to pay refunds with interest.¹⁶ Tenaska Power contends that MISO should pay refunds with interest to the extent it has resettled and assessed Revenue Sufficiency Guarantee charges in excess of the Interim Rate. Tenaska Power explains that MISO, in its stakeholder discussions on resettlement, proposed to exclude exempted deviations from the denominator of the Revenue Sufficiency Guarantee charge, and that this resulted in a rate higher than the Interim Rate.¹⁷

11. Tenaska Power also argues that MISO should be required to propose changes to the tariff on file and have those changes accepted by the Commission. According to Tenaska Power, MISO proposes to implement its increase without filing any tariff revisions or receiving Commission authorization; as such, its proposal violates the filed rate doctrine and the Commission's policy that compliance filings do not become effective until accepted by the Commission. Tenaska Power faults the Paper Hearing Compliance Order for failing to address these violations.

12. Financial Marketers consider the MISO proposal in Docket No. ER04-691 to recalculate the Revenue Sufficiency Guarantee charge by removing exempted deviations to be unjust since it shifts substantial costs to Financial Marketers. Because the Paper Hearing Compliance Order found the December 10, 2008 compliance filing to be inadequate and the Commission failed to order refunds with interest, Financial Marketers argue that MISO should be required to issue refunds with interest for all Revenue Sufficiency Guarantee charges that have occurred due to the unlawful and unauthorized decision to exclude certain exempt deviations from the denominator.¹⁸

13. Westar points out that the statement in the Paper Hearing Compliance Order that MISO is holding stakeholder discussions on refunds and resettlement is not correct. Westar indicates MISO is not holding discussions and has already issued bills and collected payments.¹⁹ Financial Marketers agree that no stakeholder meetings took place regarding refunds for RSG payments.²⁰ Tenaska Power also agrees and contends the Commission did not engage in reasoned decision-making when it accepted MISO's

¹⁶ Tenaska Power Rehearing Request at 3.

¹⁷ *Id.* at 8.

¹⁸ Financial Marketers Rehearing Request at 14.

¹⁹ Westar Rehearing Request at 14.

²⁰ Financial Marketers Rehearing Request at 8.

misrepresentations and did not give due consideration to other parties' requests that MISO provide detailed refund reports or establish a Commission proceeding to resolve refund and billing disputes.²¹

14. While DC Energy agrees that MISO is not holding discussions, it believes that refunds should be addressed in the proceedings in which the Commission rules on MISO's proposed exemption of deviations. DC Energy requests prompt action on Revenue Sufficiency Guarantee charge-related issues, and notes that the Interim Rate is harming the market.

15. Financial Marketers contend that MISO began charging virtual transactions of market participants without actual withdrawals of energy while the December 10, 2008 compliance filing remained pending before the Commission, thus violating fundamental rate principles and protections.²²

16. Financial Marketers fault the Commission for not taking action to stop the unjust, unreasonable and unduly discriminatory Revenue Sufficiency Guarantee charges, which violate the Commission's directives in the Order on Paper Hearing. Financial Marketers cite to analysis undertaken in Docket No. ER09-411 as evidence for its claims that virtual supply offers have been overcharged.²³ Financial Marketers consider this harm irreparable because they will never be made whole for the high costs they are experiencing as a result of an illiquid market. According to Financial Marketers, in order to fulfill its obligations under section 205 of the FPA and to prevent further irreparable harm the Commission must take immediate action to replace the Interim Rate with a just and reasonable allocation of costs and to require refunds with interest to market participants that have been overcharged.²⁴

B. Commission Determination

17. In their requests for rehearing, Westar, Tenaska Power and Financial Marketers raise the same arguments regarding the MISO settlement process that DC Energy raised in the proceeding that resulted in the Paper Hearing Compliance Order.²⁵ We affirm the

²¹ Tenaska Rehearing Request at 3.

²² Financial Marketers Rehearing Request at 9.

²³ *Id.* at 10.

²⁴ Financial Marketers Rehearing Request at 13-14.

²⁵ Paper Hearing Compliance Order, 131 FERC ¶ 61,210 at PP 14-15.

finding in the Paper Hearing Compliance Order²⁶ that the issues of that order are strictly limited to the compliance requirements of the Order on Compliance Filing. The resettlement process undertaken by MISO, reflecting its interpretation of the MISO tariff with respect to exempted deviations, has been the subject of proceedings in Docket No. ER04-691.²⁷ Accordingly, refund issues associated with that resettlement must be addressed in that proceeding since the record on whether MISO has complied with its tariff and Commission rulings is in that proceeding.

18. Tenaska Power argues that the Commission erred in relying on MISO's statement that it would hold stakeholder discussions concerning refunds and resettlement, and therefore in finding that reports and procedures regarding refunds were not necessary. This proceeding is strictly limited to compliance with the Order on Paper Hearing, and so the only resettlement properly of concern here is the resettlement associated with the Commission's requirements in the Order on Paper Hearing that MISO eliminate the phrase "actually withdraws energy" and insert the term "cleared" before "virtual offers" in the Revenue Sufficiency Guarantee charge. MISO resettlements and customer billing discussions that encompass a wide variety of Revenue Sufficiency Guarantee Charge adjustments are beyond the scope of this proceeding. The absence of stakeholder discussions that the Commission anticipated in the Paper Hearing Compliance Order has no bearing on whether MISO complied with the Order on Paper Hearing. Both Tenaska Power and Westar thus make broader allegations regarding the refund rate that we cannot properly consider on the record before us. As a result, even if the Commission incorrectly assumed that the discussions in question would take place, the fact that this issue is beyond the scope of this proceeding means that the incorrect assumption would not represent a legal error that could justify a grant of rehearing. We therefore deny rehearing on this issue.

19. We disagree with Financial Marketers' conclusion that the Paper Hearing Compliance Order found the December 10, 2008 compliance filing to be inadequate.²⁸ The Commission accepted all the tariff revisions proposed in that compliance filing that were within the proper scope of the proceeding.²⁹ These findings do not represent a

²⁶ *Id.* P 23.

²⁷ See *Midwest Indep. Transmission Sys. Operator, Inc.*, 118 FERC ¶ 61,212, *Midwest Indep. Transmission Sys. Operator, Inc.*, 121 FERC ¶ 61,131 (2007), and *Midwest Indep. Transmission Sys. Operator, Inc.*, 125 FERC ¶ 61,156 (2008).

²⁸ Financial Marketers Rehearing Request at 7.

²⁹ Paper Hearing Compliance Order, 131 FERC ¶ 61,210 at P 23.

determination of inadequacy with respect to the requirements of the Paper Hearing Compliance Order, and therefore do not provide a basis to order refunds in this proceeding.

20. We disagree with Financial Marketers' claim that by charging virtual transactions of market participants without actual withdrawals of energy while the December 10, 2008 compliance filing remained pending before the Commission, MISO violated fundamental rate principles and protections of the FPA. Financial Marketers support their argument with a number of citations, but the cases on which they rely are inapplicable here. In addition, we find that there is a sound legal basis for MISO's action.

21. Section 206(a) of the FPA specifies that "[w]henver the Commission . . . shall find that any rate . . . collected by any public utility . . . is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate . . . to be thereafter observed and in force, *and shall fix the same by order.*"³⁰ The Commission fixed the rate that MISO was implementing in this instance in the Order on Paper Hearing. Specifically, the Commission required MISO to revise section 40.3.3.a.ii and iii of the MISO tariff by removing the "actually withdraws energy" language from the first sentence of section 40.3.3.a.ii of the tariff and by inserting the word "cleared" before the term "Virtual Supply Offers" in section 40.3.3.a.ii and iii of the tariff.³¹ This means that the required compliance filing in this instance was ministerial in nature, in that it was limited simply to making the revisions to the text that the Commission specified in the Order on Paper Hearing.

22. The rate in question was known through issuance of the Order on Paper Hearing, and making the rate effective at that time left no uncertainty that could only be removed through acceptance of the compliance filing.³² The act of fixing the rate was thus completed in the Order on Paper Hearing, and no further Commission action was required to finalize the rate. As the Commission previously found, "[t]he [Order on Paper Hearing] established a just and reasonable rate 'to be thereafter observed and in force,'³³ and the compliance process is an administrative one intended to ensure that the

³⁰ 16 U.S.C. § 824e(a) (2012) (emphasis supplied).

³¹ Order on Paper Hearing, 125 FERC ¶ 61,161 at P 121.

³² See *Electrical District No. 1 v. FERC*, 774 F.2d 490, 492-94 (D.C. Cir. 1985) (*Electrical District No. 1*).

³³ 16 U.S.C. § 824e(a) (2012).

Commission-fixed rate is properly on file.”³⁴ For these reasons, the Commission’s action in the Order on Paper Hearing is precisely the type of “mechanical and expeditious . . . process” that permits fixing a rate in an “initial order” without a requirement of subsequent further Commission approval.³⁵

23. None of the cases that Financial Marketers cite in support of their position are on point here. Two of these cases deal with natural gas pipelines. While both state that a revised tariff or compliance filing does not become effective until accepted by the Commission, these rulings represent applications of section 154.3(a) of the Commission’s regulations under the Natural Gas Act.³⁶ That section supplies the meaning of the term “effective tariff” for purposes of that statute and states that “[t]he effective tariff of a natural-gas company shall be the tariff filed pursuant to the requirements of this part, and permitted by the Commission to become effective.”³⁷ The Commission stated in Order No. 582 that its description of the term “effective tariff” in section 154.3(a) of its regulations “clarifies that a pipeline may not avoid filing for a rate change by making the rate subject to an exception or condition, such as a periodic rate change under a price index.”³⁸ While the Natural Gas Act and the FPA establish similar regulatory schemes, and while case precedent under one of these statutes often is equally applicable to issues arising under the other, we are not aware of an instance where a specific provision of the regulations issued under one statute that is intended to clarify a matter specific to the industry regulated under the statute has been found to be applicable under the other statute. We see no basis for concluding that a definition formulated in connection with specific requirements intended to address issues encountered in the regulation of pipeline operations is controlling here. This is particularly the case given that the Commission’s actions here are consistent with the process that the court found to be appropriate in *Electrical District No. 1*.

³⁴ *Wabash Valley Power Ass’n, Inc. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 126 FERC ¶ 61,174, at P 21 (2009) (internal citation omitted).

³⁵ *Electrical District No. 1*, 774 F.2d at 494.

³⁶ See *Dominion Transmission, Inc.*, 118 FERC ¶ 61,036, at P 31 (2007); *LFC Gas Co. v. Northwest Pipeline Corp.*, 68 FERC ¶ 61,024, at 61,087-88 (1994).

³⁷ 18 C.F.R. § 154.3(a) (2015).

³⁸ *Filing and Reporting Requirements for Interstate Natural Gas Company Rate Schedules and Tariffs*, Order No. 582, FERC Stats. & Regs. ¶ 31,025, at 31,385 (1995), *order on reh’g*, Order No. 582-A, FERC Stats. & Regs. ¶ 31,034 (1996).

24. The other cases that Financial Marketers claim support their position all stand for the proposition that compliance filings are not filings submitted under section 205(d) of the FPA, and they therefore do not become effective by operation of law if the Commission does not act on them within 60 days.³⁹ These cases are inapplicable here because the rate in question was not made effective by operation of law, but rather was fixed in the Order on Rehearing. The compliance process in this instance was an administrative one intended to ensure that the Commission-fixed rate is properly on file. The fact that when further substantive deliberation on a compliance filing is required to fix the rate, the filing is not subject to deadlines for Commission action set forth in section 205(d) of the FPA is not relevant to the facts that Financial Marketers object to here.

25. We are not addressing the issues Financial Marketers raise with respect to analysis in Docket No. ER09-411 since those issues are beyond the scope of this proceeding.

The Commission orders:

The requests for rehearing of the Paper Hearing Compliance Order are hereby denied, as discussed on the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

³⁹ See *Southern Company Services, Inc.*, 61 FERC ¶ 61,339, at 62,330 (1992); *PJM Interconnection, L.L.C.*, 85 FERC ¶ 61,111, at 61,413 (1998); *Southern Company Services, Inc.*, 68 FERC ¶ 61,098, at 61,550-51 & n.9 (1994).