

135 FERC ¶ 61,118  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Marc Spitzer, Philip D. Moeller,  
John R. Norris, and Cheryl A. LaFleur.

Midwest Independent Transmission System  
Operator, Inc.

Docket No. ER11-2798-000

ORDER ON RECOVERY OF PENALTY ASSESSMENTS

(Issued May 6, 2011)

1. On January 28, 2011, as supplemented on March 9, 2011, Midwest Independent Transmission System Operator, Inc. (MISO) requested, pursuant to section 205 of the Federal Power Act (FPA),<sup>1</sup> Part 35 of the Commission's regulations,<sup>2</sup> and Schedule 34, "Allocation of Costs Associated with Reliability Penalty Assessments" (Schedule 34) to MISO's Open Access Transmission, Energy and Operating Reserve Markets Tariff (Tariff), the Commission's approval to recover \$7,000 in penalty costs from Tariff customers. These costs result from a settlement agreement (Settlement Agreement) entered into by and between MISO and ReliabilityFirst to resolve outstanding issues arising from a non-public investigation.<sup>3</sup>

2. For the reasons discussed below, we grant MISO's request to recover the penalty costs assessed in the Settlement Agreement and its proposed allocation methodology for recovery of such penalty costs from Tariff Customers in accordance with Schedule 34 of the Tariff.

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<sup>1</sup> 16 U.S.C. § 824d (2006).

<sup>2</sup> 18 C.F.R. Part 35 (2010).

<sup>3</sup> The Abbreviated Notice of Penalty (NOP) was filed by the North American Electric Reliability Corporation (NERC) on December 22, 2010 in Docket No. NP11-59-000.

## I. Background

3. After issuance of the Commission's order providing guidance concerning cost recovery for penalties which may be assessed against Regional Transmission Organizations and Independent System Operators for non-compliance with NERC's Reliability Standards,<sup>4</sup> MISO submitted a section 205 filing to the Commission proposing Schedule 34 to its Tariff. The Commission conditionally accepted MISO's Schedule 34, subject to a compliance filing, finding that it complied with the Guidance Order and provided a reasonable mechanism for the recovery of a monetary penalty assessed against MISO for a NERC Reliability Standard violation.<sup>5</sup> Under Schedule 34, MISO may seek to directly assign penalty costs to Tariff Customers or Members if, as the result of the Compliance Monitoring and Enforcement Process, NERC or a Regional Entity finds that such Tariff Customers or Members directly contributed to or were a root cause(s) of a confirmed violation. Where penalties cannot be directly assigned to a particular, identifiable Tariff Customer or Member or are the fault of MISO itself, MISO may seek Commission approval to recover penalty costs from all Tariff Customers and/or Members pursuant to a Commission-approved methodology for allocation of penalty costs.

4. The \$7,000 in penalty costs at issue resulted from the Settlement Agreement resolving outstanding issues concerning NERC Critical Infrastructure Protection Reliability Standard CIP-004-1, Requirements 3.2 and 3.3.<sup>6</sup> The NOP did not disclose MISO's identity, and MISO redacted information in its original January 28 filing that would reveal its identity. However, to address concerns relating to the notice requirements of the FPA, MISO submitted a supplemental filing on March 9, 2010 that included the originally non-public, unredacted version of its January 28 filing.

5. In its filing, MISO describes its corporate compliance program, and notes that, since 2008, its incentive compensation has included a specific incentive target directly tying a component of incentive compensation to reliability and compliance performance. MISO states that the issues that were the subject of the NOP were neither intentional nor grossly negligent, but were simply an administrative oversight by staff-level personnel. As a non-profit entity for which all funds received have been allocated to specific uses,

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<sup>4</sup> *Reliability Standard Compliance and Enforcement in Regions with Regional Transmission Organizations or Independent System Operators*, 122 FERC ¶ 61,247 (2008) (Guidance Order).

<sup>5</sup> *Midwest Independent Transmission System Operator, Inc.*, 128 FERC ¶ 61,229 (2009) (September 8 Order).

<sup>6</sup> These requirements pertain to updating and documenting personnel risk assessments.

MISO states that it has no reserve from which it can pay the penalty assessed in the NOP without Commission approval.

## **II. MISO's Request**

6. MISO seeks the Commission's approval to recover the penalty costs assessed under the Settlement Agreement using the proposed method for allocating the penalty costs. It proposes to allocate the penalty costs on a *pro rata* basis to all Tariff Customers based upon Schedule 10 billing determinants calculated during the calendar month immediately following the month in which its filing is approved by the Commission. Each Tariff Customer's share of the penalty will be calculated by dividing its total Network Load for the month or its total Reserved Capacity for Point-to-Point Transmission Service for the month (whichever is applicable) by the sum of the total Network Load for all Network Integration Transmission Service for the month and total Reserved Capacity for all Point-to-Point Transmission Service for that month, as those terms are defined in the Tariff. MISO anticipates that the requested allocation will result in a charge of less than one one-thousandth of one cent per megawatt hour.

## **III. Notice, Interventions, and Responsive Pleadings**

7. On January 31, 2011, notice of the January 28 filing was published in the *Federal Register*, 76 Fed. Reg. 6775 (2011), with interventions or protests due on or before February 22, 2011. Timely motions to intervene were filed by Exelon Corporation and MISO Transmission Owners (MISO TO).<sup>7</sup> Timely motions to intervene and protests were filed by American Municipal Power, Inc. (AMP), the Organization of MISO States (OMS), and Wisconsin Electric Power Company (Wisconsin Electric). Consumers

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<sup>7</sup> The MISO Transmission Owners for this filing consist of: Ameren Services Company, as agent for Union Electric Company; Ameren Illinois Company; American Transmission Company LLC; City Water, Light & Power (Springfield, IL); Dairyland Power Cooperative; Duke Energy Corporation for Duke Energy Ohio, Inc., Duke Energy Indiana, Inc., and Duke Energy Kentucky, Inc.; Great River Energy; Hoosier Energy Rural Electric Cooperative, Inc.; Indiana Municipal Power Agency; Indianapolis Power & Light Company; International Transmission Company; ITC Midwest LLC; Michigan Electric Transmission Company, LLC; Michigan Public Power Agency; MidAmerican Energy Company; Minnesota Power (and its subsidiary Superior Water, L&P); Montana-Dakota Utilities Co.; Northern Indiana Public Service Company; Northern States Power Company, a Minnesota corporation, and Northern States Power Company, a Wisconsin corporation, subsidiaries of Xcel Energy Inc.; Northwestern Wisconsin Electric Company; Otter Tail Power Company; Southern Illinois Power Cooperative; Southern Indiana Gas & Electric Company; Southern Minnesota Municipal Power Agency; Wabash Valley Power Association, Inc.; and Wolverine Power Supply Cooperative, Inc.

Energy Company (CECo) filed what was, at that time, a motion to intervene out-of-time. MISO and MISO TOs filed answers. Notice of the March 9 filing was published in the *Federal Register*, 76 Fed. Reg. 14,965 (2011), with interventions or protests due on or before March 30, 2011. Duke Energy Corporation filed a timely motion to intervene. OMS filed a comment and answer.

#### **IV. Discussion**

##### **A. Procedural Matters**

8. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2010), the notice of intervention and timely, unopposed motions to intervene serve to make the entities that filed interventions parties to this proceeding.

9. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2010), prohibits an answer to a protest or answer unless otherwise ordered by the decisional authority. We will accept the answers from MISO TOs, MISO and OMS because they have provided information that assisted us in our decision-making process.

##### **B. Substantive Matters**

###### **1. Comments and Protests**

10. In its protest, Wisconsin Electric contends that the redacted version of MISO's January 28 filing does not provide enough information for the public and interested parties to assess the proposal and therefore should be rejected because it does not satisfy the notice requirements to affected customers.<sup>8</sup> Alternatively, Wisconsin Electric states that, if the Commission deems it appropriate to act on the filing, the proposed allocation of the penalty costs is not broad enough to encompass all of the customers taking service provided by MISO. Consequently, Wisconsin Electric argues that there could be other customers receiving services who should also share in the penalty cost, such as Reliability Coordination Customers<sup>9</sup> and Transmission Owners.

11. In its protest, AMP also argues that the January 28 filing is inappropriately redacted, and it is unjust and unreasonable to allocate NERC penalty costs without giving notice to the affected parties of a charge pursuant to section 35.3 of the Commission's

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<sup>8</sup> Wisconsin Electric Protest at 3.

<sup>9</sup> Section 1.559 of the Tariff defines "Reliability Coordination Customer" as "any entity taking Reliability Coordination Service under Part I of Module F of the Tariff."

regulations.<sup>10</sup> AMP further contends that redacting such information as Tariff, Schedule and penalty amount prevents parties from assessing whether they are being charged just and reasonable rates, and the Commission should therefore discourage such practices.

12. OMS protests the January 28 filing on the grounds that it is excessively redacted and therefore fails to satisfy the requirement of section 205 of the Federal Power Act that tariff changes can be made only with notice to affected customers.<sup>11</sup> Additionally, OMS is concerned with the policy of allowing a not-for-profit entity to pass through the costs of NERC penalties because it results in a disincentive for such entity to comply with Reliability Standards. Therefore, OMS requests that the Commission either reject the January 28 filing or set it for hearing.<sup>12</sup>

## 2. Answers

13. In its answer, MISO explains that it is not authorized to use any revenues collected through its current funding rate schedules to pay penalty costs and therefore argues that the Commission must approve the January 28 filing in order for it to discharge its obligations to NERC and ReliabilityFirst.<sup>13</sup> In response to OMS' request for the filing to be set for hearing, MISO states that its recovery of the penalty costs is justified, and it acted in the best interest of stakeholders by agreeing to a settlement which avoided potentially lengthy and costly litigation. In response to Wisconsin Electric's claim that the proposed allocation is not broad enough, MISO states that its allocation methodology is fair because it attempts to balance the desire for a broad allocation with the need for administrative efficiencies, especially for a penalty as small as the one that MISO is seeking to collect.<sup>14</sup> In response to the protestors' comments that MISO failed to provide adequate notice, MISO disagrees and states that it complied with the conflicting requirements of section 205 and Schedule 34 of the Tariff by submitting both a redacted, public version and an un-redacted, non-public version of the January 28 filing.<sup>15</sup> MISO also states that the January 28 filing alerted interested parties that a non-public filing had been provided to the Commission and that any interested party could have requested it

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<sup>10</sup> AMP Protest at 4-5; *see* 18 C.F.R. § 35.3 (2010).

<sup>11</sup> OMS Protest at 2.

<sup>12</sup> *Id.* at 3.

<sup>13</sup> MISO Answer at 2.

<sup>14</sup> *Id.* at 6.

<sup>15</sup> *Id.* at 7.

from MISO since the public filing was posted on the MISO website.<sup>16</sup> Further, MISO requests that the Commission provide guidance regarding submissions of a cost recovery filing that complies with both the notice requirements of Section 205 of the FPA and the confidentiality requirements of 18 C.F.R. § 39.7(b)(4) (2010).<sup>17</sup>

14. In their answer, MISO TOs support Wisconsin Electric's contention that the penalty costs should be allocated to Reliability Coordination Customers since they are defined under the MISO Tariff as Tariff Customers.<sup>18</sup> However, MISO TOs disagree with the contention that a portion of the penalty costs should be allocated to Transmission Owners. According to MISO TOs, the Commission required MISO to modify section 3, in its order approving Schedule 34, to state that penalty costs could be recovered from Tariff Customers and/or Members.<sup>19</sup> MISO TOs claim that this revision allows MISO discretion to determine its cost allocation methodology and in this filing MISO limited its collection of penalty costs to Tariff Customers.<sup>20</sup>

15. In its comment on MISO's supplemental March 9 filing and its answer, OMS agrees with MISO that the Commission should provide guidance regarding the conflict between the requirements of section 205 of the FPA and the rules relating to penalty violations, specifically 18 C.F.R. § 39.7(b)(4) (2010).<sup>21</sup> OMS argues that the guidance should allow details of violation reports and investigations to remain non-public but should provide open and sufficient notice of rate filings, including the identity of the filing entity. OMS disagrees with MISO's claim that MISO provided adequate notice. Instead, OMS argues that it took considerable research to figure out that the filing was made by MISO. Finally, OMS states that MISO's March 9 filing should not be given any precedential value in terms of the methodology for future penalty filings.<sup>22</sup>

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<sup>16</sup> *Id.* at 8-9.

<sup>17</sup> *Id.* at 10.

<sup>18</sup> *Id.* at 3-4.

<sup>19</sup> MISO TOs Answer at n. 9, citing to section 1.412 of the Tariff and noting that "Member" includes "Transmission Owners."

<sup>20</sup> *Id.* at 4.

<sup>21</sup> OMS Response at 1.

<sup>22</sup> *Id.* at 2.

### 3. Commission Determination

16. At the outset, we note that, in its March 9 filing, MISO filed the non-public version of its January 28 filing as a public filing. Therefore, issues concerning the public version of MISO's January 28 filing are now moot. Thus, because MISO's March 9 filing is the non-redacted version of the January 28 filing, we find that the protests submitted by OMS, Wisconsin Electric, and AMP regarding a lack of sufficient notice provided by MISO to be moot.

17. We grant MISO's request to allocate penalty costs under Schedule 34. The Commission has stated that the existence of Schedule 34 "serves to notify all Tariff Customers and Members of their potential responsibility for the costs of monetary reliability penalties assessed to the Midwest ISO."<sup>23</sup> However, we will provide further guidance regarding the requirements of section 205 of the FPA and the rules relating to the non-public status of certain violations of reliability standards, specifically 18 C.F.R. § 39.7(b)(4) (2010). With respect to the notice requirement for a section 205 filing where MISO proposes to allocate specific costs associated with penalty assessments under Schedule 34 of the MISO Tariff, we clarify that this section 205 filing should identify, at minimum, the filing party, the party, if not the filing party, whose act or failure to act gave rise to the penalty, the penalty amount to be allocated, the rate schedule to be used, the method of cost recovery to be used, and the proposed effective date. We believe that identification of these elements will, in most situations, provide sufficient notice to affected parties while not running afoul of 18 C.F.R. § 39.7(b)(4) (2010).

18. Notwithstanding the above, if a filer believes that this minimal information could jeopardize the security of the Bulk-Power System if publicly disclosed, it should not disclose the information but generally state its position in the public version of its proposal to recover costs. The filer should fully support its confidentiality claim in the non-public version of its proposal to recover penalty costs so that the Commission may make a determination as to whether unmasking the party subject to the penalty would be inconsistent with section 39.7(b)(4).

19. It is the Commission's obligation to review each filing to recover and allocate the costs associated with NERC penalty assessments on a case-by-case basis in accordance with the guidelines set forth in the Guidance Order.<sup>24</sup> In the instant filing, we find MISO has provided adequate information regarding its internal compliance program that includes each applicable NERC Reliability Standard to support its proposal. MISO explains that its Board of Directors provides incentive goals that include specific

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<sup>23</sup> September 8 Order, 128 FERC ¶ 61,229 at P 37.

<sup>24</sup> Guidance Order, 122 FERC ¶ 61,247 at P 27.

incentives and bonuses targeted at encouraging employees to prioritize compliance with the NERC Reliability Standards. MISO also explains that its violations were neither intentional, nor grossly negligent, and did not involve any management personnel. Finally, NERC stated in the NOP that MISO self-reported the violation, was cooperative throughout the compliance enforcement process, and did not try to conceal the violations.<sup>25</sup> Based on these facts, we find that it is just and reasonable to allow MISO to recover these NERC penalty costs under Schedule 34 in order to comply with the NOP and pay the NERC penalty. Therefore, we reject OMS' request to reject the filing outright or to set it for hearing.

20. In addition, we reject Wisconsin Electric's request to direct MISO to allocate penalty costs to Members. In its September 8 Order approving Schedule 34, the Commission required MISO to modify section 3 to state that costs could be recovered from Tariff Customers *and/or* Members, rather than Tariff Customers *and* Members as originally proposed.<sup>26</sup> The Commission found that "the addition of '/or' to Original Sheet No. 2280W provides flexibility in the cost allocation methodology to be proposed by Midwest ISO in a section 205 filing, as each situation may warrant a different cost allocation result."<sup>27</sup> We find that in the present situation, where the rate impact of NERC penalty costs will be *de minimis*, flexibility is particularly appropriate.

21. Further, while MISO has filed under Schedule 34, MISO proposes to use the billing determinants of Schedule 10 to calculate the penalty cost allocation to Tariff Customers.<sup>28</sup> However, using the billing determinants of Schedule 10, MISO would allocate costs only to Tariff Customers taking Network and Point-to-Point Transmission Service, not *all* Tariff Customers, as defined in the Tariff. We find good cause to waive the Tariff to permit recovery only from Tariff Customers taking Network and Point-to-Point Transmission Service. In this regard, we note that the alternative of instead using other Schedules to allocate the penalty costs would be inefficient, given that the costs of implementing such cost recovery, with sufficient precision to avoid double-billing, could easily exceed the small amounts for which recovery is sought.

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<sup>25</sup> NERC Notice of Penalty, Docket No. NP11-59-000 at 3.

<sup>26</sup> September 8 Order, 128 FERC ¶ 61,229 at P 41.

<sup>27</sup> *Id.*

<sup>28</sup> The Tariff defines "Tariff Customer" as "A Market Participant, Transmission Customer or Coordination Customer," and "Coordination Customer" includes "Reliability Coordination Customer, and Congestion Management Customer." See sections 1.652 and 1.98 of the Tariff, respectively.

22. We will grant waiver of the 60-day prior notice requirement for good cause shown and accept MISO's proposal to allocate NERC penalty costs under Schedule 34 effective as of the date of this order. We agree with MISO that good cause exists because granting waiver will enable it to collect the allocated NERC penalty costs, which total only \$7,000, within the next billing cycle allowing MISO to pay its NERC penalty promptly.

The Commission orders:

MISO's proposed allocation of NERC penalty costs is hereby accepted for filing, effective as of the date of this order.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.