

173 FERC ¶ 61,055
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick and James P. Danly.

Midcontinent Independent System Operator, Inc. Docket No. ER18-1611-000

ORDER DECLINING TO REQUIRE RESETTLEMENT AND REFUNDS

(Issued October 16, 2020)

1. On May 15, 2018, as amended on July 11, 2018, Midcontinent Independent System Operator, Inc. (MISO) submitted a request for waiver of certain provisions of its Open Access Transmission, Energy and Operating Reserve Markets Tariff (Tariff) to avoid resettling certain make-whole payments back to January 6, 2009. In the alternative, MISO asks the Commission to exercise its remedial discretion to not require resettlement and refunds. For the reasons discussed below, we grant MISO's alternative request and decline to require resettlement and refunds.

I. Background

2. MISO states that during a quality assurance analysis, it discovered a discrepancy between the current MISO settlement system software and Tariff provisions in section 33.8.2 regarding manual re-dispatch.¹ MISO explains that its manual re-dispatch process automatically sets the minimum and maximum operational limits to the desired output level. According to MISO, the software does not provide a range in potential outcomes, but rather, the desired dispatch output is set to a specific level. MISO states that the Tariff, on the other hand, mandates a dispatch range, not a particular outcome. In addition, MISO states that the Tariff also requires that the Up and Down Ramp Capability Dispatch Status must be submitted as economic in the Real-Time Market. MISO explains that currently, its settlement software checks the dispatch status for this provision in the Day-Ahead Market in addition to the Real-Time Market. MISO states that although this practice is consistent with its Business Practices Manual for the Energy

¹ MISO states that its waiver request is limited to Tariff sections 33.8.2.a.1.a.i and iii, 33.8.2.a.2.a.i and iii, 33.8.2.a.2.b.i.1 and ii.1, and 33.8.2.b.1.a and c. Amendment to Filing at 3.

and Operating Reserve Market, section 33.8.2(b)(1)(d) of the Tariff does not include a dispatch check for the Day-Ahead Market.²

3. MISO states that while there are no operational impacts, the amount of the financial impact of the Tariff discrepancy is uncertain. According to MISO, however, the financial impact is less than \$1.6 million over eight years, or \$200,000 annually, and manual re-dispatch occurred in only 1.14% of the hours that Real-Time Offer Revenue Sufficiency Guarantee Payments and Day-Ahead Margin Assurance Payments³ were awarded since 2009. MISO states that the Independent Market Monitor (Market Monitor) and MISO did not identify any manipulation nor any resources intentionally making inflexible offers in order to gain excess margins from the system during intervals that a resource was manually re-dispatched.⁴

II. MISO Filing

4. MISO requests a limited waiver of the Tariff to avoid resettlement of Day-Ahead Margin Assurance Payments and Real-Time Offer Revenue Sufficiency Guarantee Payments paid to resources that were manually re-dispatched from January 6, 2009 to May 15, 2018. MISO states that, when determining if a waiver is appropriate to alleviate the effects of a discrepancy in a tariff, the Commission generally requires that the waiver meet the following criteria: (1) the underlying discrepancy resulted from actions undertaken in good faith; (2) the waiver is of limited scope; (3) a concrete problem needs to be remedied; and (4) the waiver will not have undesirable consequences, such as

² Filing at 3-4. MISO's proposed Tariff revisions to address issues related to output level and dispatch checks were approved prospectively, effective May 16, 2018. See *Midcontinent Indep. Sys. Operator, Inc.*, Docket No. ER18-1607-001 (Sept. 7, 2018) (delegated order).

³ Real-Time Offer Revenue Sufficiency Guarantee Payments ensure recovery of production costs and applies to the dispatch of energy or operating reserves above day-ahead schedules economically or the dispatch of energy above day-ahead schedules through manual re-dispatch, when the resource meets specified eligibility criteria. Day-Ahead Margin Assurance Payments ensure recovery of a resource's Day-Ahead Margin when its Day-Ahead Margin would be eroded with the dispatch of energy or operating reserves below day-ahead schedules economically or the dispatch of energy below day-ahead schedules through manual re-dispatch, when the resource meets specified eligibility criteria.

⁴ Filing at 4.

harming third parties.⁵ MISO asserts that its waiver request meets these criteria because: (1) MISO discovered the discrepancy as part of its ongoing process improvements, the underlying discrepancy resulted from actions undertaken in good faith, and MISO reported the discrepancy to both the Market Monitor and the Commission; (2) the waiver is limited in scope to a specific period of time and to a single Tariff section, section 33.8.2; (3) the waiver remedies the concrete problem of requiring resettlement of past transactions, which would result in inequitable outcomes and undermine confidence in the market; and (4) the waiver will not have undesirable consequences and would prevent harm to market participants.⁶

5. In the alternative, MISO requests that the Commission exercise its remedial discretion to find that resettlement and refunds are not appropriate in this instance. MISO asserts that “[i]n instances where a FERC regulated utility charges a rate other than that in its filed tariff, the Commission retains discretion as to whether to require resettlement or refunds so long as the Commission’s decision is reasonable.”⁷ MISO argues that the Commission has relied on this discretion to decline to order refunds or market resettlement in circumstances like those at issue here, where a regional transmission organization’s tariff and business practice manuals were inconsistent.⁸

III. Notice of Filing and Responsive Pleadings

6. Notice of the filing was published in the *Federal Register*, 83 Fed. Reg. 23,448 (May 21, 2018), with interventions or protests due on or before June 5, 2018. Timely motions to intervene were filed by NRG Companies,⁹ American Municipal Power, Inc., and Consumers Energy Company.

7. Notice of the amendment to the filing was published in the *Federal Register*, 83 Fed. Reg. 33,216 (July 17, 2018), with interventions or protests due on or before August 1, 2018. None was filed.

⁵ *Id.* at 6 (citing *N.Y. Indep. Sys. Operator, Inc.*, 128 FERC ¶ 61,086 (2014); *N.Y. Indep. Sys. Operator, Inc.*, 148 FERC ¶ 61,098 (2014)).

⁶ *Id.* at 6-7.

⁷ *Id.* at 8.

⁸ *Id.*

⁹ NRG Companies are NRG Power Marketing LLC and GenOn Energy Management, LLC.

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 (2020), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

B. Substantive Matters

9. We find that MISO's settlement practices violated section 33.8.2 of the Tariff for a prior period exceeding nine years.¹⁰ However, we agree with MISO that, based on the circumstances here, market resettlement and refunds are not an appropriate remedy. The U.S. Court of Appeals for the District of Columbia Circuit has held that the Commission has broad authority under Federal Power Act section 309¹¹ to fashion remedies for tariff violations.¹² We are persuaded that, to the extent resettlement of the market transactions at issue would be feasible, requiring such resettlement and associated refunds could create inequitable results by unfairly punishing market participants that followed MISO manual redispach instructions and could undermine confidence in market outcomes.¹³ For these reasons, we find that it is consistent with the public interest to decline to direct resettlement and refunds. Having found a tariff violation and having determined that we will not direct resettlement or refunds, we need not address MISO's waiver request.

¹⁰ See Filing at 4, 7.

¹¹ 16 U.S.C. § 825h.

¹² See, e.g., *Verso Corp. v. FERC*, 898 F.3d 1, 10 (D.C. Cir. 2018); *Columbia Gas Transmission Corp. v. FERC*, 750 F.2d 105, 109 (D.C. Cir. 1984) (“The principle fairly drawn from prior cases is that the Commission has broad authority to fashion remedies so as to do equity consistent with the public interest.”).

¹³ See Filing at 8.

The Commission orders:

MISO's alternative request for the Commission to not require resettlement and refunds is hereby granted, as discussed in the body of this order.

By the Commission. Commissioner Danly is concurring with a separate statement attached.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

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Docket No. ER18-1611-000

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DANLY, Commissioner, *concurring*:

1. The Commission's order issued today in this docket addresses a request for a retroactive waiver.¹ Nine other orders issued at the Commission's October Public Meeting address similar waiver requests.² In addition, the Commission issued two such orders on September 30, 2020, shortly before the October Public Meeting.³ In total, that is twelve orders issued in less than three weeks addressing retroactive waiver requests. I have several concerns about these orders, which I discussed briefly in my dissents to the *Montana-Dakota* and *Lightsource* orders that were issued on September 30 and again in greater detail in my dissent to the *Sunflower* order that is being issued today.

2. I concur in the result of the Commission's order in this proceeding because, unlike the Commission's other orders, the Commission's order in this proceeding does not exceed its legal authority. Here, we have not granted a retroactive waiver that violates the related doctrines prohibiting such waivers: the filed rate doctrine and the rule against retroactive ratemaking.⁴ Instead, we have found that the Midcontinent Independent System Operator, Inc. (MISO) violated its tariff because its settlement software did not properly implement its tariff. I agree with this holding. In my view, this is the approach we should take in all situations where a utility has violated its own tariff. I also agree with the Commission's decision not to impose any penalty on MISO or require that

¹ See *Midcontinent Indep. Sys. Operator, Inc.*, 173 FERC ¶ 61,055 (2020).

² See *Pac. Gas & Elec. Co.*, 173 FERC ¶ 61,051 (2020); *Borrego Solar Sys. Inc.*, 173 FERC ¶ 61,052 (2020); *Mariposa Energy, LLC*, 173 FERC ¶ 61,053 (2020); *Sunflower Elec. Power Corp.*, 173 FERC ¶ 61,054 (2020) (*Sunflower*); *Pub. Serv. Elec. & Gas Co.*, 173 FERC ¶ 61,056 (2020); *Upstream Wind Energy LLC*, 173 FERC ¶ 61,057 (2020); *Vineyard Wind LLC*, 173 FERC ¶ 61,058 (2020); *Columbia Gas Transmission, LLC*, 173 FERC ¶ 61,064 (2020); *S. Star Cent. Gas Pipeline, Inc.*, 173 FERC ¶ 61,066 (2020).

³ See *Montana-Dakota Utils. Co.*, 172 FERC ¶ 61,278 (2020) (*Montana-Dakota*); *Lightsource Renewable Energy Dev., LLC*, 172 FERC ¶ 61,294 (2020) (*Lightsource*).

⁴ See *Proposed Policy Statement on Waiver of Tariff Requirements and Petitions or Complaints for Remedial Relief*, 171 FERC ¶ 61,156, at P 5 (2020).

MISO resettle its payments to correct for the mistakes. The relatively small error and the extreme difficulty in resettling bills back to 2009 support this decision.

3. However, I disagree with the Commission's holding that, because we are finding that MISO violated its tariff, we need not rule on its waiver request. This puts the cart before the horse. We should find that MISO violated its tariff only after we first deny the waiver; if we had granted the waiver there would be no tariff violation. Apparently, the Commission is so unwilling to acknowledge that the filed rate doctrine and rule against retroactive ratemaking ever apply that it refuses to address the issue here. I do not understand that reluctance in this proceeding. MISO's waiver request goes to those provisions of its tariff setting its rate, not to a non-rate tariff provision. If the filed rate doctrine and rule against retroactive ratemaking do not apply to MISO's waiver request here, they could never apply to any waiver request under any circumstances.

4. In my view, the Commission first should have denied MISO's waiver request, and only then made the finding in this order that MISO violated its tariff. Failing to do so results in the same inconsistent decision making and lack of guidance that I discuss in more detail in my dissent in the *Sunflower* order.⁵

For these reasons, I respectfully concur.

James P. Danly
Commissioner

⁵ See *Sunflower*, 173 FERC ¶ 61,054 (Danly, Comm'r, dissenting).