

156 FERC ¶ 61,203
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. ER16-197-002

ORDER GRANTING CLARIFICATION

(Issued September 22, 2016)

1. In this order, we grant the motion for clarification by Ameren Services Company, on behalf of Ameren Illinois Company and Ameren Transmission Company of Illinois, (Ameren), and Xcel Energy Services Inc., on behalf of Northern States Power Company, a Minnesota corporation, and Northern States Power Company, a Wisconsin corporation, (NSP Companies), (collectively, Indicated TOs), of the Commission's order issued December 30, 2015.¹

I. Background

2. On October 30, 2015, Midcontinent Independent System Operator, Inc. (MISO) and certain MISO Transmission Owners (Certain TOs)² submitted a filing pursuant to section 205 of the Federal Power Act³ and part 35 of the Commission's regulations⁴ stating that they were proposing to revise Note F of Certain TOs' company-specific

¹ *Midcontinent Indep. Sys. Operator, Inc.*, 153 FERC ¶ 61,371 (2015) (December 30 Order).

² The Certain TOs for purposes of the original filing consist of: Ameren; Minnesota Power (and its subsidiary Superior Water, L&P); Montana-Dakota Utilities Co.; Northern Indiana Public Service Company; NSP Companies; Otter Tail Power Company; and Southern Indiana Gas & Electric Company (d/b/a Vectren Energy Delivery of Indiana).

³ 16 U.S.C. § 824d (2012).

⁴ 18 C.F.R. pt. 35 (2016).

Attachments O formula rates in the MISO Open Access Transmission, Energy and Operating Reserve Markets Tariff (Tariff) to clarify that they would calculate the Accumulated Deferred Income Tax (ADIT) balances used in the calculation of the projected test year revenue requirement using the proration methodology in order to comply with section 1.167(l)-1(h)(6)(ii) of the United States Internal Revenue Service (IRS) regulations. The IRS has issued a series of Private Letter Rulings addressing how the ADIT provisions apply to utilities that use a projected test year. In the Private Letter Rulings, the IRS has found that, in order to claim accelerated depreciation for utility plant in their income tax filings, utilities using a projected test year must use the formula provided in the IRS regulations.⁵ According to MISO and Certain TOs, if the IRS were to rule that Certain TOs were out of compliance with the IRS regulations, they would be ineligible to claim accelerated depreciation, which could result, initially, in a rate increase for customers.

3. In the December 30 Order, the Commission conditionally accepted the proposed revisions to Certain TOs' company-specific Attachments O formula rates. The revisions became effective on January 1, 2016, as requested. The Commission determined that the proposed revisions to Note F to apply the IRS regulations to the annual projected ADIT amounts were reasonable, but the Commission ordered a subset of the Certain TOs (the Indicated TOs in the instant filing) to remove the application of the IRS regulations to the annual true-up ADIT amounts.⁶ With respect to the proposed true-up procedures of Indicated TOs, the Commission reasoned that the Indicated TOs had not justified those proposed revisions as just and reasonable. The Commission determined that the guidance in the Private Letter Rulings does not require any changes in calculating the true-up amounts, and the Indicated TOs' filing did not contain any rationale as to why the proposed revisions are needed for the annual true-up.⁷

4. On January 29, 2016, MISO and Certain TOs submitted revisions to their company-specific Attachments O to comply with the December 30 Order, which reflected the removal of the application of the IRS regulations to the annual true-up ADIT amounts. The Commission is accepting the compliance filing in a separate order issued concurrently herewith.

⁵ See I.R.S. P.L.R. 14324114 (Jul. 6, 2015), <https://www.irs.gov/pub/irs-wd/201541010.pdf>; I.R.S. P.L.R. 14012014 (Apr. 14, 2015), <https://www.irs.gov/pub/irs-wd/201531010.pdf>.

⁶ The projected revenue requirement under Attachment O is subject to an annual true-up based on actual costs when actual data becomes available.

⁷ See December 30 Order, 153 FERC ¶ 61,371 at P 38.

II. Request for Clarification

5. On January 29, 2016, Indicated TOs filed a request for clarification or, in the alternative, rehearing of the December 30 Order. Indicated TOs request the Commission to clarify that, should the IRS rule that the proration methodology described in Section 1.167(l)-(1)(h)(6)(ii) of the Treasury regulations must continue to be applied to the originally projected ADIT balances in performing the annual formula rate true-up calculations, Indicated TOs are not estopped by the December 30 Order from making a future filing with the Commission consistent with the IRS's direction.

III. Procedural Motions

6. On March 11, 2016, Indicated TOs filed a motion to lodge the Commission's February 23, 2016 order in *PJM Interconnection, L.L.C.*⁸ Indicated TOs argue that the Commission should grant the motion to lodge because the December 30 Order is contrary to *PJM*. Indicated TOs further assert that the Commission's reasoning in *PJM* is consistent with Indicated TOs' explanation for their proposal to apply the proration methodology to the originally projected ADIT amount in calculating the true-up.

7. Also on March 11, 2016, Indicated TOs filed a motion for reconsideration of the December 30 Order. Indicated TOs argue that the December 30 Order is inconsistent with *PJM* to the extent it prohibits Ameren from applying the IRS's proration methodology in calculating the true-up. Indicated TOs further assert that the calculations contained in Ameren's revised ADIT work papers mirror those of the filing party in *PJM*, which the Commission accepted as just and reasonable.

8. On August 2, 2016, Indicated TOs filed a motion to lodge the Commission's April 12, 2016 order in *Pub. Serv. Co. of Colorado*,⁹ as well as another motion for reconsideration of the December 30 Order. Indicated TOs argue that the Commission should grant the motion to lodge because *PSCo* is contrary to the December 30 Order. Indicated TOs further assert that the proration methodology accepted in *PSCo* is the same methodology for which Indicated TOs sought approval to use in calculating their Attachment O rates, and which the Commission rejected.

⁸ 154 FERC ¶ 61,126 (2016) (*PJM*).

⁹ 155 FERC ¶ 61,028 (2016) (*PSCo*).

9. On August 23, 2016, Joint Consumer Advocates¹⁰ filed a motion to intervene out-of-time and comments opposing the motions to lodge and motions for reconsideration of Indicated TOs. Joint Consumer Advocates recommend that the Commission not allow any ADIT proration, but that at a minimum if the Commission allows ADIT proration, that the Commission require a true-up once actual amounts are known, so that ADIT proration is only a timing issue and not a permanent overcharging of ratepayers. Joint Consumer Advocates present various arguments justifying why the Commission should deny Indicated TOs' motions, ranging from the violation of conventional ratemaking accounting principles and the potential negative effect on ratepayers, to the limited precedential value of IRS Private Letter Rulings as applied to other entities and the Commission's primary jurisdiction regarding utility accounting matters.

10. On September 2, 2016, the Organization of MISO States filed a motion to intervene out-of-time.

IV. Discussion

A. Request for Clarification

11. We grant the motion for clarification by Indicated TOs. Indicated TOs specifically ask that we clarify that should the IRS rule that the proration methodology described in the Treasury regulations¹¹ must continue to be applied to the originally projected ADIT balances in performing the annual formula rate true-up calculations, Indicated TOs are not estopped by the December 30 Order from making a future filing with the Commission consistent with the IRS's direction.¹² We clarify that Indicated TOs are not estopped from making a future filing.

B. Procedural Motions

12. We deny Indicated TOs' motions to lodge. Given that the Commission has knowledge of its own holdings, we find a motion to lodge prior Commission orders is

¹⁰ Joint Consumer Advocates consist of The Illinois Citizens Utility Board, the Indiana Office of Utility Consumer Counselor, the Iowa Office of Consumer Advocate, the Michigan Citizens Against Rate Excess, the Minnesota Department of Commerce, the Minnesota Attorney General's Office, the Missouri Office of the Public Counsel, and the Citizens Utility Board of Wisconsin.

¹¹ See Treas. Reg. § 1.167(l)-1(h)(6)(ii).

¹² We do not act on Indicated TOs' alternative request for rehearing because we grant their request for clarification.

unnecessary.¹³ We also deny Indicated TOs' subsequent motions for reconsideration. The cases Indicated TOs cite do not change the fact that, although the Attachment O formula submitted with Indicated TOs' initial filing reflected proration applying to the ADIT true-up, Indicated TOs did not in their transmittal specifically request that proration be applied to the ADIT true-up, nor did they explain why the change to the calculation of the true-up was required by the IRS regulations.¹⁴ It is not appropriate to attempt to add additional requests for relief in a motion for reconsideration after the issuance of the Commission order on the filing. The Commission has long held that it will reject new arguments on rehearing that could have been but were not advanced originally.¹⁵ Similarly, it is not appropriate to raise new requests for relief in a motion for reconsideration. Indeed, Indicated TOs acknowledge in their request for clarification that they did not explicitly request that the proration methodology be used for the true-up.¹⁶

13. When late intervention is sought after the issuance of a dispositive order, the prejudice to other parties and burden upon the Commission of granting the late intervention may be substantial. Thus, movants bear a higher burden to demonstrate good cause for granting such late intervention. Joint Consumer Advocates and the Organization of MISO States have not met this higher burden of justifying their late intervention.¹⁷

¹³ *Midwest Indep. Transmission Sys. Operator, Inc.*, 153 FERC ¶ 61,114 (2015) (citing *La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 146 FERC ¶ 61,152, at P 13 (2014)).

¹⁴ October 30, 2015 Transmittal at 4.

¹⁵ *See, e.g., Algonquin Gas Transmission, LLC*, 154 FERC ¶ 61,048, at P 250 (2016) (explaining that novel issues raised on rehearing are rejected "because our regulations preclude other parties from responding to a request for rehearing and such behavior is disruptive to the administrative process because it has the effect of moving the target for parties seeking a final administrative decision") (internal quotations omitted).

¹⁶ *See* Indicated TOs' Request for Clarification at P 7.

¹⁷ *See, e.g., Midwest Indep. Transmission Sys. Operator, Inc.*, 102 FERC ¶ 61,250, at P 7 (2003).

The Commission orders:

Indicated TOs' request for clarification is hereby granted, and their motions to lodge and for reconsideration are denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.