

147 FERC ¶61,127  
 UNITED STATES OF AMERICA  
 FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Acting Chairman;  
 Philip D. Moeller, John R. Norris,  
 and Tony Clark.

Midwest Independent Transmission System Operator, Inc. and the MISO Transmission Owners	Docket Nos.	ER13-187-002 ER13-187-003 ER13-187-004
Midwest Independent Transmission System Operator, Inc. and the MISO Transmission Owners	Docket No.	ER13-186-001
MidAmerican Energy Company and Midwest Independent Transmission System Operator, Inc.	Docket Nos.	ER13-89-001 ER13-89-002
American Transmission Company LLC and Midwest Independent Transmission System Operator, Inc.	Docket Nos.	ER13-101-002 ER13-101-003
Cleco Power LLC	Docket No.	ER13-84-001
Entergy Arkansas, Inc.	Docket No.	ER13-95-001

ORDER ON REHEARING AND COMPLIANCE FILINGS

(Issued May 15, 2014)

	<u>Paragraph Numbers</u>
I. Background .....	<u>5.</u>
II. Requests for Rehearing or Clarification – Docket Nos. ER13-187-002, ER13-186-001, ER13-89-001, ER13-101-002, ER13-84-001, ER13-95-001 .....	<u>12.</u>
III. Procedural Matters.....	<u>15.</u>
IV. Discussion .....	<u>19.</u>
A. Procedural Matters .....	<u>19.</u>
B. Substantive Matters .....	<u>25.</u>
1. Regional Transmission Planning Requirements .....	<u>28.</u>

a. Order No. 890 and Other Regional Transmission Planning Process General Requirements.....	<u>29.</u>
i. First Compliance Order .....	<u>30.</u>
ii. Summary of Compliance Filing .....	<u>34.</u>
iii. Protests/Comments .....	<u>36.</u>
iv. Commission Determination .....	<u>37.</u>
b. Consideration of Transmission Needs Driven by Public Policy Requirements .....	<u>38.</u>
i. Incorporating Consideration of Transmission Needs Driven by Public Policy Requirements in the Regional Transmission Planning Process .....	<u>41.</u>
(a) First Compliance Order .....	<u>41.</u>
(b) Summary of Compliance Filing .....	<u>45.</u>
(c) Protests/Comments .....	<u>50.</u>
(d) Answer .....	<u>54.</u>
(e) Commission Determination .....	<u>55.</u>
ii. Incorporating Consideration of Transmission Needs Driven by Public Policy Requirements in MidAmerican’s Local Transmission Planning Process – Docket No. ER13-89-002 .....	<u>60.</u>
(a) First Compliance Order .....	<u>60.</u>
(b) Summary of Compliance Filing .....	<u>61.</u>
(c) Commission Determination .....	<u>65.</u>
iii. Incorporating Consideration of Transmission Needs Driven by Public Policy Requirements in American Transmission’s Local Transmission Planning Process; Docket No. ER13-101-003.....	<u>66.</u>
(a) First Compliance Order .....	<u>66.</u>
(b) Summary of Compliance Filing .....	<u>69.</u>
(c) Commission Determination .....	<u>76.</u>
2. Nonincumbent Transmission Developer Reforms .....	<u>77.</u>
a. Federal Rights of First Refusal.....	<u>78.</u>
i. Mobile-Sierra.....	<u>80.</u>
(a) First Compliance Order .....	<u>80.</u>
(b) Summary of Requests for Rehearing or Clarification .....	<u>91.</u>
(c) Commission Determination .....	<u>108.</u>
ii. References to State or Local Rights of First Refusal .....	<u>123.</u>
(a) First Compliance Order .....	<u>123.</u>
(b) Requests for Rehearing or Clarification .....	<u>126.</u>
(1) Proposed Language Does Not Create Right of First Refusal; Inefficiency and Delay; State/Federal Law Dispute; Preemption .....	<u>126.</u>
(2) Cost Allocation for Project with State Rights of First Refusal .....	<u>151.</u>
(c) Compliance .....	<u>158.</u>
(1) Summary of Compliance Filings .....	<u>158.</u>
(2) Protests/Comments.....	<u>161.</u>
(3) Answer .....	<u>166.</u>
(4) Commission Determination .....	<u>167.</u>

iii. Projects with Upgrades and New Transmission Facilities (20 mile threshold) .....	<u>169.</u>
(a) First Compliance Order .....	<u>169.</u>
(b) Summary of Compliance Filings .....	<u>170.</u>
(c) Protests/Comments .....	<u>174.</u>
(d) Answer .....	<u>180.</u>
(e) Commission Determination .....	<u>182.</u>
iv. Upgrade Definition– Existing Transmission Lines .....	<u>184.</u>
(a) First Compliance Order .....	<u>184.</u>
(b) Requests for Rehearing or Clarification .....	<u>186.</u>
(1) Summary of Requests for Rehearing or Clarification .....	<u>186.</u>
(2) Commission Determination .....	<u>188.</u>
(c) Compliance .....	<u>189.</u>
(1) Summary of Compliance Filings .....	<u>189.</u>
(2) Protests/Comments .....	<u>194.</u>
(3) Commission Determination .....	<u>198.</u>
v. Upgrade Definition – Transmission Substations .....	<u>204.</u>
(a) First Compliance Order .....	<u>204.</u>
(b) Requests for Rehearing or Clarification .....	<u>206.</u>
(1) Summary of Requests for Rehearing or Clarification .....	<u>206.</u>
(2) Commission Determination .....	<u>209.</u>
(c) Compliance .....	<u>210.</u>
(1) Summary of Compliance Filings .....	<u>210.</u>
(2) Protests/Comments .....	<u>214.</u>
(3) Answer .....	<u>217.</u>
(4) Commission Determination .....	<u>222.</u>
vi. Upgrade Definition – Right-of-Way .....	<u>227.</u>
(a) First Compliance Order .....	<u>227.</u>
(b) Summary of Compliance Filings .....	<u>228.</u>
(c) Protests/Comments .....	<u>231.</u>
(d) Answer .....	<u>236.</u>
(e) Commission Determination .....	<u>237.</u>
b. Qualification Criteria .....	<u>241.</u>
i. First Compliance Order .....	<u>243.</u>
ii. Summary of Compliance Filings .....	<u>245.</u>
iii. Protests/Comments .....	<u>258.</u>
iv. Answer .....	<u>273.</u>
v. Commission Determination .....	<u>281.</u>
c. Information Requirements .....	<u>296.</u>
i. First Compliance Order .....	<u>297.</u>
ii. Summary of Compliance Filings .....	<u>300.</u>
iii. Protests/Comments .....	<u>306.</u>
iv. Answer .....	<u>312.</u>

v. Commission Determination .....	<u>318.</u>
d. Evaluation Process for Transmission Proposals for Selection in the Regional Transmission Plan for Purposes of Cost Allocation .....	<u>326.</u>
i. First Compliance Order .....	<u>327.</u>
ii. Summary of Compliance Filings .....	<u>331.</u>
iii. Protests/Comments .....	<u>338.</u>
iv. Answer .....	<u>342.</u>
v. Commission Determination .....	<u>346.</u>
e. Reevaluation Process for Transmission Proposals for Selection in the Regional Transmission Plan for Purposes of Cost Allocation .....	<u>352.</u>
i. First Compliance Order .....	<u>353.</u>
ii. Requests for Rehearing or Clarification .....	<u>356.</u>
(a) Summary of Requests for Rehearing or Clarification .....	<u>356.</u>
(b) Commission Determination .....	<u>357.</u>
iii. Compliance .....	<u>358.</u>
(a) Summary of Compliance Filings .....	<u>358.</u>
(b) Protests/Comments .....	<u>360.</u>
(c) Commission Determination .....	<u>361.</u>
f. Cost Allocation for Transmission Projects Selected in the Regional Transmission Plan for Purposes of Cost Allocation .....	<u>363.</u>
i. Competitive Bidding Process .....	<u>364.</u>
(a) First Compliance Order .....	<u>364.</u>
(b) Summary of Compliance Filings .....	<u>365.</u>
(c) Commission Determination .....	<u>366.</u>
ii. Construction Work in Progress (CWIP) .....	<u>367.</u>
(a) First Compliance Order .....	<u>367.</u>
(b) Summary of Requests for Rehearing or Clarification .....	<u>368.</u>
(c) Commission Determination .....	<u>374.</u>
3. Cost Allocation .....	<u>379.</u>
i. First Compliance Order .....	<u>386.</u>
ii. Requests for Rehearing or Clarification .....	<u>392.</u>
(a) Summary of Requests for Rehearing or Clarification .....	<u>392.</u>
(b) Commission Determination .....	<u>395.</u>
iii. Compliance .....	<u>402.</u>
(a) Summary of Compliance Filings .....	<u>402.</u>
(b) Commission Determination .....	<u>404.</u>
V. Entergy and Cleco .....	<u>405.</u>
A. First Compliance Order .....	<u>405.</u>
B. Summary of Compliance Filings .....	<u>408.</u>
C. Protests/Comments .....	<u>409.</u>
D. Answer .....	<u>411.</u>
E. Commission Determination .....	<u>412.</u>

VI. Baseline Reliability Project Filing .....415.

    A. First Compliance Order.....415.

    B. Requests for Rehearing or Clarification.....421.

    C. Commission Determination.....436.

Appendix A: Abbreviated Names of Commenters and Petitioners

1. On March 22, 2013, the Commission issued an order accepting, subject to modifications,<sup>1</sup> compliance filings made to comply with the local and regional transmission planning and cost allocation requirements of Order No. 1000,<sup>2</sup> which were submitted by: (1) Midcontinent Independent System Operator, Inc. (MISO)<sup>3</sup> in Docket No. ER13-187-000; (2) MidAmerican Energy Company (MidAmerican) in Docket No. ER13-89-000; (3) American Transmission Company LLC (American Transmission) in Docket No. ER13-101-000; (4) Cleco Power LLC (Cleco) in Docket No. ER13-84-000; and (5) Entergy Services Inc., acting as agent for the Entergy Operating Companies<sup>4</sup> in Docket No. ER13-95-000. The Commission also conditionally accepted MISO’s proposed revisions to Attachment FF of the MISO Open Access Transmission Energy and Operating Reserve Markets Tariff (Tariff),<sup>5</sup> pursuant to section 205 of the Federal Power Act (FPA),<sup>6</sup> to modify the cost allocation method for Baseline Reliability Projects

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<sup>1</sup> *Midwest Indep. Transmission Sys. Operator, Inc.*, 142 FERC ¶ 61,215 (2013) (First Compliance Order).

<sup>2</sup> *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, FERC Stats. & Regs. ¶ 31,323 (2011), *order on reh’g*, Order No. 1000-A, 139 FERC ¶ 61,132, *order on reh’g*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012).

<sup>3</sup> Effective April 26, 2013, MISO changed its name from “Midwest Independent Transmission System Operator, Inc.” to “Midcontinent Independent System Operator, Inc.”

<sup>4</sup> The Entergy Operating Companies are Entergy Arkansas, Inc., Entergy Gulf States Louisiana, L.L.C., Entergy Louisiana, LLC, Entergy Mississippi, Inc., Entergy New Orleans, Inc., and Entergy Texas, Inc. (together, Entergy).

<sup>5</sup> MISO, FERC Electric Tariff, Attachment FF (Transmission Expansion Planning Protocol) (8.0.0) (Attachment FF).

<sup>6</sup> 16 U.S.C. § 824d (2012).

(Baseline Reliability Project Filing) in Docket No. ER13-186-000, subject to a further compliance filing.

2. On April 18, 2013, Illinois Commission<sup>7</sup> filed a request for rehearing of the First Compliance Order. On April 22, 2013, AEP, ATC/Duke/Transource, AWEA/WOW, Indiana Commission, LS Power,<sup>8</sup> MISO, MISO Transmission Owners, Midwest TDUs, NARUC, and Organization of MISO States filed requests for rehearing of the First Compliance Order. On May 8, 2013, the Arkansas Commission filed comments in support of the Organization of MISO States' request for rehearing.

3. On July 22, 2013, MISO and MISO Transmission Owners,<sup>9</sup> submitted, pursuant to section 206 of the FPA,<sup>10</sup> revisions to Module A<sup>11</sup> and Attachment FF of MISO's Tariff and the Agreement of Transmission Facilities Owners to Organize the Midwest Independent Transmission System Operator, Inc., A Delaware Non-Stock Corporation

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<sup>7</sup> Appendix A contains the list of abbreviated names of commenters and petitioners in the proceedings addressed by this order.

<sup>8</sup> LS Power filed separate requests for rehearing in Docket No. ER13-187-002 and Docket No. ER13-186-001.

<sup>9</sup> MISO Transmission Owners for purposes of the filings addressed in this order are: Ameren Services Company, as agent for Union Electric Company, Ameren Illinois Company and Ameren Transmission Company of Illinois; City Water, Light & Power (Springfield, IL); Dairyland Power Cooperative; Great River Energy; Hoosier Energy Rural Electric Cooperative, Inc.; Indianapolis Power & Light Company; MidAmerican Energy Company; Minnesota Power (and its subsidiary Superior Water, L&P); Missouri River Energy Services; Montana-Dakota Utilities Co.; Northern Indiana Public Service Company; Northern States Power Company, a Minnesota corporation, and Northern States Power Company, a Wisconsin corporation; Northwestern Wisconsin Electric Company; Otter Tail Power Company; Southern Illinois Power Cooperative; Southern Indiana Gas & Electric Company; and Southern Minnesota Municipal Power Agency.

<sup>10</sup> 16 U.S.C. § 824e (2012).

<sup>11</sup> MISO, FERC Electric Tariff, Module A (Common Tariff Provisions) (0.0.0). Unless otherwise noted, citations to MISO's Attachment FF in this order, including the proposed provisions submitted as part of the instant compliance filing, will refer to version 15.0.0.

(Transmission Owners Agreement)<sup>12</sup> to comply with the First Compliance Order. On July 22, 2013, MidAmerican and American Transmission also separately submitted, pursuant to FPA section 206, revisions to Attachment FF-MidAmerican (MidAmerican Local Transmission Planning Process) of MISO's Tariff (Attachment FF-MidAmerican)<sup>13</sup> and Attachment FF-ATCLLC (American Transmission Local Transmission Planning Process) of MISO's Tariff (Attachment FF-ATCLLC),<sup>14</sup> respectively, to comply with the First Compliance Order requirements related to their respective local transmission planning processes.<sup>15</sup>

4. For the reasons discussed below, we deny in part and grant in part the requests for rehearing, and we conditionally accept in part and reject in part MISO's proposed Tariff revisions to comply with the directives of Order No. 1000 and the First Compliance Order, subject to a further compliance filing by MISO due within 60 days of the date of issuance of this order. Additionally, for the reasons discussed below, we accept MidAmerican's and American Transmission's respective proposed Tariff revisions to comply with the directives of Order No. 1000 and the First Compliance Order.<sup>16</sup>

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<sup>12</sup> MISO, FERC Electric Tariff, MISO Rate Schedules, MISO Transmission Owner Agreement, App. B (Planning Framework) (0.0.0).

<sup>13</sup> MISO, FERC Electric Tariff, Attachment FF-MidAmerican (Local Transmission Planning Process) (1.0.0). Unless otherwise noted, citations to Attachment FF-MidAmerican in this order will refer to version 1.0.0.

<sup>14</sup> MISO, FERC Electric Tariff, Attachment FF-ATCLLC (Local Transmission Planning Process) (3.0.0). Unless otherwise noted, citations to Attachment FF-ATCLLC in this order will refer to version 3.0.0.

<sup>15</sup> MISO also submitted proposed revisions to its Tariff to address the compliance requirement for its Baseline Reliability Project Filing in Docket No. ER13-186-002, requesting that the Commission address the compliance requirement separately from, and ahead of, the First Compliance Order's other requirements. The Commission accepted these proposed revisions, subject to a further compliance filing. *See Midcontinent Independent System Operator, Inc.*, 144 FERC ¶ 61,096 (2013).

<sup>16</sup> We note that the same or similar issues are addressed in the following orders that have issued or are being issued contemporaneously with this order: *Cal. Indep. Sys. Operator Corp.*, 146 FERC ¶ 61,198 (2014); *PacifiCorp*, 147 FERC ¶ 61,057 (2014); *PJM Interconnection, L.L.C.*, 147 FERC ¶ 61,128; *South Carolina Electric & Gas Co.*, 147 FERC ¶ 61,126; and *Maine Public Service Co.*, 147 FERC ¶ 61,129.

## I. Background

5. In Order No. 1000, the Commission adopted a package of reforms addressing transmission planning and cost allocation that, taken together, are designed to ensure that Commission-jurisdictional services are provided at just and reasonable rates and on a basis that is just and reasonable and not unduly discriminatory or preferential. In particular, regarding regional transmission planning, Order No. 1000 amended the transmission planning requirements of Order No. 890<sup>17</sup> to require that each public utility transmission provider: (1) participate in a regional transmission planning process that produces a regional transmission plan; (2) amend its tariff to describe procedures for the consideration of transmission needs driven by public policy requirements established by local, state, or federal laws or regulations in the local and regional transmission planning processes; and (3) remove federal rights of first refusal from Commission-jurisdictional tariffs and agreements for certain new transmission facilities.

6. The regional cost allocation reforms in Order No. 1000 also required each public utility transmission provider to set forth in its tariff a method, or set of methods, for allocating the costs of new regional transmission facilities selected in a regional transmission plan for purposes of cost allocation. Order No. 1000 also required that each cost allocation method adhere to six cost allocation principles.

7. On October 25, 2012, MISO submitted revisions to its Tariff and Transmission Owners Agreement to comply with the local and regional transmission planning and cost allocation requirements of Order No. 1000.

8. On October 11, 2012, MidAmerican and American Transmission separately submitted revisions to their local transmission planning processes in MISO's Tariff, Attachment FF-MidAmerican and Attachment FF-ATCLLC, respectively, to comply with the requirements in Order No. 1000 related to their local transmission planning processes. MidAmerican and American Transmission explained that their local transmission planning processes function in concert with the MISO regional transmission planning process. With the exception of MidAmerican and American Transmission, MISO performs local transmission planning for its transmission owning members.

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<sup>17</sup> *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241, *order on reh'g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh'g*, Order No. 890-C, 126 FERC ¶ 61,228, *order on clarification*, Order No. 890-D, 129 FERC ¶ 61,126 (2009).

9. On October 11, 2012, Cleco and Entergy separately submitted revisions to Attachment K of their respective tariffs<sup>18</sup> to comply with the regional transmission planning requirements of Order No. 1000. Cleco and Entergy indicated that they would comply with the requirements of Order No. 1000 by participating in the MISO regional transmission planning process. MISO explained that Cleco and Entergy had announced their intent to join MISO, at which time MISO would take over responsibility for planning their transmission systems pursuant to MISO's Tariff. Cleco and Entergy stated that they would participate in MISO's regional transmission planning process, which results in a regional transmission plan, i.e., the MISO Transmission Expansion Plan (MTEP), beginning in June 2013 for the MTEP 2014 transmission planning cycle.

10. On October 25, 2012, MISO submitted its Baseline Reliability Project Filing under FPA section 205 to modify its existing cost allocation provisions for Baseline Reliability Projects so that 100 percent of the costs of Baseline Reliability Projects would be allocated to the pricing zone where the Baseline Reliability Project is located. MISO explained that while it was not relying on the Baseline Reliability Project cost allocation method to comply with Order No. 1000, its proposed revisions were consistent with the six Order No. 1000 cost allocation principles.

11. On March 22, 2013, the Commission conditionally accepted MISO's, MidAmerican's, and American Transmission's respective compliance filings, subject to further modifications. The Commission also conditionally accepted Cleco's and Entergy's respective compliance filings, conditioned upon the Commission's examination and acceptance of modifications to MISO's Tariff, to be proposed by MISO, which would reflect the integration of Cleco and Entergy into the MISO system and subject to a further compliance filing by MISO. The Commission also directed Cleco and Entergy to notify the Commission by June 1, 2013 should they fail to join the MTEP 2014 process as proposed. Finally, finding MISO's proposed revisions to the Tariff to modify the cost allocation method for Baseline Reliability Projects to be just and reasonable, the Commission conditionally accepted these revisions subject to a further compliance filing.<sup>19</sup>

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<sup>18</sup> Cleco Power LLC, OATT, Attachment K (Transmission Planning Process) (2.0.0); Entergy Arkansas, Inc., Open Access Transmission Tariff, Attachment K (Transmission Planning Process) (2.0.0) (Entergy Tariff).

<sup>19</sup> First Compliance Order, 142 FERC ¶ 61,215 at P 28.

## **II. Requests for Rehearing or Clarification – Docket Nos. ER13-187-002, ER13-186-001, ER13-89-001, ER13-101-002, ER13-84-001, ER13-95-001**

12. On April 18, 2013, Illinois Commission filed a request for rehearing of the First Compliance Order seeking rehearing of the Commission’s determinations with respect to references to state or local rights of first refusal and cost allocation. On April 22, 2013, MISO, MISO Transmission Owners, Midwest TDUs, Indiana Commission, NARUC,<sup>20</sup> Organization of MISO States, LS Power, and ATC/Duke/Transource filed requests for rehearing of the First Compliance Order. Specifically, MISO and MISO Transmission Owners seek rehearing of the Commission’s *Mobile-Sierra*<sup>21</sup> findings and the Commission’s determinations with respect to references to state or local rights of first refusal. Midwest TDUs, Indiana Commission, NARUC, and Organization of MISO States also seek rehearing of the Commission’s determinations with respect to references to state or local rights of first refusal. Additionally, Indiana Commission and Organization of MISO States seek rehearing of the Commission’s reevaluation findings. LS Power and ATC/Duke/Transource both seek rehearing of the Commission’s findings on construction work in process (CWIP) recovery for nonincumbent transmission providers. Finally, LS Power seeks rehearing of the Commission’s determinations with respect to upgrades to existing transmission lines and the upgrade definition for transmission substations.

13. On April 22, 2013, AEP, AWEA/WOW, LS Power, and ATC/Duke/Transource filed requests for rehearing with respect to the First Compliance Order’s findings on MISO’s Baseline Reliability Project Filing.

14. On May 8, 2013, the Arkansas Commission filed comments in support of the request for rehearing by Organization of MISO States.

## **III. Procedural Matters**

15. MISO has submitted further revisions to its local and regional transmission planning processes to comply with the Commission’s requirements in the First Compliance Order, including modifications outlined in the “Regional Transmission Planning Requirements,” “Consideration of Transmission Needs Driven by Public Policy Requirements,” “Nonincumbent Transmission Developer Reforms,” “Cost Allocation,”

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<sup>20</sup> NARUC filed a motion to intervene out-of-time with its request for rehearing.

<sup>21</sup> The *Mobile-Sierra* doctrine originated in the Supreme Court’s decisions in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956) (*Mobile*) and *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) (*Sierra*).

and “Entergy and Cleco” sections of the First Compliance Order. MISO indicates that the Order No. 1000 compliance provisions are located in Attachment FF of its Tariff. MISO requests an effective date for its compliance filing of June 1, 2013, consistent with the effective date the Commission approved in the First Compliance Order.<sup>22</sup>

16. Notice of MISO’s compliance filing was published in the *Federal Register*, 78 Fed. Reg. 45,519 (2013), with interventions and protests due on or before August 21, 2013. ATC/Duke/Transource, Illinois Commission, Indiana Commission, LS Power, and Organization of MISO States filed timely protests and comments. MISO filed an answer in response to the protests and comments. On March 5, 2014, LS Power submitted late-filed supplemental comments. On May 2, 2014, LS Power submitted a second set of late-filed supplemental comments. On May 14, 2014, MISO submitted an answer to LS Power’s late-filed supplemental comments.

17. In response to the First Compliance Order, MidAmerican and American Transmission<sup>23</sup> have each separately submitted further revisions to their local transmission planning processes to comply with the Commission’s requirements in the First Compliance Order related to “Consideration of Transmission Needs Driven by Public Policy Requirements.” MidAmerican and American Transmission indicate that the Order No. 1000 compliance provisions are located in Attachment FF-MidAmerican and Attachment FF-ATCLLC, respectively, of MISO’s Tariff. MidAmerican requests an effective date for its compliance filing of October 11, 2012, which is the same effective date the Commission approved in the First Compliance Order.<sup>24</sup> American Transmission requests that the Commission make its proposed revisions effective as of the date of issuance of an order accepting its proposed revisions.<sup>25</sup>

18. Notice of MidAmerican’s compliance filing was published in the *Federal Register*, 78 Fed. Reg. 45,519 (2013), with interventions and protests due on or before

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<sup>22</sup> MISO, Transmittal Letter, Docket Nos. ER13-187-003 and ER13-187-004, at 1-2 (filed July 22, 2013) (MISO Compliance Transmittal).

<sup>23</sup> MISO joins in MidAmerican’s and American Transmission’s local transmission planning compliance filings because MISO is the administrator of MISO’s Tariff, but MISO takes no position on the substance of these filings.

<sup>24</sup> MidAmerican, Transmittal Letter, Docket No. ER13-89-002, at 1 (filed July 22, 2013) (MidAmerican Compliance Transmittal).

<sup>25</sup> American Transmission, Transmittal Letter, Docket No. ER13-101-003, at 9 (filed July 22, 2013) (American Transmission Compliance Transmittal).

August 21, 2013. None was filed. Notice of American Transmission's compliance filing was published in the *Federal Register*, 78 Fed. Reg. 45,920 (2013), with interventions and protests due on or before August 21, 2013. None was filed.

#### **IV. Discussion**

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

19. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2013), the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

20. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2013), prohibits an answer to a protest or an answer unless otherwise ordered by the decisional authority. We will accept MISO's answer filed in this proceeding because it has provided information that assisted us in our decision-making process.

21. We reject LS Power's late-filed supplemental comments submitted on March 5, 2014. These late-filed supplemental comments relate to actions taken by Alberta Independent System Operator in its solicitation for transmission sponsors. As such, these comments are beyond the scope of this proceeding, which addresses MISO's compliance with the First Compliance Order. Moreover, we note that several of the issues raised by LS Power in its late-filed supplemental comments have already been raised in its protest of MISO's compliance filing. Thus, these arguments are merely repetitive and will not aid the Commission in its decision making process. For these reasons, LS Power's March 5, 2014 late-filed supplemental comments are rejected. We also reject LS Power's late-filed supplemental comments submitted on May 2, 2014, which relate to how MISO is implementing its transmission developer qualification process. MISO will have to make changes to the transmission developer qualification process based on the findings in this order, and, therefore, it would be premature to address LS Power's concerns prior to MISO making those changes. We likewise reject MISO's May 14, 2014 answer.

22. NARUC states that the Commission should grant its out-of-time request for intervention, arguing that "[c]ompelling and unique circumstances" surround its request. NARUC states that it has good cause for not timely filing its intervention given that it could not have foreseen the First Compliance Order's "potential profound and far reaching impacts to transmission siting policy."<sup>26</sup> NARUC avers that this late request

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<sup>26</sup> NARUC, Request for Rehearing and Motion to Intervene Out-of-Time, Docket No. ER13-187-002, *et al.*, at 3 (filed April 22, 2013) (NARUC Rehearing Request).

could not have been avoided unless it filed interventions in every Order No. 1000 compliance docket filing. In addition, NARUC contends that it agrees to accept the record as it stands at the time of its intervention so that permitting NARUC's intervention will not disrupt the proceeding or prejudice any party. NARUC also states that the filing deadlines in the proceeding besides those for rehearing requests have passed. Finally, NARUC argues that, absent its intervention, its interests would not be adequately represented.<sup>27</sup>

23. 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.<sup>28</sup> We find no such prejudice here, and we grant NARUC's motion to intervene out of time.

24. We note that the tariff records MISO submitted here in response to the First Compliance Order also include tariff provisions pending in tariff records that MISO separately filed on July 10, 2013 to comply with the interregional transmission coordination and cost allocation requirements of Order No. 1000. The tariff records MISO submitted in their interregional compliance filings are pending before the Commission and will be addressed in a separate order. Therefore, any acceptance of the tariff records in the instant filings that include tariff provisions submitted to comply with the interregional transmission coordination and cost allocation requirements of Order No. 1000 is made subject to the outcome of the Commission order addressing MISO's interregional compliance filing in Docket No. ER13-1945-000.

## **B. Substantive Matters**

25. We deny in part and grant in part the requests for rehearing. As discussed below, we affirm the findings in the First Compliance Order with respect to the application of the *Mobile-Sierra* doctrine, upgrades to existing transmission lines, the upgrade definition for transmission substations, CWIP, cost allocation, and MISO's Baseline Reliability

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<sup>27</sup> *Id.* at 4.

<sup>28</sup> The Commission looks with disfavor on interventions filed at the rehearing stage of a proceeding. *Cent. Ill. Pub. Serv. Co.*, 59 FERC ¶ 61,219, at 61,753-54 (1992); *W. Res., Inc.*, 83 FERC ¶ 61,077, at 61,379 (1998); *PJM Interconnection, L.L.C.*, 88 FERC ¶ 61,039, at 61,091 (1999); *ISO New England, Inc.*, 90 FERC ¶ 61,053, at 61,224 (2000); *Am. Elec. Power Serv. Corp.*, 90 FERC ¶ 61,244, at 61,809 (2000); *Cal. Power Exch.*, 90 FERC ¶ 61,343, at 62,130-31 (2000); *Tenn. Power Co.*, 91 FERC ¶ 61,271, at 61,923-24 (2000); *S. Co. Servs., Inc.*, 92 FERC ¶ 61,167, at 61,565-66 (2000); *Midwest Indep. Transmission Sys. Operator, Inc.*, 102 FERC ¶ 61,250, at P 7 (2003).

Project Filing. We grant requests for rehearing with respect to references to state or local rights of first refusal and MISO's reevaluation process.

26. We find that MISO's compliance filing partially complies with the directives in the First Compliance Order. Accordingly, we accept MISO's compliance filing to be effective June 1, 2013, subject to a further compliance filing, as discussed below. We direct MISO to submit the further compliance filing within 60 days of the date of issuance of this order.

27. We find that MidAmerican's and American Transmission's compliance filings comply with the directives in the First Compliance Order. Accordingly, we accept MidAmerican's and American Transmission's compliance filings to be effective October 11, 2012.

### **1. Regional Transmission Planning Requirements**

28. Order No. 1000 required each public utility transmission provider to participate in a regional transmission planning process that produces a regional transmission plan and that complies with the identified transmission planning principles of Order No. 890.<sup>29</sup> The regional transmission planning reforms required public utility transmission providers to consider and select, in consultation with stakeholders, transmission facilities that meet the region's reliability, economic, and Public Policy Requirements-related transmission needs more efficiently or cost-effectively than solutions identified by individual public utility transmission providers in their local transmission planning processes.<sup>30</sup>

#### **a. Order No. 890 and Other Regional Transmission Planning Process General Requirements**

29. Order No. 1000 required that the regional transmission planning process result in a regional transmission plan<sup>31</sup> and satisfy the Order No. 890 transmission planning principles of (1) coordination, (2) openness, (3) transparency, (4) information exchange, (5) comparability, (6) dispute resolution, and (7) economic planning.<sup>32</sup>

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<sup>29</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at PP 6, 11, 146.

<sup>30</sup> *Id.* PP 11, 148.

<sup>31</sup> *Id.* P 147.

<sup>32</sup> *Id.* PP 146, 151. These transmission planning principles are explained more fully in Order No. 890.

**i. First Compliance Order**

30. In the First Compliance Order, the Commission noted that it previously found that MISO's regional transmission planning process satisfies each of the Order No. 890 transmission planning principles. The Commission found that the MISO regional transmission planning process, as amended to comply with the requirements of Order No. 1000, continued to comply with the Order No. 890 transmission planning principles.<sup>33</sup> The Commission also reviewed MISO's proposed amendments to its Tariff and Transmission Owners Agreement that create an Organization of MISO States committee (OMS Committee), and placed several compliance obligations on MISO related to these amendments.

31. In the First Compliance Order, the Commission found that MISO's proposal to define the role of the Organization of MISO States by creating the OMS Committee under MISO's Tariff and Transmission Owners Agreement was reasonable. Specifically, the Commission found that the proposed Tariff provisions formalize and define the opportunities for the Organization of MISO States to provide input to MISO for use in its transmission planning, resource adequacy, and transmission cost allocation processes. The Commission also agreed with MISO's proposal to allow it and its stakeholders to assess the effectiveness of the OMS Committee after an initial two year period. The Commission encouraged MISO to work with the OMS Committee and its other stakeholders to evaluate what, if any, communications between the Organization of MISO States and MISO could be posted on MISO's website.<sup>34</sup>

32. The Commission also directed MISO to submit a further compliance filing to revise the Tariff to clarify that the OMS Committee is autonomous and self-governing, as agreed to by MISO in its answer.<sup>35</sup> In addition, the Commission stated that MISO's Tariff must be sufficiently detailed as to provide interested parties with the framework necessary to understand the process, with remaining information relegated to the Transmission Planning Business Practices Manual. Thus, the Commission stated that it

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<sup>33</sup> First Compliance Order, 142 FERC ¶ 61,215 at P 47. The Commission noted that MISO had an outstanding Order No. 890 compliance obligation regarding the comparability principle related to how MISO will consider contractual commitments to evaluate proposed alternatives. *Id.* P 48 n.74.

<sup>34</sup> *Id.* P 62.

<sup>35</sup> *Id.* P 64.

would evaluate on compliance whether MISO's amended Tariff revisions providing these clarifying details as requested by the OMS Committee are sufficiently detailed.<sup>36</sup>

33. Finally, the Commission found that the Tariff did not specify how the OMS Committee will be funded. Therefore, the Commission directed MISO to revise its Tariff to clarify how the OMS Committee will be funded, while noting that administrative costs are generally recovered under Schedule 10 (ISO Cost Recovery Adder) of the Tariff.<sup>37</sup>

**ii. Summary of Compliance Filing**

34. MISO has revised the definition of the OMS Committee in the Tariff and in the Transmission Owners Agreement to state that the OMS Committee was established as an autonomous and self-governing body.<sup>38</sup>

35. MISO also has revised the definition of OMS Committee in the Tariff and the Transmission Owners Agreement to state that the costs associated with the OMS Committee will be recovered from all users of MISO's system under Schedule 10 (ISO Cost Recovery Adder) of the Tariff, which MISO states is consistent with how it recovers the other administrative costs associated with MISO operations. MISO states that recovery under Schedule 10 is reasonable because the formation and activities of the newly created OMS Committee are an extension of current Organization of MISO States activities, the costs of which are already recovered under Schedule 10.<sup>39</sup>

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<sup>36</sup> *Id.* P 65.

<sup>37</sup> *Id.* P 67.

<sup>38</sup> MISO Compliance Transmittal at 6 (citing MISO, FERC Electric Tariff, Module A, § 1.474a (OMS Committee) (1.0.0); MISO, FERC Electric Tariff, MISO Rate Schedules, MISO Transmission Owners Agreement, Article II, § VI.C; MISO, FERC Electric Tariff, MISO Rate Schedules, MISO Transmission Owner Agreement, Appendix K, § I.H).

<sup>39</sup> *Id.*

**iii. Protests/Comments**

36. Indiana Commission and Organization of MISO States submitted comments in support of MISO's proposed revisions related to the OMS Committee.<sup>40</sup>

**iv. Commission Determination**

37. We find that MISO's proposed revisions to the regional transmission planning process comply with the directives in the First Compliance Order because MISO has revised the Tariff to state that the OMS Committee will be "an autonomous and self-governing body" and that the OMS Committee will be funded pursuant to Schedule 10 of the Tariff. Upon further review, we also find that the Tariff is sufficiently detailed as to provide interested parties with the framework necessary to understand the OMS Committee process. However, although MISO made the same revisions to the definition of the OMS Committee in Article II and in Appendix K of the Transmission Owners Agreement that it did in the Tariff and which we find acceptable, MISO did not revise the definition of the OMS Committee in Appendix F of the Transmission Owners Agreement.<sup>41</sup> Accordingly, we direct MISO to submit, within 60 days of the date of issuance of this order, a further compliance filing to revise the definition of OMS Committee in Appendix F of the Transmission Owners Agreement to state that the OMS Committee will be an autonomous and self-governing body and will be funded pursuant to Schedule 10 of the Tariff.

**b. Consideration of Transmission Needs Driven by Public Policy Requirements**

38. Order No. 1000 required public utility transmission providers to amend their tariffs to include procedures for the consideration of transmission needs driven by Public Policy Requirements in both the local and regional transmission planning processes.<sup>42</sup> Public Policy Requirements are requirements established by local, state or federal laws or regulations (i.e., enacted statutes passed by the legislature and signed by the executive

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<sup>40</sup> Indiana Commission, Comments, Docket Nos. ER13-187-003 and ER13-187-004, at 3 (filed Aug. 19, 2013) (Indiana Commission Comments); Organization of MISO States, Comments, Docket Nos. ER13-187-003 and ER13-187-004, at 9 (filed Aug. 21, 2013) (Organization of MISO States Comments).

<sup>41</sup> MISO, FERC Electric Tariff, MISO Rate Schedules, MISO Transmission Owner Agreement, Appendix F, § 6.3.

<sup>42</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 203.

and regulations promulgated by a relevant jurisdiction, whether within a state or at the federal level).<sup>43</sup>

39. The Commission in Order No. 1000 explained that, to consider transmission needs driven by Public Policy Requirements, public utility transmission providers must adopt procedures to (1) identify transmission needs driven by Public Policy Requirements and (2) evaluate potential solutions to meet those identified needs.<sup>44</sup> More specifically, public utility transmission providers must adopt procedures in their local and regional transmission planning processes for identifying transmission needs driven by Public Policy Requirements that give all stakeholders a meaningful opportunity to provide input and to offer proposals regarding what they believe are transmission needs driven by Public Policy Requirements.<sup>45</sup> Each public utility transmission provider must explain how it will determine at both the local and regional level, the transmission needs driven by Public Policy Requirements for which solutions will be evaluated<sup>46</sup> and must post on its website an explanation of: (1) those transmission needs driven by Public Policy Requirements that were identified for evaluation for potential solutions in the local and regional transmission planning processes and (2) why other proposed transmission needs driven by Public Policy Requirements were not selected for further evaluation.<sup>47</sup>

40. Order No. 1000 also required public utility transmission providers, in consultation with stakeholders, to evaluate at the local and regional level potential solutions to identified transmission needs driven by Public Policy Requirements, including transmission facilities proposed by stakeholders.<sup>48</sup> The evaluation procedures must give stakeholders the opportunity to provide input and enable the Commission and stakeholders to review the record created by the process.<sup>49</sup>

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<sup>43</sup> *Id.* P 2. Order No. 1000-A clarified that Public Policy Requirements included local laws and regulations passed by a local governmental entity, such as a municipal or county government. Order No. 1000-A, 139 FERC ¶ 61,132 at P 319.

<sup>44</sup> *Id.* P 205.

<sup>45</sup> *Id.* PP 206-209; Order No. 1000-A, 139 FERC ¶ 61,132 at P 335.

<sup>46</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at PP 208-209

<sup>47</sup> *Id.* P 209; *see also* Order No. 1000-A, 139 FERC ¶ 61,132 at P 325.

<sup>48</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 211 & n.191.

<sup>49</sup> Order No. 1000-A, 139 FERC ¶ 61,132 at PP 320-321.

i. **Incorporating Consideration of Transmission Needs Driven by Public Policy Requirements in the Regional Transmission Planning Process**

(a) **First Compliance Order**

41. In the First Compliance Order, the Commission found that MISO's filing partially complied with the provisions of Order No. 1000 addressing transmission needs driven by public policy requirements.<sup>50</sup> The Commission stated that MISO's proposal complied with the requirement to have procedures in its Tariff to evaluate at the regional level potential transmission solutions to identified transmission needs driven by public policy requirements that both include the evaluation of transmission facilities stakeholders propose to satisfy an identified transmission need driven by public policy requirements and allow stakeholders an opportunity to provide input during the evaluation of potential transmission solutions to identified transmission needs. The Commission also found that MISO's proposal complied with the requirement that each public utility transmission provider post on its website an explanation of: (1) those transmission needs driven by public policy requirements that have been identified for evaluation for potential transmission solutions in the local and regional transmission planning processes; and (2) why other suggested transmission needs driven by public policy requirements will not be evaluated.<sup>51</sup>

42. However, the Commission found that MISO's proposal was deficient in three ways. First, the Commission stated that MISO's proposed definition of public policy requirements, which relies on MISO's consideration of Transmission Issues,<sup>52</sup> did not encompass the full range of public policy requirements that may drive transmission needs. In particular, the Commission found that MISO's proposed definition, which referenced "applicable state and federal laws," did not allow for consideration of duly

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<sup>50</sup> First Compliance Order, 142 FERC ¶ 61,215 at P 109.

<sup>51</sup> *Id.* PP 112-113.

<sup>52</sup> MISO proposed to define Transmission Issues to include "the need to comply with all requirements imposed on the Transmission System performance by entities with jurisdiction or authority over all or part of the Transmission System including, but not necessarily limited to ... compliance with applicable state and federal laws," and "compliance with applicable regulatory mandates and obligations, including regulatory obligations related to serving load, interconnecting generation and providing transmission service." *Id.* P 88.

enacted laws or regulations passed by local government entities.<sup>53</sup> Therefore, the Commission required MISO to submit a further compliance filing to clarify in its Tariff that it will also consider duly enacted laws and regulations passed by a local governmental entity.<sup>54</sup>

43. Second, the Commission found that MISO did not provide sufficient detail in its Tariff about how MISO will identify transmission needs driven by public policy requirements. Therefore, the Commission required MISO to submit a further compliance filing to revise its Tariff to include clear and transparent procedures for identifying transmission needs driven by public policy requirements in its regional transmission planning process that allow stakeholders an opportunity to provide input and offer proposals regarding the transmission needs they believe are driven by public policy requirements.<sup>55</sup>

44. Finally, the Commission found that MISO had not complied with the requirement to establish, in consultation with its stakeholders, a just and reasonable and not unduly discriminatory process through which it will identify those transmission needs driven by public policy requirements for which transmission solutions will be evaluated. The Commission therefore required MISO to submit a compliance filing to explain in its Tariff the just and reasonable and not unduly discriminatory process it will use to identify, out of the larger set of transmission needs driven by public policy requirements that stakeholders may propose, those needs for which transmission solutions will be evaluated.<sup>56</sup>

**(b) Summary of Compliance Filing**

45. MISO proposes to revise the definition of Transmission Issues to delete the phrase “applicable state and federal laws” and replace it with the phrase “Applicable Laws and Regulations.” As revised, the definition of Transmission Issues would include “the need to comply with all requirements imposed on the Transmission System performance by entities with jurisdiction or authority over all or part of the Transmission System including, but not necessarily limited to ... compliance with Applicable Laws and

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<sup>53</sup> *Id.* PP 95-96.

<sup>54</sup> *Id.* P 96.

<sup>55</sup> *Id.* PP 109-110.

<sup>56</sup> *Id.* P 111.

Regulations.”<sup>57</sup> The phrase “Applicable Laws and Regulations” is defined in the Tariff as:

[a]ll duly promulgated applicable federal, state and local laws, regulations, rules, ordinances, codes, decrees, judgments, directives, or judicial or administrative orders, permits and other duly authorized actions of any Governmental Authority having jurisdiction over the Parties, their respective facilities and/or the respective services they provide.<sup>[58]</sup>

MISO states, therefore, that revising the definition of Transmission Issues to reference Applicable Laws and Regulations rather than state and federal laws will now include public policy requirements at the federal, state, and local levels.<sup>59</sup>

46. To comply with the requirement to provide sufficient detail about the procedures for identifying transmission needs driven by public policy requirements in its regional transmission planning process, MISO proposes to revise its Tariff to provide additional details to clarify how MISO and its stakeholders will identify Transmission Issues and how MISO will select the Transmission Issues for which transmission solutions will be evaluated.<sup>60</sup> MISO proposes to integrate into the development of the MTEP the Transmission Issues identified by MISO or by stakeholders that MISO selects to address applicable transmission needs driven by public policy requirements.<sup>61</sup> MISO proposes that each transmission planning cycle commences with, among other things, the identification of potential Transmission Issues, the selection of Transmission Issues for evaluation, and the identification of potential transmission expansions that address the selected Transmission Issues.<sup>62</sup> MISO also proposes changes to its Tariff to include the

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<sup>57</sup> MISO, FERC Electric Tariff, Module A, § 1.667c (Transmission Issue) (1.0.0).

<sup>58</sup> MISO Compliance Transmittal at 7-8 (citing MISO, FERC Electric Tariff, Module A, § 1.14 (Applicable Laws and Regulations) (0.0.0)).

<sup>59</sup> *Id.* MISO also proposes to revise its planning criteria so that projects included in the MTEP may be based upon Applicable Laws and Regulations. MISO, FERC Electric Tariff, Attachment FF, § I.C.5.

<sup>60</sup> MISO Compliance Transmittal at 7-8.

<sup>61</sup> MISO, FERC Electric Tariff, Attachment FF, § I.C.

<sup>62</sup> *Id.* § I.C.1.b.

identification of potential Transmission Issues and the selection of Transmission Issues to evaluate as key milestones in the transmission planning cycle.<sup>63</sup>

47. In addition, MISO proposes to revise its Tariff to describe the process through which MISO will select the Transmission Issues, including but not limited to those involving applicable transmission needs driven by public policy requirements, for which transmission solutions will be evaluated through the MTEP process.<sup>64</sup> Specifically, MISO's proposed process for selecting such Transmission Issues includes several steps. First, stakeholders may submit proposals to consider transmission needs driven by public policy requirements, as part of Transmission Issues they may raise, through Sub-regional Planning Meetings,<sup>65</sup> the Planning Subcommittee,<sup>66</sup> and/or the Planning Advisory Committee.<sup>67</sup> MISO may also identify transmission needs driven by public policy requirements for evaluation. Second, MISO will consolidate into a list all identified transmission needs driven by public policy requirements that it receives and will distribute that list to stakeholders through the Planning Subcommittee, the Planning Advisory Committee, and/or other stakeholder forums. Third, transmission needs driven by public policy requirements will be discussed in the Sub-regional Planning Meetings,

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<sup>63</sup> *Id.* § I.C.1.b.i. MISO, FERC Electric Tariff, Attachment FF, § I.C.1.b.i provides that the requirements and timelines for data submittal, review, and comment at each of the milestones will be included in MISO's Transmission Planning Business Practices Manual.

<sup>64</sup> *Id.* § I.C.1.b.ii.

<sup>65</sup> Sub-regional Planning Meetings are currently used by MISO to provide opportunity for stakeholders to provide input to the transmission planning process, and to carry out the tasks of coordinating transmission plans among the transmission owners. *Id.* § I.C.2.c.

<sup>66</sup> The Planning Subcommittee is a standing stakeholder-chaired subcommittee of the Planning Advisory Committee. Planning Subcommittee membership is open to interested parties, including, but not limited to: transmission delivery service and interconnection service customers, marketers, developers, transmission owners, state and federal regulatory staff, and other Market Participants and observers. *Id.* § I.C.2.b.

<sup>67</sup> The Planning Advisory Committee is a committee of stakeholders established under the Transmission Owners Agreement for the purpose of providing input to the planning staff on the development of the MTEP. MISO, FERC Electric Tariff, Module A, § 1.502 (Planning Advisory Committee) (1.0.0); *see also* MISO, FERC Electric Tariff, Attachment FF, § I.C.2.a.

Planning Subcommittee, and/or the Planning Advisory Committee. Finally, considering feedback received from stakeholders and the Sub-regional Planning Meetings, Planning Subcommittee, and/or Planning Advisory Committee, MISO will assess the identified transmission needs driven by public policy requirements and select those that will be further studied in the MTEP process.<sup>68</sup>

48. MISO proposes to select transmission needs driven by public policy requirements for further study based on the following criteria: (1) the effective dates, nature, and magnitude of public policy requirements in the Applicable Laws and Regulations; (2) the immediacy or other estimated timing, and extent, of the potential impact on the identified transmission needs; (3) the availability of the resources, and any limitations thereto, required to consider such transmission needs; (4) the relative significance of other Transmission Issues raised for consideration; and (5) other appropriate factors that can aid the prioritization of Transmission Issues to be considered in the regional transmission planning process.<sup>69</sup>

49. MISO also proposes clarifying Tariff revisions concerning stakeholder input in the planning process. First, MISO proposes to clarify that MISO will seek guidance concerning which Transmission Issues to consider from transmission owners, state and local regulatory authorities, and other stakeholders through the Planning Subcommittee and/or Planning Advisory Committee before each transmission planning cycle begins.<sup>70</sup> Moreover, MISO proposes that the Sub-regional Planning Meetings provide an opportunity for transmission owners, state and local regulatory authorities, and other stakeholders to coordinate proposals to address identified Transmission Issues.<sup>71</sup>

**(c) Protests/Comments**

50. LS Power states that it is concerned that MISO's definition of public policy requirements, which adds the phrase "Applicable Laws and Regulations" to the definition of Transmission Issues, is overly broad. LS Power argues that MISO fails to explain how including in the definition of Applicable Laws and Regulations "judgments, directives or

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<sup>68</sup> MISO, FERC Electric Tariff, Attachment FF, § I.C.1.b.ii.

<sup>69</sup> *Id.*

<sup>70</sup> MISO Compliance Transmittal at 8; MISO, FERC Electric Tariff, Attachment FF, § I.C.2.b.

<sup>71</sup> MISO Compliance Transmittal at 8; MISO, FERC Electric Tariff, Attachment FF, § I.C.2.c.

judicial or administrative orders” and “permits and other duly authorized actions of any Governmental Authority having jurisdiction over the Parties, their respective facilities and/or the respective services they provide” rises to the level of public policy or how MISO will address these issues. LS Power contends that these clauses should therefore be stricken from the definition of Applicable Laws and Regulations. In addition, LS Power claims that “permits” are usually company- or project-specific and often issued well into the development process for a specific transmission project. Thus, LS Power argues that it is unclear how such a permit can result in a public policy that MISO should include in its transmission planning.<sup>72</sup>

51. ATC/Duke/Transource object to MISO’s proposed new Tariff section that describes how Transmission Issues to be evaluated through the MTEP process will be selected. ATC/Duke/Transource state that this section states in relevant part that “[t]he Transmission Provider will select *the Transmission Issues, including but not limited to* those involving applicable transmission needs driven by public policy requirements, for which transmission solutions will be evaluated through the MTEP process.”<sup>73</sup> ATC/Duke/Transource argue that MISO’s proposed language goes beyond the scope of the First Compliance Order and the relevant Order No. 1000 requirements and gives MISO too much discretion regarding the issues that will be addressed in the MTEP planning process.<sup>74</sup>

52. ATC/Duke/Transource also argue that the proposed language conflicts with existing section I.C of Attachment FF, which requires MISO to integrate transmission projects proposed by transmission owners, as follows:

This analysis and planning process *shall integrate* into the development of the MTEP among other things . . . (iii) the Transmission Issues, including proposed transmission projects, identified by the Transmission Owners in connection with their planning analyses in accordance with local

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<sup>72</sup> LS Power, Protest, Docket Nos. ER13-187-003, *et al.*, at 5-6 (filed Aug. 21, 2013) (LS Power Protest).

<sup>73</sup> ATC/Duke/Transource, Protest, Docket No. ER13-187-003, at 3-4 (filed Aug. 21, 2013) (ATC/Duke/Transource Protest) (quoting MISO, FERC Electric Tariff, Attachment FF, § I.C.1.b.ii; MISO Compliance Transmittal at 8 (emphasis added by ATC/Duke/Transource)).

<sup>74</sup> *Id.* at 3-4.

planning process described in Section I.B.1.a to this Attachment FF and the coordination processes of Section I.B.1.b., or developed by Transmission Owners utilizing their own FERC-approved local transmission planning process described in Section I.B.2, as applicable, to provide reliable power supply to their connected load customers and to expand trading opportunities, better integrate the grid and alleviate congestion.<sup>75</sup>

53. ATC/Duke/Transource argue that MISO's proposed Tariff language for selecting the Transmission Issues that will be evaluated through the MTEP process would improperly dilute the extent to which issues or projects identified by transmission owners must be integrated into the development of the MTEP and would vest in MISO an inappropriate amount of discretion, directly impacting transmission owners' ability to address the needs of their transmission customers.<sup>76</sup> Accordingly, ATC/Duke/Transource request that the following proposed language be deleted in its entirety:

Selecting Transmission Issues to be evaluated through the MTEP Process: The Transmission Provider will select the Transmission Issues, including but not limited to those involving applicable transmission needs driven by public policy requirements, for which transmission solutions will be evaluated through the MTEP process. The scope of planning studies, development of future scenarios to be modeled and analyzed in long-term transmission planning studies, and the development of suitable models and assumptions to support such transmission planning studies will be driven by the selected Transmission Issues.<sup>77</sup>

**(d) Answer**

54. MISO responds to LS Power's assertion that the definition of Applicable Laws and Regulations is vague and unexplained and that the phrases "judgments, directives or judicial or administrative orders" and "permits and other duly authorized actions of any

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<sup>75</sup> *Id.* at 4 (quoting MISO, FERC Electric Tariff, Attachment FF, § I.C (emphasis added by ATC/Duke/Transource)).

<sup>76</sup> *Id.* (citing MISO, FERC Electric Tariff, Attachment FF, § I.C.1.b.ii).

<sup>77</sup> *Id.* at 4-5 (citing MISO, FERC Electric Tariff, Attachment FF, § I.C.1.b.ii).

Governmental Authority having jurisdiction over the Parties, their respective facilities and/or the respective services they provide” should be stricken from MISO’s Tariff. MISO states that the term “Applicable Laws and Regulations” refers to the binding laws and regulations that may be issued by governmental entities in MISO’s footprint, which drive transmission needs that MISO should consider for further evaluation in the MTEP.<sup>78</sup> MISO states the term is intended to include local or sub-regional authorities and provides Michigan’s Clean, Renewable, and Efficient Energy Act as an example that was described in the Commission’s orders that addressed the Michigan Thumb Project, the first Multi-Value Project (MVP)<sup>79</sup> in MISO. MISO reiterates that its proposed process for selecting Transmission Issues to be evaluated through the MTEP process would be the same for transmission needs driven by public policy requirements sourced from “judgments, directives, or judicial or administrative orders,” thus appropriately interpreting and implementing relevant state or federal legislation.<sup>80</sup>

**(e) Commission Determination**

55. We find that MISO’s proposed revisions to the regional transmission planning process partially comply with the directives in the First Compliance Order concerning the consideration of transmission needs driven by public policy requirements. Specifically, we find that MISO provided clear and transparent procedures for identifying transmission needs driven by public policy requirements in its regional transmission planning process that allow stakeholders an opportunity to provide input and offer proposals, as well as the just and reasonable and not unduly discriminatory process it will use to identify, out of the larger set of transmission needs driven by public policy requirements that stakeholders may propose, those needs for which transmission solutions will be evaluated.

56. However, we reject MISO’s proposal to revise the definition of Transmission Issues to delete the phrase “applicable state and federal laws” and replace it with the phrase “Applicable Laws and Regulations.” The proposed language goes beyond the

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<sup>78</sup> MISO, Answer, Docket Nos. ER13-187-003 and ER13-187-004, at 43 (filed Oct. 15, 2013) (MISO Answer).

<sup>79</sup> A MVP is one or more Network Upgrades that address a common set of Transmission Issues and satisfy the conditions listed in sections II.C.1, II.C.2, and II.C.3 of Attachment FF. MISO, FERC Electric Tariff, Module A, § 1.429a (Multi-Value Project (MVP)) (1.0.0).

<sup>80</sup> MISO Answer at 44 (citing MISO, FERC Electric Tariff, Attachment FF, § I.C.1.b.ii.a).

requirement in the First Compliance Order for MISO to revise its Tariff to include in the definition of Transmission Issues “duly enacted laws and regulations passed by a local governmental entity.”<sup>81</sup> The Commission found that MISO’s definition of Transmission Issues, subject to MISO including in the definition “duly enacted laws and regulations passed by a local governmental agency,” complied with the Order No. 1000 requirement to consider the full range of public policy requirements which may drive transmission needs as specified by the Commission in Order No. 1000.<sup>82</sup> Therefore, we reject MISO’s proposal to replace “applicable state and federal laws” with the defined phrase, “Applicable Laws and Regulations.” Accordingly, we direct MISO to submit, within 60 days of the date of issuance of this order, a further compliance filing that removes the term “Applicable Laws and Regulations” from its definition of Transmission Issues, and consistent with the directive in the First Compliance Order, to include enacted laws or regulations passed by local government entities in the definition of Transmission Issues.<sup>83</sup>

57. We find that requiring MISO to remove “Applicable Laws and Regulations” from the definition of Transmission Issues in its Tariff addresses LS Power’s concern that the definition of Applicable Laws and Regulations is overly broad as applied to the consideration of transmission needs driven by public policy requirements.<sup>84</sup>

58. We find that MISO has complied with the requirements to establish procedures for identifying transmission needs driven by public policy requirements in its regional transmission planning process that allow stakeholders an opportunity to provide input and offer proposals for transmission needs driven by public policy requirements. Additionally, we find that MISO has described a just and reasonable and not unduly discriminatory process through which it will identify those needs driven by public policy requirements for which transmission solutions will be evaluated.<sup>85</sup> The proposed process offers opportunities for MISO and its stakeholders to propose transmission needs driven by public policy requirements, and provides an opportunity for stakeholders to review and comment on the list of potential transmission needs driven by public policy requirements through participation in the Sub-Regional Planning Meetings, the Planning

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<sup>81</sup> See First Compliance Order, 142 FERC ¶ 61,215 at P 96.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> LS Power Protest at 5-6.

<sup>85</sup> First Compliance Order, 142 FERC ¶ 61,215 at P 109.

Subcommittee, and the Planning Advisory Committee.<sup>86</sup> The process in the Tariff describes the factors MISO will consider, after consulting with stakeholders, to decide which transmission needs driven by public policy requirements will be further evaluated in the MTEP for potential transmission solutions.<sup>87</sup>

59. However, we agree with ATC/Duke/Transource that there is a discrepancy between: (1) existing language in the Tariff stating that MISO shall integrate into the development of the MTEP, among other things, Transmission Issues that include proposed transmission projects identified by Transmission Owners in connection with their local planning processes<sup>88</sup> and (2) proposed new language in the Tariff giving MISO discretion to decide whether the Transmission Issues it will incorporate into the development of the MTEP includes proposed transmission projects identified by Transmission Owners in their local transmission planning processes.<sup>89</sup> Accordingly, we direct MISO to submit, within 60 days of the date of issuance of this order, a further compliance filing with Tariff revisions that resolve the discrepancy.

ii. **Incorporating Consideration of Transmission Needs Driven by Public Policy Requirements in MidAmerican's Local Transmission Planning Process – Docket No. ER13-89-002**

(a) **First Compliance Order**

60. In the First Compliance Order, the Commission found that MidAmerican's revisions to Attachment FF-MidAmerican did not comply with the requirement to describe procedures that provide for the consideration of transmission needs driven by public policy requirements in its local transmission planning process. The Commission directed MidAmerican to submit an additional compliance filing to: (1) establish procedures for identifying transmission needs driven by public policy requirements in its local transmission planning process that allow stakeholders an opportunity to provide input and offer proposals regarding the transmission needs they believe are driven by public policy requirements; (2) describe a just and reasonable and not unduly discriminatory process through which it will identify those needs driven by public policy

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<sup>86</sup> MISO, FERC Electric Tariff, Attachment FF, § I.C.1.b.ii.a.1.

<sup>87</sup> *Id.* § I.C.1.b.ii.4.

<sup>88</sup> *Id.* § I.C.iii.

<sup>89</sup> *Id.* § I.C.1.b.ii.

requirements for which transmission solutions will be evaluated; (3) establish procedures to evaluate at the local level potential solutions to identified transmission needs driven by public policy requirements that comply with the requirements of Order No. 1000; and (4) provide for the posting on its website of an explanation of the transmission needs driven by public policy requirements that have been identified for evaluation for potential solutions in the local transmission planning process and why other suggested transmission needs will not be evaluated.<sup>90</sup>

**(b) Summary of Compliance Filing**

61. MidAmerican proposes a new section to Attachment FF-MidAmerican to describe how MidAmerican will consider transmission needs driven by public policy requirements in its local transmission planning process.<sup>91</sup> MidAmerican proposes to define public policy requirements “to include requirements established by applicable local, state or federal laws or regulations.”<sup>92</sup> MidAmerican proposes to comply with the requirement to establish procedures for identifying transmission needs driven by public policy requirements in the local transmission planning process by: (1) allowing itself and its stakeholders to submit proposals to consider transmission needs driven by public policy requirements; (2) giving stakeholders the opportunity to discuss such proposals at a stakeholder meeting; and (3) consolidating all such proposals, including proposals it submitted, into a list that MidAmerican will post on its website for stakeholder review and comment and will email stakeholders to notify them of such posting.<sup>93</sup>

62. MidAmerican states that it has revised Attachment FF-MidAmerican to describe the just and reasonable and not unduly discriminatory process through which it will identify those transmission needs driven by public policy requirements for which solutions will be evaluated. MidAmerican includes new language stating that it will select transmission issues, including but not limited to those involving transmission needs driven by public policy requirements, to be considered in the transmission planning process for which transmission solutions will be evaluated based on the scope of planning studies to be undertaken, the development of future scenarios to be modeled and analyzed

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<sup>90</sup> First Compliance Order, 142 FERC ¶ 61,215 at P 117.

<sup>91</sup> MidAmerican Compliance Transmittal at 2. *See also* MISO, FERC Electric Tariff, Attachment FF– MidAmerican, § XII.

<sup>92</sup> MISO, FERC Electric Tariff, Attachment FF– MidAmerican, § XII.

<sup>93</sup> MidAmerican Compliance Transmittal at 2-3. *See also* MISO, FERC Electric Tariff, Attachment FF– MidAmerican, § XII.

in long-term planning studies, and the development of suitable models and assumptions to support such studies.<sup>94</sup> In addition, to assess proposals to consider transmission needs driven by public policy requirements specifically, MidAmerican shall consider stakeholder feedback and select the public policy requirements that it will study further in its local transmission planning process. MidAmerican will select which public policy requirements will be studied along with all other transmission issues in the local transmission planning process based on: (1) effective dates, nature and magnitude of public policy requirements in the applicable laws and regulations; (2) immediacy or other estimated timing, and extent, of the potential impact on the identified transmission needs; (3) availability of the resources, and any limitations thereto, that would be required by consideration of such transmission needs driven by public policy requirements; (4) relative significance of other transmission issues that have been raised for consideration; and (5) other appropriate factors that can aid in prioritization of transmission issues to be considered in the MidAmerican local transmission planning process.<sup>95</sup>

63. MidAmerican proposes to include a provision stating that MidAmerican will post on its website an explanation of which transmission needs driven by public policy requirements will be evaluated for potential solutions in its local transmission planning process, as well as an explanation of why other suggested potential transmission needs will not be evaluated.<sup>96</sup> MidAmerican will use the same procedures to evaluate at the local level potential solutions to identified transmission needs driven by public policy requirements as it does for any other transmission issue.<sup>97</sup> These evaluations will be based on planning studies, the development of future scenarios to be modeled and analyzed in long-term planning studies, and the development of suitable models and assumptions to support such studies.<sup>98</sup> MidAmerican holds at least two stakeholder meetings per year to discuss local transmission planning, including local transmission issues. Stakeholders may submit questions or comments, including other suggested

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<sup>94</sup> MISO, FERC Electric Tariff, Attachment FF– MidAmerican, § IV.

<sup>95</sup> MidAmerican Compliance Transmittal at 3. *See also* MISO, FERC Electric Tariff, Attachment FF– MidAmerican, §§ IV, XII.

<sup>96</sup> MidAmerican Compliance Transmittal at 3. *See also* MISO, FERC Electric Tariff, Attachment FF– MidAmerican, § XII.

<sup>97</sup> *See* MidAmerican Compliance Transmittal at 3. *See also* MISO, FERC Electric Tariff, Attachment FF– MidAmerican, §§ IV, XII.

<sup>98</sup> MISO, FERC Electric Tariff, Attachment FF– MidAmerican, § IV.

system constraints or problems and suggested solutions thereto, in advance of, at, or up to 30 days after a semi-annual meeting. Stakeholders also provide comment on draft transmission reports as part of working groups, which are established to receive information and provide comment on planning issues that arise between stakeholder meetings. Stakeholders who do not participate in a working group have an opportunity to comment on the draft report after MidAmerican has considered the comments of the working group.<sup>99</sup>

64. In addition, MidAmerican proposes to update the name for the Transmission Provider from the Midwest Independent Transmission System Operator, Inc. to the Midcontinent Independent System Operator, Inc. in Attachment FF-MidAmerican.<sup>100</sup>

(c) **Commission Determination**

65. We find that MidAmerican's proposed revisions to the local transmission planning process comply with Order No. 1000 and the directives in the First Compliance Order concerning the consideration of transmission needs driven by public policy requirements. MidAmerican defines public policy requirements to include requirements established by applicable local, state or federal laws or regulations, consistent with the definition adopted in Order No. 1000. MidAmerican's proposed process allows stakeholders as well as MidAmerican to submit proposals to consider transmission needs driven by public policy requirements, which MidAmerican will consolidate and post on its website for discussion at a stakeholder meeting. Thus, MidAmerican complies with the Commission's directive in the First Compliance Order that it establish procedures for identifying transmission needs driven by public policy requirements in its local transmission planning process that allow stakeholders an opportunity to provide input and offer proposals regarding the transmission needs they believe are driven by public policy requirements. MidAmerican will consider stakeholder feedback and then, using factors outlined in Attachment FF-MidAmerican, will identify the transmission needs driven by public policy requirements that MidAmerican will evaluate in its local transmission planning process for potential transmission solutions. Accordingly, MidAmerican also complies with the Commission's directive in the First Compliance Order that it describe a just and reasonable and not unduly discriminatory process through which it will identify those needs driven by public policy requirements for which transmission solutions will be

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<sup>99</sup> See MISO, FERC Electric Tariff, Attachment FF– MidAmerican, §§ VI.1-VI.12 (1.0.0).

<sup>100</sup> MidAmerican Compliance Transmittal at 3. See, e.g., MISO, FERC Electric Tariff, Attachment FF– MidAmerican, § V.3.

evaluated. MidAmerican will post on its website the transmission needs driven by public policy requirements that have been identified for evaluation for potential solutions and why other suggested transmission needs will not be evaluated,<sup>101</sup> as the First Compliance Order requires. Finally, MidAmerican will use the existing procedures in its local transmission planning process to evaluate potential transmission solutions to identified transmission needs driven by public policy requirements, complying with the Commission's directive in the First Compliance Order that it establish such procedures.

iii. **Incorporating Consideration of Transmission Needs Driven by Public Policy Requirements in American Transmission's Local Transmission Planning Process; Docket No. ER13-101-003**

(a) **First Compliance Order**

66. In the First Compliance Order, the Commission found that American Transmission partially complied with the provisions of Order No. 1000 addressing transmission needs driven by public policy requirements in Attachment FF-ATCLLC. The Commission found that American Transmission's proposal complied with Order No. 1000's requirement that public utility transmission providers amend their tariffs to describe the procedures by which transmission needs driven by public policy requirements will be identified in the local transmission planning processes and that allow stakeholders an opportunity to provide input and offer proposals regarding the transmission needs they believe are driven by public policy requirements.<sup>102</sup> However, the Commission found that American Transmission's proposed definition of public policy requirements only partially complied with Order No. 1000, stating that the proposed definition did not include duly enacted laws or regulations passed by a local governmental entity, such as a municipal or county government, as required by Order No. 1000.<sup>103</sup> The Commission further found that American Transmission's proposal to post on its website an explanation of which solutions to identified needs will be considered in study assumptions, as well as any suggested public policy requirements that will not be considered in study assumptions, partially complied with Order No. 1000, stating that Order No. 1000 requires an explanation of why other suggested transmission

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<sup>101</sup> MISO, FERC Electric Tariff, Attachment FF– MidAmerican, §§ IV, XII.

<sup>102</sup> First Compliance Order, 142 FERC ¶ 61,215 at P 128.

<sup>103</sup> *Id.* P 127.

needs driven by public policy requirements will not be evaluated, not an explanation of why the public policy requirements themselves will not be evaluated.<sup>104</sup>

67. The Commission found that American Transmission did not comply with the requirement for a public utility transmission provider to establish, in consultation with its stakeholders, a just and reasonable and not unduly discriminatory process through which the public utility transmission provider will identify those needs driven by public policy requirements for which transmission solutions will be evaluated.<sup>105</sup> The Commission also found that American Transmission did not comply with the requirement that each public utility transmission provider, in consultation with stakeholders, establish procedures in its tariff to evaluate at the local level potential solutions to identified transmission needs driven by public policy requirements that both include the evaluation of transmission facilities stakeholders propose to satisfy an identified transmission need driven by public policy requirements and allow stakeholders an opportunity to provide input during the evaluation of potential solutions to identified needs.<sup>106</sup>

68. Thus, the Commission required American Transmission to revise Attachment FF-ATCLLC to: (1) include a definition of public policy requirements that is consistent with the definition adopted in Order No. 1000 and that includes duly enacted laws or regulations passed by a local governmental entity; (2) describe a just and reasonable and not unduly discriminatory process through which the public utility transmission provider will identify those needs driven by public policy requirements for which transmission solutions will be evaluated; (3) establish procedures to evaluate at the local level potential solutions to identified transmission needs driven by public policy requirements that comply with the requirements of Order No. 1000; and (4) provide for the posting on its website of an explanation of the transmission needs driven by public policy requirements that have been identified for evaluation for potential solutions in the local transmission planning processes and why other suggested transmission needs will not be evaluated.<sup>107</sup>

**(b) Summary of Compliance Filing**

69. American Transmission proposes revisions to Attachment FF-ATCLLC in order to satisfy the compliance directives of the First Compliance Order. American Transmission

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<sup>104</sup> *Id.* P 131.

<sup>105</sup> *Id.* P 129.

<sup>106</sup> *Id.* P 130.

<sup>107</sup> *Id.* P 126

proposes to revise the definition of public policy requirements so that, in addition to regulations promulgated by a relevant jurisdiction within a state or at the federal level, it also includes consideration of “duly enacted laws or regulations passed by a local governmental entity, such as a municipal or county government.”<sup>108</sup>

70. American Transmission states that it has proposed Tariff revisions to comply with the Commission’s directive to describe a process to identify needs driven by public policy requirements for which transmission solutions will be evaluated. Specifically, American Transmission proposes language in Attachment FF-ATCLLC stating that it shall post on its web page a solicitation for information from stakeholders, including federal, state, and local regulators, regarding needs driven by public policy requirements and potential transmission facilities to address those needs.<sup>109</sup> In addition, American Transmission proposes that American Transmission shall affirmatively conduct its own reasonable inquiries, if it deems necessary, in an effort to ascertain the existence of any relevant public policy requirements not identified by stakeholders, and shall incorporate or otherwise take into account all relevant information regarding public policy requirements, without regard to whether such information was obtained from a stakeholder or resulted from American Transmission’s affirmative inquiry.<sup>110</sup> American Transmission also proposes that, to the extent that it has affirmatively identified relevant public policy requirements, it shall make inquiries, or take any other action necessary, to assure itself that the information regarding the public policy requirement is complete, accurate, and sufficient to incorporate such information in the studies or assessments associated with the ten year assessment.<sup>111</sup>

71. Further, American Transmission proposes revisions to identify how it will select identified transmission needs driven by public policy requirements for inclusion in, or exclusion from, study assumptions for its ten year assessment. Specifically, American Transmission proposes to revise Attachment FF-ATCLLC to state that, when evaluating potential needs driven by public policy requirements, American Transmission will consider relevant factors such as: (1) the effective dates, nature and magnitude of the

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<sup>108</sup> American Transmission Transmittal at 3. *See also* MISO, FERC Electric Tariff, Attachment FF-ATCLLC, § IV.

<sup>109</sup> MISO, FERC Electric Tariff, Attachment FF-ATCLLC, § VI.D.2.

<sup>110</sup> American Transmission Transmittal at 4. *See also* MISO, FERC Electric Tariff, Attachment FF-ATCLLC, § VI.D.2.

<sup>111</sup> American Transmission Transmittal at 4. *See also* MISO, FERC Electric Tariff, Attachment FF-ATCLLC, § VI.D.3.B.

public policy requirements in applicable laws and regulations; (2) the immediacy or other estimated timing, and extent of the potential impact on any identified transmission needs; and (3) the relative significance of any other issues that have been raised for consideration in American Transmission's local transmission planning process.<sup>112</sup>

American Transmission will then post on its website an explanation as to why relevant transmission needs driven by public policy requirements were, or were not, included in American Transmissions' study assumptions and models.<sup>113</sup>

72. American Transmission also proposes to revise Attachment FF-ATCLLC to state that stakeholders are entitled to participate in the meeting(s) held to discuss assumptions and models, specifically including a discussion of American Transmission's decision to include in, or exclude from, its proposed models any transmission needs driven by public policy requirements. In addition, participants in such meetings, or thereafter, are entitled to comment on, provide additional information associated with, or otherwise offer suggested revisions, changes, modifications or additions to the assumptions that will be used in performing the studies required by the ten-year assessment, specifically including American Transmission's decision to include in or exclude from proposed models any transmission needs driven by and public policy requirements.<sup>114</sup> Furthermore, under its proposal, American Transmission will give stakeholders the opportunity to comment on the inputs provided to American Transmission. American Transmission will consider such comments provided they are predicated on relevant facts, information not available during the study, or evaluation of the network requirements, and to the extent appropriate, American Transmission will include the comments in the evaluation of the network requirements, and may include them in the ten year analysis.<sup>115</sup> American Transmission also proposes that it shall perform such studies or assessments of its network

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<sup>112</sup> American Transmission Transmittal at 5. *See also* MISO, FERC Electric Tariff, Attachment FF-ATCLLC, § V.D.

<sup>113</sup> American Transmission Transmittal at 4-5. *See also* MISO, FERC Electric Tariff, Attachment FF-ATCLLC, §§ VI.D.4, VI.F.9. Sections VI.D.4 and VI.F.9 of Attachment FF-ATCLLC already state that American Transmission shall post on its web site an explanation of which transmission needs driven by public policy requirements it will consider in study assumptions, as well as any suggested public policy requirements that it will not consider in study assumptions.

<sup>114</sup> American Transmission Transmittal at 4. *See also* MISO, FERC Electric Tariff, Attachment FF-ATCLLC, § VI.D.4.

<sup>115</sup> MISO, FERC Electric Tariff, Attachment FF-ATCLLC, § VI.D.4.

requirements as it determines are appropriate or necessary, given the information supplied by stakeholders, including needs driven by public policy requirements, or resulting from American Transmission's own inquiries.<sup>116</sup> Finally, American Transmission proposes that any dispute arising between American Transmission and any interested party respecting the applicability of any public policy requirement or American Transmission's decision to include or exclude certain public policy requirements in its ten-year assessment study assumptions shall be handled in accordance with the dispute resolution provisions of the Tariff.<sup>117</sup>

73. To comply with the requirement to establish procedures to evaluate, at the local level, potential solutions to identified transmission needs driven by public policy requirements, American Transmission proposes to post on its web page a solicitation for information from stakeholders, including federal, state, and local regulators, regarding potential transmission facilities to address needs driven by public policy requirements.<sup>118</sup> American Transmission further proposes to perform such studies or assessments of its network requirements as it determines are appropriate or necessary, given the information supplied by stakeholders, including potential transmission facilities to address needs driven by public policy requirements, or resulting from American Transmission's own inquiries.<sup>119</sup> In addition, American Transmission proposes that, in determining the transmission facilities to be included in the ten year assessment, American Transmission shall include those transmission facilities that provide the most benefit to meet the needs of its distribution customers, transmission customers, and all other parties, taking into account public policy requirements.<sup>120</sup> American Transmission also proposes that, with respect to identified transmission needs driven by public policy requirements, American Transmission will provide in the ten-year assessment a written explanation of its decision to include or exclude transmission facilities that would satisfy such transmission needs.<sup>121</sup>

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<sup>116</sup> *Id.* § VI.D.5.

<sup>117</sup> American Transmission Transmittal at 5. *See also* MISO, FERC Electric Tariff, Attachment FF-ATCLLC, § VII.D.

<sup>118</sup> American Transmission Transmittal at 6. *See also* MISO, FERC Electric Tariff, Attachment FF-ATCLLC, § VI.D.2.

<sup>119</sup> MISO, FERC Electric Tariff, Attachment FF-ATCLLC, § VI.D.5.

<sup>120</sup> *Id.* § VI.D.6.

<sup>121</sup> American Transmission Transmittal at 6, 8. *See also* MISO, FERC Electric Tariff, Attachment FF-ATCLLC, § VI.D.6.

74. American Transmission also proposes that, at a stakeholder meeting or meetings following the publication of the ten year assessment, American Transmission will discuss the conclusions set forth in the ten year assessment and the transmission facilities identified to meet the needs of American Transmission's transmission system as a whole, including any solutions intended to satisfy public policy requirements and American Transmission's decision to include, or not include, transmission facilities that would satisfy identified transmission needs driven by public policy requirements. In addition, American Transmission proposes to revise this section to state that participants in such meetings are entitled to comment on and offer suggested revisions, changes, modifications or additions to the conclusions reached in the ten year assessment and transmission facilities set forth in the ten year assessment, including transmission facilities identified as meeting a need driven by public policy requirements. American Transmission may include such comments in the next evaluation of the network requirements as well as in a succeeding ten year assessment.<sup>122</sup>

75. In addition, American Transmission proposes that, with respect to any decision it makes regarding transmission facilities it identified as being potentially necessary to meet a need driven by a public policy requirement, American Transmission reserves the right to reconsider its decision regarding such transmission facilities following receipt of additional information or comments from stakeholders, or following further review of the ten-year assessment unilaterally initiated by American Transmission and, time permitting, to revise the ten year assessment for the relevant year to address American Transmission's revised decision regarding such transmission facilities.<sup>123</sup> American Transmission proposes that any dispute arising between American Transmission and any interested party respecting the applicability of any public policy requirement or American Transmission's decision to include in, or exclude from, the ten-year assessment transmission facilities identified to address transmission needs driven by public policy requirements shall be handled in accordance with the dispute resolution provisions of the Tariff.<sup>124</sup> Lastly, American Transmission proposes to allow stakeholders to request that American Transmission perform a study, assessment, or analysis for any proposed economic project, including potential transmission facilities to address needs driven by public policy requirements, and to allow stakeholders to comment on such projects, as

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<sup>122</sup> American Transmission Transmittal at 6. *See also* MISO, FERC Electric Tariff, Attachment FF-ATCLLC, § VI.D.8.

<sup>123</sup> American Transmission Transmittal at 6-7. *See also* MISO, FERC Electric Tariff, Attachment FF-ATCLLC, § VI.D.8.

<sup>124</sup> American Transmission Transmittal at 7. *See also* MISO, FERC Electric Tariff, Attachment FF-ATCLLC, § VII.D.

well as those economic projects that American Transmission identifies for further study or evaluation, including those identified to meet a need driven by public policy requirements.<sup>125</sup>

(c) **Commission Determination**

76. We find that American Transmission's proposed revisions to its local transmission planning process in Attachment FF-ATCLLC comply with Order No. 1000 and the directives in the First Compliance Order concerning the consideration of transmission needs driven by public policy requirements. American Transmission revised its proposed definition of public policy requirements to include local laws and regulations, as directed in the First Compliance Order. American Transmission has expanded opportunities for stakeholders to propose transmission needs driven by public policy requirements and describes the process it will use to identify transmission needs driven by public policy requirements for which transmission solutions will be evaluated, which includes opportunities for stakeholder feedback.<sup>126</sup> Thus, American Transmission complies with the Commission's directive in the First Compliance Order that it describe a just and reasonable and not unduly discriminatory process through which it will identify those needs driven by public policy requirements for which transmission solutions will be evaluated. As the Commission required in the First Compliance Order, American Transmission will post on its website an explanation as to why relevant transmission needs driven by public policy requirements were, or were not, included in American Transmission's study assumptions and models.<sup>127</sup> American Transmission will then solicit from stakeholders proposed transmission solutions to meet identified transmission needs driven by public policy requirements and evaluate those proposals, with opportunities for stakeholder feedback on which transmission facilities should be included in local transmission plan. The local transmission plan will include a written explanation of American Transmission's decision to include or exclude transmission facilities that would satisfy identified transmission needs driven by public policy requirements, and American Transmission will discuss those decisions with stakeholders. Thus, American Transmission complies with the Commission's directive in the First Compliance Order that it establish procedures to evaluate at the local level potential

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<sup>125</sup> American Transmission Transmittal at 5, 7. *See also* MISO, FERC Electric Tariff, Attachment FF-ATCLLC, §§ VI.F.2, VI.F.4.

<sup>126</sup> American Transmission Transmittal at 3-5. *See also* MISO, FERC Electric Tariff, Attachment FF-ATCLLC, §§ IV, VI.D.

<sup>127</sup> American Transmission Transmittal at 4. *See also* MISO, FERC Electric Tariff, Attachment FF-ATCLLC, § VI.D.4.

transmission solutions to identified transmission needs driven by public policy requirements that comply with the requirements of Order No. 1000.

## **2. Nonincumbent Transmission Developer Reforms**

77. In Order No. 1000, the Commission adopted a framework of reforms to ensure that nonincumbent transmission developers have the opportunity to participate in the transmission development process. In particular, public utility transmission providers must eliminate federal rights of first refusal from Commission-jurisdictional tariffs and agreements and develop not unduly discriminatory qualification criteria and processes governing the submission and evaluation of proposals for new transmission facilities.

### **a. Federal Rights of First Refusal**

78. Order No. 1000 required each public utility transmission provider to remove provisions in Commission-jurisdictional tariffs and agreements that establish a federal right of first refusal for an incumbent transmission provider with respect to transmission facilities selected in a regional transmission plan for purposes of cost allocation.<sup>128</sup> The requirement to eliminate a federal right of first refusal does not apply to local transmission facilities,<sup>129</sup> or to the right of an incumbent transmission provider to build, own, and recover costs for upgrades to its own transmission facilities, regardless of whether an upgrade has been selected in the regional transmission plan for purposes of

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<sup>128</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 313. In Order No. 1000-A, the Commission clarified that the phrase “a federal right of first refusal” refers only to rights of first refusal that are created by provisions in Commission-jurisdictional tariffs or agreements. Order No. 1000-A, 139 FERC ¶ 61,132 at P 415.

<sup>129</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at PP 226, 258, 318. Order No. 1000 defined local transmission facilities as transmission facilities located solely within a public utility transmission provider’s retail distribution service territory or footprint that are not selected in the regional transmission plan for purposes of cost allocation. Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 63. The Commission clarified in Order No. 1000-A that a local transmission facility is one that is located within the geographical boundaries of a public utility transmission provider’s retail distribution service territory, if it has one; otherwise the area is defined by the public utility transmission provider’s footprint. In the case of an RTO or ISO whose footprint covers the entire region, local transmission facilities are defined by reference to the retail distribution service territories or footprints of its underlying transmission owning members. Order No. 1000-A, 139 FERC ¶ 61,132 at P 429.

cost allocation.<sup>130</sup> In addition, the requirement does not remove, alter, or limit an incumbent transmission provider's use and control of its existing rights-of-way under state law.<sup>131</sup>

79. The Commission determined in Order No. 1000 that issues concerning the applicability of the *Mobile-Sierra* doctrine to transmission owners' rights to build found in Commission-jurisdictional agreements are better addressed as part of the proceedings on Order No. 1000 compliance, where interested parties may provide additional information.<sup>132</sup>

**i. Mobile-Sierra**

**(a) First Compliance Order**

80. The Commission stated in the First Compliance Order that a *Mobile-Sierra* presumption applies to a contract only if the contract has certain characteristics that justify the presumption. The Commission found that the right of first refusal provision in the MISO Transmission Owners Agreement lacks the characteristics necessary to justify a *Mobile-Sierra* presumption.<sup>133</sup>

81. The Commission stated that in ruling on whether the characteristics necessary to justify a *Mobile-Sierra* presumption are present, the Commission must determine whether the instrument at issue embodies either (1) individualized rates, terms, or conditions that apply only to sophisticated parties who negotiated them freely at arm's length or (2) rates, terms, or conditions that are generally applicable or that arose in circumstances that do not provide the assurance of justness and reasonableness associated

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<sup>130</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at PP 226, 319; Order No. 1000-A, 139 FERC ¶ 61,132 at P 426. The Commission stated in Order No. 1000 that upgrades to transmission facilities included such things as tower change outs or reconductoring, regardless of whether or not an upgrade has been selected in the regional transmission plan for purposes of cost allocation. Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 319. The Commission clarified in Order No. 1000-A that the term "upgrade" means an improvement to, addition to, or replacement of a part of, an existing transmission facility. The term does not refer to an entirely new transmission facility. Order No. 1000-A, 139 FERC ¶ 61,132 at P 426.

<sup>131</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 319.

<sup>132</sup> *Id.* P 292.

<sup>133</sup> First Compliance Order, 142 FERC ¶ 61,215 at P 176.

with arm's-length negotiations. The former constitute contract rates, terms, or conditions that necessarily qualify for a *Mobile-Sierra* presumption; that presumption does not necessarily apply to the latter, although the U.S. Court of Appeals for the District of Columbia Circuit has determined that the Commission is legally authorized to impose a more rigorous application of the statutory "just and reasonable" standard of review on future changes to agreements that do not present contract rates.<sup>134</sup>

82. The Commission found that the right of first refusal provision in the Transmission Owners Agreement formulates a rule that is a prescription of general applicability rather than a negotiated rate provision that is necessarily entitled to a *Mobile-Sierra* presumption. The Commission stated that where the language of an agreement establishes rules that delimit, qualify, or restrict the ability of any other potential competitor to engage in the subject activity, that language creates generally applicable requirements.<sup>135</sup> The Commission stated that new MISO members must accept these provisions as-is, with limited room for negotiation, and as a result, which places new MISO members in a position that differs fundamentally from that of parties who are able to negotiate freely, like buyers and sellers entering into a typical power sales contract that would be entitled to a *Mobile-Sierra* presumption.<sup>136</sup>

83. The Commission also found "that the *Mobile-Sierra* presumption does not apply to the right of first refusal in the MISO Transmission Owners Agreement because that provision arose in circumstances that do not provide the assurance of justness and reasonableness on which the *Mobile-Sierra* presumption rests."<sup>137</sup> The Commission stated that unlike circumstances in which the Commission can presume that the resulting rate is the product of negotiations between parties with competing interests, the negotiation that led to the provisions at issue here were among parties with the same interest, namely, protecting themselves from competition in transmission development.<sup>138</sup> The Commission noted that it has recognized a similar point in other contexts that are relevant here, such as in the Commission observation that the self-interest of two merger partners converge sufficiently, even prior to the merger, to compromise the market

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<sup>134</sup> See *New England Power Generators Ass'n, Inc. v. FERC*, 707 F.3d 364, at 370-371 (D.C. Cir. 2013) (*NEGPA*).

<sup>135</sup> First Compliance Order, 142 FERC ¶ 61,215 at P 180.

<sup>136</sup> *Id.* P 181.

<sup>137</sup> *Id.* P 182.

<sup>138</sup> *Id.* P 183.

discipline inherent in arm's-length bargaining, and in the Commission's policy on market-based rates, which incorporate similar principles.<sup>139</sup>

84. The Commission stated that MISO's response to Arkansas Electric's argument that *Mobile-Sierra* should not apply to Transmission Owners that become parties to the Transmission Owners Agreement after the effective date of Order No. 1000 reinforces this conclusion. The Commission noted that MISO argues that the right of first refusal provision in the Transmission Owners Agreement applies to Entergy even though Entergy is not yet a party to that agreement and did not negotiate those provisions. The Commission found that this argument implicitly acknowledges that the provision is one of general applicability and therefore does not merit the *Mobile-Sierra* presumption.<sup>140</sup>

85. In response to MISO's argument that the Commission has granted *Mobile-Sierra* protection to agreements that it describes as similar to the one at issue here, the Commission stated that such cases reflect its analysis of the facts presented in specific cases and are not necessarily determinative here. The Commission stated that the question presented here is whether the Commission must presume that the right of first refusal set forth in the MISO Transmission Owners Agreement is just and reasonable, and the fact that the Commission has in some situations exercised its discretion to establish enhanced requirements for a showing that something is not just and reasonable does not answer this question.<sup>141</sup>

86. The Commission also disagreed with MISO on the importance in this context of the fact that *Mobile-Sierra* can bind entities that are not parties to the contract. The Commission stated that the point at issue here is not whether the public interest standard binds third parties, but rather whether the agreement itself establishes rates, terms, and conditions that bind third parties by restricting their ability to engage in certain business activities.<sup>142</sup>

87. Finally, the Commission addressed MISO's argument that the Commission has found that the Transmission Owners Agreement imposes a *Mobile-Sierra* standard of review. The Commission denied that it has used its authority to find that a *Mobile-Sierra*

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<sup>139</sup> *Id.* P 184 (citing *Delmarva Power & Light Co.*, 76 FERC ¶ 61,331, at 62,582 (1996) (*Delmarva Power*); 18 C.F.R. § 35.36(a)(9)(iii) (2013)).

<sup>140</sup> *Id.* P 185.

<sup>141</sup> *Id.* P 186.

<sup>142</sup> *Id.* P 187.

heightened standard of review should apply to the right of first refusal in the Transmission Owners Agreement. The Commission stated that MISO's claim that the Commission did do this is based on a statement made in a footnote in a 2008 Commission order that conditionally accepted revisions to MISO's Tariff dealing with the transmission service that the MISO Transmission Owners must take to meet their obligations to serve bundled retail load. The Commission noted that one party to the proceeding argued that the proposed Tariff revisions violated the Transmission Owners Agreement because they would alter revenue distribution and because the MISO Transmission Owners had failed to satisfy the requirement that any adjustment to revenue distribution be approved by a unanimous vote of the MISO Transmission Owners. That party argued that there was no justification for disregarding this requirement and that the changes to the Transmission Owners Agreement were subject to the *Mobile-Sierra* public interest standard.<sup>143</sup>

88. The Commission noted that it had concluded that it was ambiguous whether the unanimity requirement applied in that situation and that the proposed Tariff revisions were consistent with the Transmission Owners Agreement. The Commission also noted that it had stated in a footnote that it agreed that the Transmission Owners Agreement imposed a *Mobile-Sierra* standard of review, although there was no need to address changes to that agreement. However, the Commission also found that when this statement is read in context, it has neither the meaning nor the precedential value that MISO attributes to it.<sup>144</sup>

89. The Commission found that its statements on *Mobile-Sierra* in that instance are best understood as directed to a specific rate matter that is dealt with in the Transmission Owners Agreement, not to everything contained in that agreement. The Commission noted that when it stated that *Mobile-Sierra* applied, its attention was directed to the claim that proposed Tariff revisions violated the requirement in the Transmission Owners Agreement that Transmission Owners must unanimously approve all modifications to the revenue distribution provisions of Appendix C of the Transmission Owners Agreement. The Commission found that a conclusion that the public interest standard applies to modifications to the revenue distribution provisions in Appendix C states nothing about the standard that applies to modifications to Appendix B, which is the portion of the Transmission Owners Agreement affected by the requirements of Order No. 1000 concerning federal rights of first refusal.<sup>145</sup>

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<sup>143</sup> *Id.* P 188.

<sup>144</sup> *Id.* P 189.

<sup>145</sup> *Id.* P 190.

90. The Commission also stated that regardless of how broadly one chooses to read the statement on *Mobile-Sierra* in question, that statement provides little reasoning to support its conclusion, and it was not necessary to decide the question presented. The Commission concluded that the simple statement cited by MISO provides no reasoning that could be used to persuade one that MISO's interpretation is correct.<sup>146</sup>

**(b) Summary of Requests for Rehearing or Clarification**

91. MISO and MISO Transmission Owners argue that the Commission erred in the First Compliance Order by finding that the right of first refusal provision in the Transmission Owners Agreement is not entitled to a *Mobile-Sierra* presumption because the agreement formulates a rule of general applicability rather than a negotiated rate provision that is necessarily entitled to a *Mobile-Sierra* presumption and because the provision in question arose in a negotiation aimed at protecting a common interest among competing transmission owners. MISO and MISO Transmission Owners maintain that the Commission made this finding without an evidentiary basis and based on incorrect characterizations.<sup>147</sup> MISO and MISO Transmission Owners also argue that the Commission erred in failing to distinguish the MISO Transmission Owners Agreement from other agreements of the same type that it found were protected under *Mobile-Sierra*;<sup>148</sup> and by failing to recognize that the Commission previously determined that the entire Transmission Owners Agreement has *Mobile-Sierra* protection.<sup>149</sup>

92. MISO maintains that in finding that the Transmission Owners Agreement formulates a rule of general applicability, the Commission appears to formulate a new rule without any support. MISO states that the Commission relied on *NRG Power*

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<sup>146</sup> *Id.* P 191.

<sup>147</sup> See MISO, Request for Rehearing, Docket No. ER13-187-002, at 3-4 (filed Apr. 22, 2013) (MISO Rehearing Request) (citing First Compliance Order, 142 FERC ¶ 61,215 at PP 180, 182 (additional citation omitted)); MISO Transmission Owners, Request for Rehearing, Docket No. ER13-187-002, at 21-22 (filed Apr. 22, 2013) (MISO Transmission Owners Rehearing Request).

<sup>148</sup> See MISO Rehearing Request at 9-10; MISO Transmission Owners Rehearing Request at 19-21.

<sup>149</sup> See MISO Rehearing Request at 14-15; MISO Transmission Owners Rehearing Request at 12-18.

*Marketing, LLC v. Me. Pub. Util. Comm.*<sup>150</sup> in this connection, but it argues that while this case acknowledged a potential distinction between “prescriptions of general applicability” and “contractually negotiated rates,” it did not rule on the issue and thus did not establish a clear dichotomy between the terms.<sup>151</sup> MISO also contends that *NRG* does not preclude *Mobile-Sierra* protection for non-rate terms.<sup>152</sup>

93. MISO asserts that on remand, neither the U.S. Court of Appeals for the D.C. Circuit nor the Commission formulated a definitive test for determining whether an agreement constitutes a prescription of general applicability.<sup>153</sup> MISO states that while the Commission found in *Devon Power* that the auction rates at issue were not contract rates, this determination is based on the fact that the non-settling parties are subject to payment of rates determined in capacity auctions using a rate methodology they did not agree to.<sup>154</sup> MISO claims that, in contrast, the right of first refusal provision does not force new MISO participants to pay a rate determined by a method under an agreement to which they are not parties.<sup>155</sup>

94. MISO argues that the Commission failed to distinguish between multi-party agreements that allow for new signatories and prescriptions of general applicability. MISO states that the mere possibility of adding new signatories does not render an agreement one of general applicability.<sup>156</sup> MISO states that the possibility of adding new

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<sup>150</sup> 130 S.Ct. 693 (2010) (*NRG*).

<sup>151</sup> MISO states that the Supreme Court remanded the question of whether “the rates at issue qualify as ‘contract rates’ and, if not, whether FERC had discretion to treat them analogously.” MISO Rehearing Request at 5 (citing *NRG*, 130 S.Ct. at 701).

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 6 (citing *Me. Pub. Util. Comm’n v. FERC*, 625 F.3d 754 (D.C. Cir. 2010); *Devon Power, LLC*, 134 FERC ¶ 61,208 (2011) (*Devon Power*)).

<sup>154</sup> *Id.* (citing *Devon Power*, 134 FERC ¶ 61,208 at PP 12-13).

<sup>155</sup> *Id.*

<sup>156</sup> MISO notes that at least certain provisions of the Transmission Owners Agreement are covered by *Mobile-Sierra* and also that the Commission has previously given *Mobile-Sierra* protection to multi-party agreements that allow new parties to become signatories after the initial signing of the agreement, such as Balancing Authority agreements. *Id.* at 7 (citing First Compliance Order, 142 FERC ¶ 61,215 at P 190;

(continued...)

parties to the Transmission Owners Agreement is not a basis for denying *Mobile-Sierra* protection. MISO argues if, as the Supreme Court specified in *NRG*, the *Mobile-Sierra* presumption of justness and reasonableness applies to third party challenges, the same must be true for new parties to the agreement.<sup>157</sup> MISO states that the Commission also failed to distinguish between “general applicability” and the applicability of *Mobile-Sierra* protection to third parties, who must respect the contractual parties’ bargain when interacting with those parties on matters covered by the contract.<sup>158</sup>

95. MISO Transmission Owners state that the Commission interpreted certain statements that MISO and MISO Transmission Owners made in their answer to protests and comments as conceding that the Transmission Owners Agreement is an agreement of general applicability.<sup>159</sup> MISO Transmission Owners seek to clarify their position by stating that under *Mobile-Sierra*, they cannot be compelled to adopt a two-tiered system regarding transmission construction rights and obligations and that the parties to the Transmission Owners Agreement remain free to negotiate amendments to accommodate specific parties or interests. Accordingly, MISO Transmission Owners argue that the Commission erred in both its premise that the provisions of the Transmission Owners Agreement are not subject to negotiation and its conclusions that this factor makes the Transmission Owners Agreement akin to a tariff of general applicability.<sup>160</sup>

96. MISO and MISO Transmission Owners dispute the Commission’s determination that the right of first refusal provision arose through a negotiation in which transmission owners sought to protect their common interest in protecting themselves from

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*Midwest Indep. Transmission Sys. Operator, Inc.*, 110 FERC ¶ 61,177, at P 32 (2005); *Southwest Power Pool, Inc.*, 117 FERC ¶ 61,207, at P 29 (2006)).

<sup>157</sup> *Id.* at 8.

<sup>158</sup> For example, by comparison, MISO notes that Carved-Out Grandfathered Agreements (GFAs) that are protected by *Mobile-Sierra* in MISO remain entitled to such protection even if MISO participants that are not parties to the GFAs are required to accept the consequences associated with carved-out GFA treatment. *Id.* at 8-9 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 108 FERC ¶ 61,236, at PP 5, 50, 142-43, 149 (2004) (September 16, 2004 Order), *order on reh’g*, 111 FERC ¶ 61,042, at PP 68-69, 81-91, 93-101 (2005)).

<sup>159</sup> MISO Transmission Owners Rehearing Request at 28 (citing First Compliance Order, 142 FERC ¶ 61,215 at P 185).

<sup>160</sup> *Id.*

competition in transmission development, thereby preventing the negotiation from bearing the hallmarks necessary for the *Mobile-Sierra* presumption.<sup>161</sup>

97. MISO argues that the *Mobile-Sierra* presumption is based on the parties' equal bargaining ability in arm's length negotiations, not any particular degree of competitiveness or commonality of their respective interests. MISO thus contends that if the contracting parties have equal bargaining positions, a measure of commonality in the contracting parties' interests would not preclude application of the *Mobile-Sierra* presumption.

98. MISO also asserts that the transmission owners that originally entered into the Transmission Owners Agreement are sophisticated parties that negotiated both rights and obligations to construct transmission facilities in order to ensure that the facilities identified by the MISO planning process would be constructed. MISO states that, even if new signatories have little room to negotiate the terms of the Transmission Owners Agreement,<sup>162</sup> this does not alter the fact that the original transmission owners were sophisticated parties that entered into a legally binding agreement. According to MISO, depriving them of the benefit of their bargain while continuing to require that they construct facilities identified in the MISO planning process violates the core premise of the *Mobile-Sierra* doctrine.<sup>163</sup> Finally, MISO asserts that the Commission has recognized that the Transmission Owners Agreement is entitled to *Mobile-Sierra* protection; thus, the fact that new signatories would be subject to the agreement does mean that the provisions

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<sup>161</sup> See MISO Rehearing Request at 11-14; MISO Transmission Owners Rehearing Request at 22-28.

<sup>162</sup> However, MISO disputes this argument, stating that the First Compliance Order did not cite any precedent either when it: (1) conditioned *Mobile-Sierra* protection on a contract not allowing any new parties to join or denying protection on that basis; or (2) characterized a new party to an existing multi-party contract as *ipso facto* unsophisticated and devoid of bargaining power, merely because it would have to accept the terms of the existing contract if it decides to sign it. Further, MISO argues that the Commission neglects the sophistication of new transmission owners, which have other Regional Transmission Organization (RTO) options and their own interests, which ensure the arm's length nature of their discussions to join MISO. MISO Rehearing Request at 13-14.

<sup>163</sup> *Id.* at 11-13 (citing *NRG* 130 S. Ct. 693 at 696).

with *Mobile-Sierra* protection were not negotiated at arm's length between the original parties.<sup>164</sup>

99. MISO Transmission Owners argue that the Commission incorrectly concluded that the parties to the Transmission Owners Agreement have common interests. They claim that the only common interest of these is their desire to form MISO.<sup>165</sup> Similarly, MISO states that one of the key rationales for the formation of MISO is to prevent potentially anti-competitive practices of the transmission owners by transferring functional control of their transmission facilities to MISO as an independent entity.<sup>166</sup> MISO Transmission Owners state that following the Commission's logic, no agreement would ever be entitled to *Mobile-Sierra* protection because adverse parties to a contract inherently would have some common interest in the formation of the contract itself.<sup>167</sup>

100. MISO Transmission Owners also contend that the construction rights and obligations set forth in Appendix B, section VI of the Transmission Owners Agreement were not intended to be a right of first refusal. Instead they were intended to provide a contractual means for ensuring that MISO could require transmission owners to build facilities that MISO determines should be built.<sup>168</sup> MISO Transmission Owners claim that the language was intended to provide MISO with authority to order other transmission owners to ensure construction in the event that a transmission owner was financially incapable of carrying out its construction responsibilities for an assigned facility. MISO Transmission Owners argue that at the time the Transmission Owners Agreement was developed (i.e., January 1998), issues of conflicting development rights

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<sup>164</sup> *Id.* at 14 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 122 FERC ¶ 61,090, at P 47 n.41 (2008) (MISO 2008 Order)).

<sup>165</sup> MISO Transmission Owners Rehearing Request at 22, 25.

<sup>166</sup> MISO Rehearing Request at 12.

<sup>167</sup> For example, MISO Transmission Owners argue that, following this logic, neither settlement agreements, nor even purely bilateral wholesale energy sales rate contracts, would be eligible for *Mobile-Sierra* protection because the parties to the former have a common interest in seeing the settlement approved and the seller and buyer in the latter have a common interest in the transaction itself. MISO Transmission Owners Rehearing Request at 25-26.

<sup>168</sup> MISO claims that this fact is clear from a plain reading of Appendix B, section VI of the Transmission Owners Agreement. *Id.* at 22-24.

of incumbent transmission owners and nonincumbent transmission developers were not even on the horizon in the Midwest.<sup>169</sup>

101. MISO Transmission Owners argue that the Commission also cited irrelevant decisions and regulations as support for its determination that the relevant provisions of Appendix B, section VI are intended to protect transmission owners against competition.<sup>170</sup> MISO Transmission Owners argue that *Delmarva* and *Cenergy* orders that the Commission cited involved restrictions imposed on market-based sales between announced merger partners, whereas the Transmission Owners Agreement involves compromise and a bargained-for-exchange that was negotiated at arm's length various, disparate entities.<sup>171</sup> MISO Transmission Owners argue that, unlike potential merger partners, the parties that formed MISO (and their affiliates) compete with each other with respect to sales of energy, capacity, and ancillary services, as well as to attract new load and interconnections to their systems, and they have differing interests with respect to structure, state regulation, retail choice, obligations to serve, and size of their operations and the customers served. Likewise, MISO Transmission Owners argue that *Central Maine Power* and section 35.36(a)(9)(iii) of the Commission's regulations, which the Commission cites, are irrelevant here. The former involved a divestiture of generation and the latter governs market-based rate authority.<sup>172</sup>

102. Second, MISO and MISO Transmission Owners state that the Commission failed to distinguish the Transmission Owners Agreement from other similar agreements that

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<sup>169</sup> Additionally, MISO Transmission Owners argue that if the right of the transmission owners to construct and own such transmission facilities is eliminated under the Transmission Owners Agreement, MISO's ability to obligate a transmission owner to construct a transmission facility will result in transmission owners being the "builder of last resort" for undesirable projects while other parties have the opportunity to "cherry pick" the desirable projects, which is an unjust and unreasonable and unduly discriminatory result. *Id.* at 24-25 n.71.

<sup>170</sup> *Id.* at 26-27 (citing First Compliance Order, 142 FERC ¶ 61,215 at P 184); *Delmarva Power and Light Co.*, 76 FERC ¶ 61,331 at 62,582; *Cenergy, Inc.*, 74 FERC ¶ 61,281, at 61,900 (1996) (*Cenergy*); 18 C.F.R. § 35.36(a)(9)(iii); *Central Maine Power Co.*, 85 FERC ¶ 61,272 (1998) (*Central Maine Power*)).

<sup>171</sup> *Id.* (citing *Delmarva*, 76 FERC ¶ 61,331 at 62,582; *Cenergy*, 74 FERC ¶ 61,281 at 61,900).

<sup>172</sup> *Id.* at 27 (citing *Central Maine Power*, 85 FERC ¶ 61,272 at 62,092-62,093).

the Commission has found were entitled to *Mobile-Sierra* protection.<sup>173</sup> In particular, MISO points to the transmission planning and expansion section of the ISO New England, Inc. (ISO-NE) Transmission Operating Agreement, to which the Commission granted *Mobile-Sierra* treatment in 2004. MISO argues that it is arbitrary and capricious to grant *Mobile-Sierra* treatment for these provisions in ISO-NE's agreement denying such treatment for equivalent the right of first refusal provisions of the MISO Transmission Owners Agreement.<sup>174</sup> MISO also argues that the Commission failed to distinguish these cases.<sup>175</sup> MISO Transmission Owners argue instead of explaining why the Transmission Owners Agreement is not entitled to similar treatment, the Commission stated that these precedents are not "necessarily determinative" here. MISO Transmission Owners maintain that this does not meaningfully respond to their arguments.<sup>176</sup>

103. Finally, MISO and MISO Transmission Owners seek rehearing of the Commission's interpretation of the 2008 MISO Order, which found that only Appendix C of the Transmission Owners Agreement was protected by the *Mobile-Sierra* presumption.<sup>177</sup> MISO and MISO Transmission Owners argue that the 2008 MISO Order found that the entire Transmission Owners Agreement was subject to the *Mobile-Sierra* presumption, including Appendix B, section VI, which contains the federal right of first refusal provisions.<sup>178</sup>

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<sup>173</sup> *Id.* at 19 (citing MISO, Answer, Docket No. ER13-187-000, at 5-6 (filed Jan. 18, 2013) (MISO Jan. 18, 2013 Answer) (citing *ISO New Eng. Inc.*, 109 FERC ¶ 61,147, at PP 77-78 (2004) (*ISO New England*); *Pub. Utils. with Existing Contracts in the Cal. Indep. Sys. Operator Corp. Region*, 125 FERC ¶ 61,228, at PP 6, 15 (2008); *Sw. Power Pool, Inc.*, 117 FERC ¶ 61,207, at PP 27-28, *order on reh'g*, 119 FERC ¶ 61,021, at P 11; *Vermont Transco LLC*, 118 FERC ¶ 61,244, at P 50).

<sup>174</sup> MISO Rehearing Request at 9-10 (citing *ISO New England*, 109 FERC ¶ 61,147 at PP 77-78).

<sup>175</sup> *Id.* at 10 (citing *ISO New England Inc.*, 106 FERC ¶ 61,280, at P 213 & n.128 (2004)).

<sup>176</sup> MISO Transmission Owners Rehearing Request at 19-21.

<sup>177</sup> *See, e.g.*, MISO Rehearing Request at 14-15 (citing First Compliance Order, 142 FERC ¶ 61,215 at P 190).

<sup>178</sup> *Id.*; MISO Transmission Owners Rehearing Request at 13-16.

104. MISO argues that the Commission's interpretation of the 2008 MISO Order is not supported by the language of that order, which stated:

We agree with Union Electric that the [Transmission Owners Agreement] and Service Agreement impose a *Mobile-Sierra* standard of review. Accordingly, the Commission may modify those agreements only if it "adversely affect[s] the public interest." *Sierra*, 350 U.S. at 355. That standard is a demanding one, satisfied only in extraordinary "circumstances of unequivocal public necessity." *Permian Basin Area Rate Cases*, 390 U.S. 747, 822 (1968).<sup>179</sup>

105. MISO argues that this language makes clear that the Transmission Owners Agreement is, in its entirety, subject to the *Mobile-Sierra* presumption, emphasizing that the Commission explicitly stated that it could only modify the "agreements," not just specific "provisions" thereof.<sup>180</sup> In addition, MISO contends, when determining in previous orders that the *Mobile-Sierra* presumption was appropriate for a particular provision of a contract, the Commission did not state that such presumption was limited to that specific provision. Therefore, MISO argues, there is no reason that the *Mobile-Sierra* presumption would not apply to Appendix B, section VI of the Transmission Owners Agreement when the Commission has found that other provisions are subject to the *Mobile-Sierra* presumption.<sup>181</sup> MISO states that absent specific language to the contrary, the appropriate standard of review for the entire Transmission Owners Agreement is the *Mobile-Sierra* public interest standard.<sup>182</sup>

106. Similarly, MISO Transmission Owners argue that the Commission stated unequivocally in the 2008 MISO Order that the Transmission Owners Agreement, and not a subsection or subpart, imposes a *Mobile-Sierra* presumption.<sup>183</sup> MISO

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<sup>179</sup> MISO Rehearing Request at 15 (citing MISO 2008 Order, 122 FERC ¶ 61,090 at P 47, n.41 (emphasis added by MISO)).

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 12-13.

<sup>182</sup> *Id.* at 13 (citing *Texaco, Inc. v. FERC*, 148 F.3d 1091, 1096 (D.C. Cir. 1998); *Wis. Pub. Serv. Corp.*, 120 FERC ¶ 61,177, at P 22 (2007); *Morgan Stanley Capital Group, Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 534 (2008) (*Morgan Stanley*)).

<sup>183</sup> MISO Transmission Owners Rehearing Request at 14-15 (citing MISO 2008 Order, 122 FERC ¶ 61,090 at P 47 n.41).

Transmission Owners argue that the Commission failed to: (1) point to language in the 2008 MISO Order that qualifies or limits the scope of the Commission's ruling; (2) provide a citation that supports parsing the Transmission Owners Agreement in this way; and (3) explain why Appendix C is entitled to *Mobile-Sierra* protection while Appendix B is not, or how Appendix B is distinct from Appendix C such that Appendix B is not entitled to the same protection.<sup>184</sup>

107. MISO Transmission Owners argue that, since the Commission explicitly held that the Transmission Owners Agreement imposed a *Mobile-Sierra* presumption in the 2008 MISO Order and also because *Mobile-Sierra* is the default applicable presumption,<sup>185</sup> the Commission's decision in the First Compliance Order is an *ex post facto* revocation of *Mobile-Sierra* status. They argue that this revocation is both inconsistent with the basis of the *Mobile-Sierra* doctrine (i.e., preserving the sanctity of contracts and the benefit of the bargain struck by sophisticated parties), as well as with court decisions that draw a distinction between the Commission's authority to reject a *Mobile-Sierra* provision upon its initial review of a contract and subsequent challenges of that agreement.<sup>186</sup>

(c) **Commission Determination**

108. We deny rehearing. As the Commission stated in the First Compliance Order, in determining whether a *Mobile-Sierra* presumption applies in a specific instance, the Commission must determine whether the instrument or provision at issue embodies either (1) individualized rates, terms, or conditions that apply only to sophisticated parties who negotiated them freely at arm's length or (2) rates, terms, or conditions that are generally applicable or that arose in circumstances that do not provide the assurance of justness and reasonableness associated with arm's-length negotiations. The former constitute contract rates, terms, or conditions that necessarily qualify for a *Mobile-Sierra* presumption; that

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<sup>184</sup> *Id.* at 14-16.

<sup>185</sup> MISO Transmission Owners argue that the Commission's conditional acceptance of the Transmission Owners Agreement in 1998 was not premised on review of future challenges under the just and reasonable standard, nor did any language in the initial filing of the agreement waive *Mobile-Sierra* protection; thus, *Mobile-Sierra* is the default rule. *Id.* at 17-18, n.26 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 84 FERC ¶ 61,231, at 62,138 (1998); 2008 MISO Order, 122 FERC ¶ 61,090 at P 47 n.41); *see also* MISO Rehearing Request at 13.

<sup>186</sup> MISO Transmission Owners Rehearing Request at 17 (citing *Me. Pub.Util.Comm'n v. FERC*, 454 F.3d 278, 283-85 (D.C. Cir. 2006); *Boston Edison Co. v. FERC*, 233 F.3d 60, 68 (1st Cir. 2000)).

presumption does not necessarily apply to the latter, although the U.S. Court of Appeals for the District of Columbia Circuit has determined that the Commission is legally authorized to impose a more rigorous application of the statutory “just and reasonable” standard of review on future changes to agreements that do not present contract rates.<sup>187</sup>

109. MISO and the MISO Transmission Owners make three basic contentions in support of their argument that the Commission erred in finding that the right of first refusal provision in the MISO Transmission Owners Agreement is not entitled to a *Mobile-Sierra* presumption. First, they argue that the Commission was incorrect in finding that the Transmission Owners Agreement was not the product of arm’s-length bargaining. Second, MISO and the MISO Transmission Owners argue that the Commission erred in finding that the right of first refusal provision in the Transmission Owners Agreement formulates a rule of general applicability rather than a negotiated rate provision that is necessarily entitled to a *Mobile-Sierra* presumption, and MISO questions the Commission’s distinction between individualized rates, terms, or conditions and rates, terms, and conditions of general applicability. Finally, MISO reiterates its argument that the Commission has already found that the Transmission Owners Agreement has *Mobile-Sierra* protection, and it faults the Commission for failing to distinguish between this agreement and other agreements that it has granted *Mobile-Sierra* protection. We address these arguments in the order presented here.

110. In arguing that the Commission was incorrect in finding that the Transmission Owners Agreement was not the product of arm’s-length bargaining, MISO maintains that an arm’s-length agreement is an agreement between sophisticated parties with equal bargaining power. It rejects the notion that the particular degree of competitiveness or commonality of the parties’ respective interests is relevant to whether the agreement is an arm’s-length agreement that merits a *Mobile-Sierra* presumption.

111. We disagree with MISO’s argument because it leaves out of account an essential feature of the well-established understanding of arm’s-length bargaining. Courts have found that “arm’s length negotiations or transactions are characterized as adversarial negotiations between parties that are each pursuing independent interests.”<sup>188</sup> A “typical arm’s length transaction involves an adversarial negotiation in which the parties have independent interests and each tries to obtain the best deal for itself.”<sup>189</sup> Courts have

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<sup>187</sup> See *NEGPA*, 707 F.3d at 370-371.

<sup>188</sup> *Santomenno v. Transamerica Life Ins. Co.*, 2013 WL 603901, at 6 (C.D. CA 2013).

<sup>189</sup> *Id.* at 6 n.3 (citing Black’s Law Dictionary 109 (6th ed.1991) (defining an arm’s length transaction as “a transaction negotiated by unrelated parties, each acting in

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characterized arm's-length transactions as transactions in which "adversarial parties," i.e., "business adversaries in the commercial sense," seek "to further their own economic interests."<sup>190</sup> Courts have described "the hallmark characteristics of arm's-length bargaining" as bargaining that is "negotiated rigorously, selfishly and with an adequate concern for price."<sup>191</sup>

112. The Commission has taken a similar position. In one instance involving gas sales, it found that "the test for arm's-length bargaining" is

whether the purchaser and seller have sufficiently distinct economic interests that the buyer's interests in the negotiations are aligned with those to whom it resells the gas, and not with the interests of the seller. If the negotiating parties have a common economic interest in the outcome of the negotiations, they cannot bargain at arm's length. If the purchaser has an economic incentive to pay a higher price or agree to other terms more favorable than necessary to provide a reasonable incentive to the seller for the production of the gas, there can be no arm's-length bargaining.<sup>192</sup>

113. In short, arm's-length bargaining is a process in which each party pursues its individual interests, and a negotiation in which the parties pursue a single, common, and shared interest is thus inconsistent with such bargaining.<sup>193</sup> As discussed further below,

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his or her own self-interest .... A transaction in good faith in the ordinary course of business by parties with independent interests").

<sup>190</sup> *A.T. Kearney, Inc. v. Int'l Bus. Machines Corp.*, 73 F.3d 238, 242 (9th Cir. 1995).

<sup>191</sup> *Jeanes Hosp. v. Sec'y of Health & Human Servs.*, 448 F. App'x 202, 206 (3d Cir. 2011).

<sup>192</sup> *Nw. Central Pipeline Corp.*, 44 FERC ¶ 61,200, at 61,719 (1988).

<sup>193</sup> We note that in certain situations, a transaction may be deemed to be an arm's-length transaction when parties cannot be assumed to be pursuing individual, adverse interests. For example, Black's Law Dictionary defines an arm's-length transaction, in part, as:

The standard under which unrelated parties, each acting in his or her own best interest *would carry out* a particular transaction. For example, if a

the Commission found in the First Compliance Order and affirms here only that the right of first refusal provision of the Transmission Owners Agreement lacked the requisite characteristics of arm's-length bargaining and, therefore, is not entitled to the *Mobile-Sierra* presumption.<sup>194</sup>

114. MISO Transmission Owners reject the idea that they are acting in the furtherance of a common interest on the grounds that they compete with each other with respect to sales of energy, capacity, and ancillary services, as well as to attract new load and interconnections to their systems, and because they have differing interests with respect to structure, state regulation, retail choice, obligations to serve, and size of their operations and the customers served. However, our concern here is with the right of first refusal, and it serves to preclude competition in the area of transmission development.

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corporation sells property to its sole shareholder for \$10,000, in testing whether \$10,000 is an "arm's length" price it must be ascertained for how much the corporation could have sold to property to a disinterested third party in a bargained transaction. (Emphasis supplied.)

Black's Law Dictionary 100 (5th ed. 1978). The Commission has taken a similar approach. *See, e.g., Indiana and Michigan Municipal Distributors Ass'n v. Indiana Michigan Power Co.*, Opinion No. 382, 62 FERC ¶ 61,189, at 62,238 (1993) (stating that in assessing whether rates are just and reasonable, the Commission cannot presume prudence or assume . . . an arm's-length relationship if costs are incurred through an affiliate transaction, and the Commission will instead look to a range of market prices for comparable transactions during the same time period).

This alternative approach is not, however, applicable here. The Commission is not dealing with a price term that can be compared to prices in competitive markets or with a transaction that otherwise can be presumed to have a certain outcome when negotiated among parties that do not share common interests with respect to the substance of the transaction.

<sup>194</sup> First Compliance Order, 142 FERC ¶ 61,215 at P 179 (finding that "the MISO Transmission Owners Agreement cannot be classified in its entirety as containing contract rates or tariff rates" and further finding "that determining the standard of review that should apply to specific provisions of the Transmission Owners Agreement is an appropriate way to recognize the distinctions among its provisions"). The Commission's finding that the Transmission Owners Agreement is a document of general applicability, however, applies to the Transmission Owners Agreement as a whole rather than turning on the limitation of the right-of-first-refusal provision.

The Commission concluded in Order No. 1000 that federal rights of first refusal create a barrier to entry that discourages nonincumbent transmission developers from proposing alternative solutions for consideration at the regional level.<sup>195</sup> One cannot conclude that the MISO Transmission Owners deal with each other as competitors in all matters because they may do so with respect to some, in particular when the effect of the agreement in question is to restrict competition from third parties in a way that can adversely affect transmission rates.

115. While federal rights of first refusal create barriers, the Commission made clear in the First Compliance Order that it did not intend to imply that the parties that negotiated the MISO Transmission Owners Agreement acted in bad faith.<sup>196</sup> MISO Transmission Owners' description of their intentions in formulating the provisions at issue serves only to demonstrate that the parties that negotiated the MISO Transmission Owners Agreement acted in good faith, not that they bargained at arm's-length.

116. MISO and MISO Transmission Owners argue that the MISO Transmission Owners Agreement as a whole does not constitute a prescription of general applicability, and they treat the entire agreement as being entitled to the *Mobile-Sierra* presumption in some instances and do the same only with respect to the right of first refusal provision in others. The Commission did not find in the First Compliance Order that the entire Transmission Owners Agreement could be characterized in this way, and it conceded that some provisions of the Transmission Owners Agreement may have the characteristics necessary to justify a *Mobile-Sierra* presumption.<sup>197</sup> The Commission found only that the right of first refusal provision had the characteristics of a prescription of general applicability and as a result did not merit a *Mobile-Sierra* presumption.<sup>198</sup> We thus address the arguments regarding prescriptions of general applicability that have been advanced on rehearing only as they pertain to the right of first refusal provision.

117. MISO argues that the Supreme Court did not establish a clear dichotomy between the terms "prescriptions of general applicability" and "contractually negotiated rates." However, even if this is the case, the point has no significance here. We think it is clear from the context that when the Court referred to "contract rates," it was referring to rates to which the Commission was required to apply a *Mobile-Sierra* presumption.

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<sup>195</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 257.

<sup>196</sup> *Id.* P 400 n.340.

<sup>197</sup> First Compliance Order, 142 FERC ¶ 61,215 at P 179.

<sup>198</sup> *Id.* PP 182-183, 187.

Specifically, the Court acknowledged the Commission's use of the term "contract rates" in this way and went on to say that on remand, the court of appeals could consider whether rates that did not qualify as contract rates could nevertheless be treated analogously.<sup>199</sup> The court of appeals then remanded this issue back to the Commission as part of a general requirement that the Commission explain whether it had the discretion to treat rates that were not contract rates as analogous to contract rates.<sup>200</sup> To the extent that MISO is arguing that all contracts, regardless of their characteristics, are entitled to *Mobile-Sierra* protection, we disagree. That view is overbroad, as it would sweep in even a situation where the terms of an agreement, if approved, would be incorporated into the service agreements of all present and future customers. In contrast to such an overbroad approach, the Commission reasonably distinguished between "contract rates," i.e., rates in a contract that qualifies for a *Mobile-Sierra* presumption, and rates, terms, or conditions in an agreement that are generally applicable or that arose in circumstances that do not provide the assurance of justness and reasonableness associated with arm's-length negotiations.

118. Contrary to MISO's argument, the Commission did not find that the "mere possibility" of adding new signatories to a multi-party agreement renders the agreement one of general applicability that is not entitled to a *Mobile-Sierra* presumption. The Commission found in the First Compliance Order that "[w]here the language of an agreement establishes rules that delimit, qualify, or restrict the ability of any other potential competitor to engage in the subject activity, that language creates generally applicable requirements."<sup>201</sup> Whether a multi-party agreement that allows for new signatories is restrictive in this sense depends on the situation that new signatories face at the time of their accession to membership. The Commission found that new MISO members must accept the right of first refusal provision as-is, with limited room for negotiation and that as a result, new MISO members are placed in a position that differs fundamentally from that of parties who are able to negotiate freely, such as buyers and sellers entering into a typical power sales contract that would be entitled to a *Mobile-Sierra* presumption.<sup>202</sup>

119. MISO does not contest this characterization of the situation that new signatories to the Transmission Owners Agreement face. Instead, it argues under *NRG* the *Mobile-*

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<sup>199</sup> *NRG*, 130 S.Ct. at 701.

<sup>200</sup> *Me. Pub. Util. Comm'n v. FERC*, 625 F.3d 754, 759-60 (2010).

<sup>201</sup> First Compliance Order, 142 FERC ¶ 61,215 at P 180.

<sup>202</sup> *Id.* P 181.

*Sierra* presumption applies to third party challenges, and the same should apply to new parties to the agreements. MISO maintains that “the mere fact that any new signatories would be subject to the terms of the [Transmission Owners Agreement] does not render the *Mobile-Sierra* protected provisions any less negotiated at arm’s length between the original parties.”<sup>203</sup> At the outset, *NRG* does not resolve the question of whether the *Mobile-Sierra* presumption applies to the rates at issue in a particular case. As noted above, in *NRG*, the U.S. Supreme Court held that a *Mobile-Sierra* presumption applies to third-party challenges to “contract rates,” i.e., that rates that possess the factual preconditions for a *Mobile-Sierra* presumption, but, as discussed above, it remanded to the court of appeals the questions of whether the rates at issue qualify as contract rates and, if not, whether they could nevertheless be treated analogously.<sup>204</sup> The court of appeals then remanded these questions back to the Commission,<sup>205</sup> which found that the rates were not contract rates, but they possessed characteristics that justified treating them analogously to contract rates.<sup>206</sup> Even if *NRG* resolved the issue as MISO claims, the issue presented here would be whether the provisions were in fact negotiated at arm’s-length and thus have *Mobile-Sierra* protection. We have established that the preconditions for the presumption do not exist here for the reasons discussed above. Consequently, even if the *Mobile-Sierra* presumption applies to new parties to an agreement in the same way that it applies to the third party challenges, something that *NRG* does not address, the point would have no relevance here.

120. We reject MISO Transmission Owners’ argument that the Commission erred when it found that MISO Transmission Owners had implicitly acknowledged that the right of first refusal in the MISO Transmission Owners Agreement was a provision of general applicability when they stated that this provision applies to Entergy even though Entergy is not yet a party to that agreement and did not negotiate those provisions.<sup>207</sup> MISO Transmission Owners state that they, along with MISO, took this position only to argue that under *Mobile-Sierra* they cannot be compelled to adopt a two-tiered system regarding transmission construction rights and obligations, i.e., one proposed by Arkansas Electric Cooperative Corporation under which *Mobile-Sierra* protection would not apply to Entergy operating companies that did not sign the MISO Transmission

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<sup>203</sup> MISO Rehearing Request at 14.

<sup>204</sup> *NRG*, 130 S.Ct. at 701.

<sup>205</sup> *Me. Pub. Util. Comm’n v. FERC*, 625 F.3d at 759-60.

<sup>206</sup> *Devon Power*, 134 FERC ¶ 61,208 at PP 12-14.

<sup>207</sup> *See* First Compliance Order, 142 FERC ¶ 61,215 at P 185.

Owners Agreement prior to the effective date of Order No. 1000.<sup>208</sup> MISO Transmission Owners argue that the parties to the Transmission Owners Agreement remain free to negotiate amendments to accommodate specific parties or interests. However, the Commission's point in the First Compliance Order was that if the provision applied to Entergy before it became a party to the Transmission Owners Agreement, that in itself showed that the right of first refusal provision was a provision of general applicability.<sup>209</sup> The fact that MISO Transmission Owners stated that the right of first refusal provision would apply to Entergy as part of a response to a proposal by Arkansas Electric Cooperative Corporation does not affect this conclusion. Moreover, as the Commission noted in the First Compliance Order, the room that new parties had to negotiate amendments was limited.<sup>210</sup>

121. MISO's arguments concerning the discussion of *Mobile-Sierra* in the MISO 2008 Order reiterate arguments that the Commission addressed in the First Compliance Order. We reaffirm our findings that these MISO arguments are misguided.<sup>211</sup> As the Commission stated, when this statement in the MISO 2008 Order is read in context, it has neither the meaning nor the precedential value that MISO attributes to it.<sup>212</sup> Our statements on *Mobile-Sierra* in that instance are best understood as directed to a specific rate matter that is dealt with in the Transmission Owners Agreement, not to everything contained in that agreement.<sup>213</sup> In addition, regardless of how broadly one chooses to read the statement on *Mobile-Sierra* in question, that statement provides little reasoning to support its conclusion and was not necessary to decide the question presented.<sup>214</sup>

122. Finally, we find no merit in MISO Transmission Owners' argument that we failed to distinguish the MISO Transmission Owners Agreement from other similar agreements

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<sup>208</sup> See Arkansas Electric Cooperative Corp., Protest, Docket Nos. ER13-187-000 and ER13-187-001, at 10 (filed Dec. 10, 2012); MISO Transmission Owners Rehearing Request at 28.

<sup>209</sup> First Compliance Order, 142 FERC ¶ 61,215 at P 185.

<sup>210</sup> *Id.* P 181.

<sup>211</sup> See *id.* PP 188 – 191.

<sup>212</sup> *Id.* P 189.

<sup>213</sup> *Id.* P 190.

<sup>214</sup> *Id.* P 191.

that MISO states the Commission has found were entitled to *Mobile-Sierra* protection. The question presented here is whether the right of first refusal provision in the MISO Transmission Owners Agreement represents an instance of contract rates that the Commission is required to acknowledge is subject to a *Mobile-Sierra* presumption. None of the cases that MISO cites address this issue. Only one of these cases concerns a right of first refusal provision. That is a 2004 order in which the Commission exercised its discretion to apply a *Mobile-Sierra* standard of review to some provisions of the ISO-NE Transmission Operating Agreement, including a right of first refusal provision, but not others.<sup>215</sup> Such discretionary Commission action occurs in instances where an agreement is not subject to a *Mobile-Sierra* presumption as a matter of law, and for that reason the ISO-NE order in question does not speak to the issue presented here, i.e. whether the right of first refusal provision of the MISO Transmission Owners Agreement has the characteristics that require the Commission to apply a *Mobile-Sierra* presumption to it. None of the other cases that MISO Transmission Owners cite deal with agreements that are similar to the MISO Transmission Owners Agreement,<sup>216</sup> and they thus do not support MISO Transmission Owners' argument that we have failed to distinguish the MISO Transmission Owners Agreement from similar agreements that are subject to a *Mobile-Sierra* standard of review.

**ii. References to State or Local Rights of First Refusal**

**(a) First Compliance Order**

123. In the First Compliance Order, the Commission directed MISO to remove the following provision from section VIII.A of Attachment FF – State or Local Rights of First Refusal in its Tariff:<sup>217</sup>

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<sup>215</sup> *ISO New England Inc.*, 109 FERC ¶ 61,147 (2004).

<sup>216</sup> *See Pub. Utils. with Existing Contracts in the Cal. Indep. Sys. Operator Corp. Region*, 125 FERC ¶ 61,228, at PP 6, 15 (2008) (finding that certain transmission service agreements were subject to a “mixed” standard of review); *Sw. Power Pool, Inc.*, 117 FERC ¶ 61,207, at PP 27-28 (accepting a *Mobile-Sierra* clause in a balancing agreement), *order on reh’g*, 119 FERC ¶ 61,021, at P 11 (2007) (affirming that a *Mobile-Sierra* standard should apply to a balancing agreement); *Vt. Transco LLC*, 118 FERC ¶ 61,244, at P 50 (2007) (finding that a *Mobile-Sierra* standard applies to the withdrawal provisions of a multi-party transmission services agreement)).

<sup>217</sup> First Compliance Order, 142 FERC ¶ 61,215, at P 205.

State or Local Rights of First Refusal. The Transmission Provider shall comply with any Applicable Laws and Regulations granting a right of first refusal to a Transmission Owner. The Transmission Owner will be assigned any transmission project within the scope, and in accordance with the terms, of any Applicable Laws and Regulations granting such a right of first refusal. These Applicable Laws and Regulations include, but are not limited to, those granting a right of first refusal to the incumbent Transmission Owner(s) or governing the use of existing developed and undeveloped right of way held by an incumbent utility.<sup>1218]</sup>

124. The Commission stated that Order No. 1000 does not require removal from Commission-jurisdictional tariffs or agreements references to state or local laws or regulations with respect to construction of transmission facilities, including but not limited to authority over siting or permitting of transmission facilities.<sup>219</sup> However, the Commission found that MISO's proposal went beyond mere reference to state or local laws or regulations; it referenced relevant state and local laws and then used that reference to create a federal right of first refusal.<sup>220</sup> The Commission explained that Order No. 1000 did not permit a public utility transmission provider to add a federal right of first refusal for a "new transmission facility"<sup>221</sup> based on state law.<sup>222</sup> The

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<sup>218</sup> *Id.* P 202 (citing MISO, FERC Electric Tariff, Attachment FF, § VIII.A (8.0.0)).

<sup>219</sup> *See id.* P 205 (citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 253 n.231 ("Nothing in this Final Rule is intended to limit, preempt, or otherwise affect state or local laws or regulations with respect to construction of transmission facilities, including but not limited to authority over siting or permitting of transmission facilities. This Final Rule does not require removal of references to such state or local laws or regulations from Commission-approved tariffs or agreements"); Order No. 1000-A, FERC Stats. & Regs. ¶ 31,132 at P 381).

<sup>220</sup> *See* First Compliance Order, 142 FERC ¶ 61,215 at P 205.

<sup>221</sup> Order No. 1000 defines new transmission facilities as transmission facilities that are subject to evaluation, or reevaluation, within a public utility transmission provider's local or regional transmission planning process after the effective date of the public utility transmission provider's filing adopting the relevant requirements of Order No. 1000. Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 65.

<sup>222</sup> *See* First Compliance Order, 142 FERC ¶ 61,215 at P 205.

Commission found that, while state laws and regulations may not be used to automatically exclude from consideration proposals for transmission facilities to be selected in the regional transmission plan for purposes of cost allocation as the more efficient or cost-effective transmission solutions to regional transmission needs, it may be permissible to consider the effect of the state regulatory process at appropriate points in the regional transmission planning process.<sup>223</sup>

125. Therefore, in the First Compliance Order, the Commission directed MISO to remove section VIII.A of Attachment FF because it referenced relevant state and local laws and then used that reference to create a federal right of first refusal.<sup>224</sup>

(b) **Requests for Rehearing or Clarification**

(1) **Proposed Language Does Not Create Right of First Refusal; Inefficiency and Delay; State/Federal Law Dispute; Preemption**

(i) **Proposed Language Does Not Create a Right of First Refusal**

126. MISO, MISO Transmission Owners, NARUC, and Organization of MISO States argue that the references in the Tariff to state or local rights of first refusal do not create a federal right of first refusal.<sup>225</sup> MISO argues that the Commission's determination in the First Compliance Order, finding that MISO's proposed provision referencing local or state rights of first refusal goes beyond "mere reference" to state or local laws or regulations, is not supported by the language in the provision.<sup>226</sup> MISO states that, given that the Commission has ordered the elimination of federal rights of first refusal in jurisdictional tariffs, the "Applicable Laws and Regulations" addressed by MISO's

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<sup>223</sup> *See id.* P 206.

<sup>224</sup> *Id.* P 205.

<sup>225</sup> MISO Rehearing Request at 16-17; MISO Transmission Owners Rehearing Request at 39-40; NARUC Rehearing Request at 5-6; Organization of MISO States, Request for Clarification and Rehearing, Docket No. ER13-187-002, at 6 (filed Apr. 22, 2013) (Organization of MISO States Rehearing Request).

<sup>226</sup> MISO Rehearing Request at 16 (referencing First Compliance Order, 142 FERC ¶ 61,215 at P 205).

proposed changes encapsulate only state or local laws and regulations. Thus, the proposed changes implicitly state that MISO will comply with applicable state and local laws, and that transmission owners will be assigned any transmission projects *within the scope, and in accordance with the terms* of such state and local laws and regulations.<sup>227</sup> MISO argues that the mere mention of state or local rights of first refusal in a FERC-jurisdictional tariff does not convert them into federal rights of first refusal. Instead, MISO contends, the proposed additions to the Tariff referencing local or state rights of first refusal simply recognize that state rights of first refusal may exist.<sup>228</sup>

127. MISO Transmission Owners argue that, prior to the issuance of Order No. 1000, language in the Tariff referencing state and local rights of first refusal was unnecessary because the existing Transmission Owners Agreement ensured that any state-adopted rights of first refusal would be honored; in other words, implicit in the existing Transmission Owners Agreement Appendix B, section VI language is the fact that a state certificated utility will build facilities connected to its system, consistent with state law, including any applicable state laws granting a right of first refusal. MISO Transmission Owners contend that given Order No. 1000's requirement to remove federal rights of first refusal from the Transmission Owners Agreement, additional language referencing such state or local laws or regulations is now necessary. However, MISO Transmission Owners assert that the proposed language does not "create" any new federal right of first refusal that does not already exist in the Transmission Owners Agreement, but rather reflects the possibility that a state or local law may create a right of first refusal.<sup>229</sup>

128. MISO Transmission Owners also argue that to the extent that state or local laws or regulations change, the applicability of the Tariff provisions regarding transmission projects constructed in that state would similarly change, without necessitating any filing at the Commission. Because the applicability of the language can change *without action by the Commission*, MISO Transmission Owners contend, these provisions merely "reference" state or local laws or regulations and *do not* create a federal right of first refusal.<sup>230</sup> MISO Transmission Owners again argue that these provisions simply recognize state and local rights of first refusal where they exist, and that requiring their

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<sup>227</sup> *Id.* at 16-17.

<sup>228</sup> *Id.* at 17.

<sup>229</sup> MISO Transmission Owners Rehearing Request at 39-40.

<sup>230</sup> *Id.* at 40.

removal violates the exception in Order No. 1000 allowing continued references to state and local right of first refusal laws.<sup>231</sup>

129. Organization of MISO States asserts that the Commission must recognize the existence of state right of first refusal statutes, which the Commission cannot override. Organization of MISO States does not consider such recognition of states' jurisdiction to establish a federal right of first refusal.<sup>232</sup> Similarly, NARUC argues that the mere acknowledgement of state law that would otherwise apply does not confer on the incumbent transmission owner a *federal* right of first refusal and, therefore, the proposed Tariff revision recognizing state or local right of first refusal statutes does not constitute language in a Commission-jurisdictional tariff or agreement that grants a federal right of first refusal.<sup>233</sup> Indiana Commission states that, rather than federalizing state law, MISO's proposed Tariff provision referencing state and local rights of first refusal simply recognizes that the transmission developer selection process under the federal tariff should account for state law.<sup>234</sup> According to Indiana Commission, the Commission failed to provide any basis or explanation for its conclusion that referencing state law creates a federal right of first refusal, rendering such conclusion arbitrary and capricious.<sup>235</sup>

**(ii) Inefficiency and Delay**

130. MISO, MISO Transmission Owners, Organization of MISO States, Midwest TDUs, and Indiana Commission argue that requiring MISO to remove from its Tariff the reference to state or local laws that grant a right of first refusal to an incumbent transmission owner will lead to inefficiency and delay.<sup>236</sup> Petitioners argue that such a

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<sup>231</sup> *Id.* at 40-41.

<sup>232</sup> Organization of MISO States Rehearing Request at 6.

<sup>233</sup> NARUC Rehearing Request at 5-6.

<sup>234</sup> Indiana Commission, Request for Clarification and Rehearing, Docket No. ER13-187-002, at 5 (filed Apr. 22, 2013) (Indiana Commission Rehearing Request).

<sup>235</sup> *Id.* at 6.

<sup>236</sup> MISO Rehearing Request at 18-19; MISO Transmission Owners Rehearing Request at 34, 35, 37; Organization of MISO States Rehearing Request at 4-5, 8-9; Midwest TDU's Rehearing Request at 4-7; Indiana Commission Rehearing Request at 9-11.

result is inconsistent with the stated intent of Order No. 1000 for efficient and cost-effective transmission development, and, as such, the Commission's directive is arbitrary and capricious.<sup>237</sup> Midwest TDUs argue that the Commission's determination is also counter to the Commission's obligations under FPA section 217(b)(4)<sup>238</sup> to facilitate transmission planning and expansion to meet the needs of load-serving entities.<sup>239</sup>

131. MISO states that, unless the Tariff expressly articulates deference to state and local laws granting rights of first refusal, the Tariff may be construed as requiring MISO to apply its transmission developer selection procedures even when a state or local right of first refusal would require selection of the incumbent transmission owner. MISO argues that the consequent conflicts, inefficiencies, and delays that will ensue from failing to recognize relevant state or local laws from the beginning and throughout MISO's transmission developer selection process are inconsistent with the Commission's policies.<sup>240</sup>

132. MISO Transmission Owners contend that the Commission's decision will result in higher rates for customers and cause potential delays in the construction of needed transmission facilities. Specifically, MISO Transmission Owners argue that requiring MISO to undertake a timely and costly transmission developer selection process for a transmission facility located in a state with laws dictating which entities are eligible to construct transmission facilities within the state, or for a transmission facility located along an existing, state-granted right of way, could lead to the selection of a transmission

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<sup>237</sup> *See, e.g.*, MISO Transmission Owners Rehearing Request at 29-30; Indiana Commission Rehearing Request at 9; Organization of MISO States Rehearing Request at 4 (“a primary goal of Order No. 1000...is ‘to speed along the development of needed electric transmission projects in an efficient manner.’”) (quoting First Compliance Order, 142 FERC ¶ 61,215, Clark, Comm’r, dissenting). Organization of MISO States notes that while more efficient and cost-effective transmission planning is beneficial, the Commission should be indifferent as to whether MISO selects a nonincumbent transmission developer or incumbent transmission owner in a state or locality with right of first refusal laws to develop a transmission project, if all other relevant criteria are equivalent.

<sup>238</sup> 16 U.S.C. 824q(b)(4) (2012).

<sup>239</sup> Midwest TDUs, Request for Rehearing, Docket Nos. ER13-186-001 and ER13-187-002, at 7 (filed Apr. 22, 2013) (Midwest TDUs Rehearing Request) (citing 16 U.S.C. § 824q(b)(4) (2006)).

<sup>240</sup> MISO Rehearing Request at 18.

developer that cannot obtain the legal right to construct the transmission facility. MISO Transmission Owners claim that this requirement will result in inefficient and less cost-effective transmission development, as the resources and time of both MISO and prospective transmission developers will be wasted in selecting a transmission developer that will never be permitted to develop the transmission facility it was selected to develop.<sup>241</sup> Indiana Commission argues that allowing the selection of a transmission developer that is not eligible to develop a transmission facility under state law will lead to increased litigation.<sup>242</sup>

133. According to MISO Transmission Owners, the Commission offered no justification as to why requiring MISO to conduct the transmission developer selection process for a transmission facility in a state with a right of first refusal law or where an incumbent transmission owner has obtained an exclusive right of way will lead to efficient and cost-effective transmission development and result in just and reasonable rates for MISO customers.<sup>243</sup>

134. Midwest TDUs argue that courts have previously rejected Commission directives to perform studies where there is no evidence that the potential benefits from implementing the study recommendations would be sufficient to justify the study costs, finding that such a requirement “borders on the absurd.”<sup>244</sup> MISO TDUs argue that the

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<sup>241</sup> MISO Transmission Owners Rehearing Request at 29-34. *See also* Indiana Commission Rehearing Request at 11 (arguing that resources of state and local commissions and agencies and other interested stakeholders would also be wasted); Midwest TDUs Rehearing Request at 5 (stating that the Commission’s directive creates a process that is either frivolous, in that it expends substantial resources only to assign the transmission project to the incumbent transmission owner, or irrelevant, in that it assigns the transmission project to a transmission developer that, absent waiver of the right of first refusal by the incumbent transmission owner, cannot build under applicable state and local laws).

<sup>242</sup> Indiana Commission Rehearing Request at 5.

<sup>243</sup> MISO Transmission Owners Rehearing Request at 35.

<sup>244</sup> Midwest TDUs Rehearing Request at 6-7 (citing *City of Centralia v. FERC*, 213 F.3d 742 (D.C. Cir. 2000) (*City of Centralia*)). Midwest TDUs state that in *City of Centralia*, the National Marine Fisheries Service (Fisheries Service) recommended that the Commission require Centralia to construct a tailrace barrier to prevent harm to the river’s anadromous fish population as a condition of any hydropower license issued to the City. *Id.* at 6 (citing *City of Centralia*, 213 F.3d at 744). Midwest TDUs state that,

(continued...)

requirement here that MISO and its stakeholders use their limited resources to evaluate and potentially select transmission developers barred from building the proposed transmission project likewise “borders on the absurd” and should be reversed on rehearing.<sup>245</sup>

135. In addition, Midwest TDUs state that MISO’s transmission planning processes must be in sync—not operate at cross-purposes—with applicable state and local laws.<sup>246</sup> Therefore, Midwest TDUs assert that state laws and regulations affecting transmission developer selection and transmission facility siting (such as state preferences for building on existing rights of way) should be acknowledged and addressed in the MISO transmission planning process.<sup>247</sup>

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although the Commission rejected the Fisheries Service’s recommendation, concluding that there were no facts in the record sufficient to require construction of a tailrace barrier, it held that as a condition of the license, Centralia must nevertheless undertake a study on the potential need for a tailrace barrier. *Id.* (citing *City of Centralia*, 213 F.3d at 747). Midwest TDUs state that the D.C. Circuit ruled that the Commission’s decision to require the study was arbitrary and capricious and unsupported by substantial evidence. *Id.* (citing *City of Centralia*, 213 F.3d at 749). According to the court, “[h]aving acknowledged that a barrier is not justified, FERC stumbles badly in concluding the costs of a study could be justified.” *Id.* (citing *City of Centralia*, 213 F.3d at 749). The court also noted that

Standing alone, the study is arguably too expensive, for it is difficult to justify a \$300,000 expenditure for an inconclusive study to determine whether to spend another \$1,000,000 to construct a tailrace barrier to address a problem that has not been identified. When weighed against the alternative remedies proposed by Centralia and the Tribe, however, the order requiring a study borders on absurd. *Id.* (citing *City of Centralia*, 213 F.3d at 750).

<sup>245</sup> *Id.* at 6-7.

<sup>246</sup> Midwest TDUs contend that the Commission’s directive discounts state planning preferences and may reduce the likelihood that a transmission facility will receive state siting approval. *Id.* at 7 n.9 (citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 42).

<sup>247</sup> *Id.* at 7.

136. Organization of MISO States argues that hypothetically, under the First Compliance Order, were the MISO Board to select a transmission developer other than the incumbent transmission owner for a transmission project subject to the competitive bidding process in a state that has a right of first refusal law, the relevant state authority would be required to follow state law and award the project to the incumbent transmission owner. Since the MISO Board did not select the incumbent transmission owner, Organization of MISO States argues, litigation would ensue regarding the transmission developer selection and whether the transmission project would be eligible for regional cost allocation. Organization of MISO States requests clarification as to whether this hypothetical is accurate and, if not, contends that this issue requires rehearing for stakeholders to better understand the impacts of the First Compliance Order.<sup>248</sup>

137. Organization of MISO States requests clarification regarding whether the Commission has considered the resulting impact on resources and potential delay in transmission development of its directive.<sup>249</sup> Organization of MISO States asserts that this clarification would provide needed information to MISO and the states to reach a balance between MISO's planning process and state autonomy when moving into this new competitive bidding process for selecting the best transmission developer to meet identified transmission needs.<sup>250</sup>

138. Organization of MISO States asks the Commission to also clarify the intent of the language in paragraph 206 of the First Compliance Order that "it is not necessarily impermissible [for MISO] to consider the effect of the state regulatory process at appropriate points in the regional transmission planning process."<sup>251</sup> Organization of MISO States asserts that it is unclear when such "consideration" is to occur. Organization of MISO States states that the language could suggest that MISO may establish a process in which the effect of a state or local right of first refusal could be considered before the transmission developer selection process even begins, such as after a transmission project is approved in MTEP. According to Organization of MISO States, the language could also mean that MISO could propose to address state and local right of first refusal statutes as a possible exemption to Order No. 1000's requirement to remove any federal right of first refusal, similar to MISO's proposed exemption for Baseline

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<sup>248</sup> Organization of MISO States Rehearing Request at 17.

<sup>249</sup> *Id.* at 4-5.

<sup>250</sup> *Id.* at 5.

<sup>251</sup> *Id.* (citing First Compliance Order, 142 FERC ¶ 61,215 at P 206).

Reliability Projects or upgrades to existing systems.<sup>252</sup> Organization of MISO States states that, if the Commission fails to provide sufficient clarification, it requests rehearing of the requirement for MISO to remove the reference to state rights of first refusal from the Tariff.

(iii) **Creates a Dispute Between State and Federal Laws**

139. MISO, MISO Transmission Owners, Organization of MISO States, and Indiana Commission argue that the First Compliance Order places MISO's transmission planning process in a dispute between state and federal laws, which will further frustrate efficient and cost-effective transmission expansion in the MISO region.<sup>253</sup>

140. MISO states that, unless the Tariff expressly articulates deference to state or local rights of first refusal, the Tariff may be construed as requiring MISO to implement its transmission developer selection procedure even when a state or local right of first refusal that would require selection of the incumbent transmission owner clearly applies. MISO argues that this would, in effect, force it to ignore the applicable state or local laws such that it would not be in compliance with such laws.<sup>254</sup> MISO Transmission Owners claim that without the provision in the Tariff recognizing state or local rights of first refusal laws, MISO may select a transmission developer other than the incumbent transmission owner for a transmission project that is located in a state with a right of first refusal law. In such case, MISO Transmission Owners contend that the nonincumbent transmission developer and the incumbent transmission owner will have competing claims under federal and state law to the right to construct the transmission project, resulting in costly and possibly duplicative litigation in multiple forums.<sup>255</sup> MISO Transmission Owners further argue that, by mandating that MISO remove the provision in the Tariff recognizing state or local rights of first refusal laws, the Commission would also force MISO to potentially select a transmission developer to develop a transmission project

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<sup>252</sup> *Id.*

<sup>253</sup> MISO Transmission Owners Rehearing Request at 34; Organization of MISO States Rehearing Request at 6; Indiana Commission Rehearing Request at 8. Michigan Public Service Commission did not join Organization of MISO States' request for rehearing with respect to this issue. Organization of MISO States Rehearing Request at 6 n.13.

<sup>254</sup> MISO Rehearing Request at 18.

<sup>255</sup> MISO Transmission Owners Rehearing Request at 34-35.

whose development of that project would infringe on an incumbent transmission owner's existing rights of way granted under applicable state law, contrary to Order No. 1000.<sup>256</sup>

141. Organization of MISO States and Indiana Commission argue that the Commission's rejection of Tariff language deferring to state and local rights of first refusal leaves unclear how the MISO Board of Directors' (MISO Board) selection of a transmission developer can be made without abridging state law or state autonomy as asserted in state-enacted right of first refusal laws. Organization of MISO States and Indiana Commission claim that the Commission's holding effectively places such selection potentially in direct conflict with a state's authority to autonomously regulate its public utilities, which will likely lead to increased litigation between transmission developers selected by MISO and incumbent transmission owners asserting state-granted rights to construct transmission projects.<sup>257</sup> Organization of MISO States further argues that the Commission's decision forces state regulators acting under a state right of first refusal law to choose between complying with state law (and potentially risking litigation over cost-sharing) and violating the law by approving a nonincumbent transmission developer that MISO selected.<sup>258</sup>

142. In addition, MISO Transmission Owners argue that requiring public utility transmission providers to consider compliance obligations under state and local laws in one area of transmission planning (obligating public utility transmission providers to "identify and consider public policy requirements in their local and regional planning") but effectively forbidding the practical consideration of state and local laws in another area of the same process (transmission developer selection) represents the type of internally inconsistent reasoning that courts have determined to be arbitrary and capricious under the Administrative Procedure Act (APA).<sup>259</sup>

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<sup>256</sup> *Id.* at 41 (citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 319).

<sup>257</sup> Organization of MISO States Rehearing Request at 6-7; Indiana Commission Rehearing Request at 8.

<sup>258</sup> Organization of MISO States Rehearing Request at 8.

<sup>259</sup> MISO Transmission Owners Rehearing Request at 38-39 (citing *Gen. Chem. Corp. v. United States*, 817 F.2d 844, 857 (D.C. Cir. 1987) (concluding that an agency order was arbitrary and capricious because it was based on internally inconsistent reasoning); *Business Roundtable v. SEC*, 647 F.3d 1144, 1153 (D.C. Cir. 2011)) (referencing Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2012)).

(iv) **Preemption of State Authority**

143. MISO Transmission Owners, Organization of MISO States, Midwest TDUs and Indiana Commission argue that by requiring MISO to remove language from its Tariff that would recognize state and local right of first refusal laws, the Commission is effectively preempting state authority without the statutory authority to do so.<sup>260</sup> MISO Transmission Owners assert that the Commission should grant rehearing to correct this violation of the APA.<sup>261</sup> MISO Transmission Owners assert that despite purportedly relying on its authority to review rates for transmission service under FPA section 206, the Commission pointed to no authority in the FPA that authorizes it to preempt state jurisdiction or direct a public utility transmission provider to ignore state laws governing construction, siting, and permitting of transmission facilities.<sup>262</sup>

144. Indiana Commission contends that under section 201(a) of the FPA,<sup>263</sup> the Commission's jurisdiction extends "only to those matters which are not subject to regulation by the States."<sup>264</sup> Indiana Commission further states that the Commission has only limited authority to site transmission facilities and no authority over transmission construction, ownership, and permitting. According to Indiana Commission, state and local laws that affect the selection of a transmission developer take precedence where the purpose is to regulate subjects of state jurisdiction and the means chosen relate to matters of legitimate state concern, notwithstanding the effects of such laws on matters subject to the Commission's jurisdiction.<sup>265</sup>

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<sup>260</sup> *Id.* at 42; Organization of MISO States Rehearing Request at 7; Midwest TDUs Rehearing Request at 7-8; Indiana Commission Rehearing Request at 4.

<sup>261</sup> MISO Transmission Owners Rehearing Request at 42 (citing 5 U.S.C. § 706(2)(C) (requiring reviewing courts to hold unlawful an agency's action, findings, and conclusions found to be "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right"))).

<sup>262</sup> *Id.*

<sup>263</sup> 16 U.S.C. § 824(a) (2012).

<sup>264</sup> Indiana Commission Rehearing Request at 4 (citing FPA section 201(a), 16 U.S.C. § 824(a) (2012)).

<sup>265</sup> *Id.* at 4-5 (citing *Northwest Cent. Pipeline Corp. v. State Corp. Comm'n*, 489 U.S. 493, 518 (1989)).

145. Likewise, MISO Transmission Owners and Organization of MISO States state that section 201(a) of the FPA expressly limits the Commission's jurisdiction over transmission and wholesale power sales "only to those matters which are not subject to regulation by the States" and the FPA grants the Commission only limited authority over siting of transmission facilities, which MISO Transmission Owners assert is not at issue here.<sup>266</sup> MISO Transmission Owners assert that the Commission otherwise lacks the authority under the FPA to dictate construction and siting decisions within MISO. MISO Transmission Owners cite to judicial precedent stating that "[t]he states have traditionally assumed all jurisdiction to approve or deny permits for the siting and construction of electric transmission facilities."<sup>267</sup> Thus, MISO Transmission Owners argue, because transmission construction and siting are matters "subject to regulation by the states," the FPA bars the Commission from asserting jurisdiction over such matters, and the Commission's requirement that MISO essentially ignore state jurisdiction violates the APA. Organization of MISO States and Indiana Commission argue that such "coercion," not contemplated by the FPA, amounts to an unconstitutional intrusion upon state police powers in violation of the Tenth Amendment of the Constitution.<sup>268</sup>

146. Finally, MISO Transmission Owners, Organization of MISO States, Midwest TDUs, Indiana Commission, and NARUC argue that the Commission's directive with respect to MISO's proposal is inconsistent with the Commission's pledge in Order No. 1000 to respect state laws, rendering the result arbitrary and capricious.<sup>269</sup>

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<sup>266</sup> MISO Transmission Owners Rehearing Request at 43; Organization of MISO States Rehearing Request at 7.

<sup>267</sup> MISO Transmission Owners Rehearing Request at 43 (citing *Piedmont Env'tl. Council. v. FERC*, 558 F.3d 304, 310 (4<sup>th</sup> Cir. 2009); *PacifiCorp*, 72 FERC ¶ 61,087, at 61,488 (1995)).

<sup>268</sup> Organization of MISO States Rehearing Request at 8; Indiana Commission Rehearing Request at 5.

<sup>269</sup> MISO Transmission Owners Rehearing Request at 36-37 (citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at PP 107, 227, 253 nn.231, 287 (cross-referenced at 136 FERC ¶ 61,051); Midwest TDUs Rehearing Request at 8 (citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 688 (cross-referenced at 136 FERC ¶ 61,051); Order No. 1000-A, 139 FERC ¶ 61,132 at P 291); Organization of MISO States Rehearing Request at 7 (citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at PP 107, 227, 253 nn.231, 287 (cross-referenced at 136 FERC ¶ 61,051); Indiana Commission Rehearing Request at 7-8 (citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at

(continued...)

(v) **Commission Determination**

147. On rehearing, petitioners argue that the provision MISO proposed in its First Compliance Filing in section VIII.A (State or Local Rights of First Refusal) of Attachment FF merely acknowledges state and local laws and regulations and does not create a federal right of first refusal. On reconsideration, we agree and grant the requests for rehearing with respect to this particular provision.

148. Noting that federal rights of first refusal create a barrier to entry that discourages nonincumbent transmission developers from proposing alternative transmission solutions for consideration at the regional level,<sup>270</sup> the Commission required public utility transmission providers to eliminate provisions in Commission-jurisdictional tariffs and agreements that establish a federal right of first refusal for an incumbent transmission provider with respect to transmission facilities selected in a regional transmission plan for purposes of cost allocation.<sup>271</sup> Order No. 1000 concluded that such reforms were necessary to eliminate practices that have the potential to undermine the identification and evaluation of more efficient or cost-effective alternatives to regional transmission needs, which in turn can result in rates for Commission-jurisdictional services that are unjust and unreasonable, or otherwise result in undue discrimination by public utility transmission providers.<sup>272</sup> Nothing has changed the Commission's view that Order No. 1000's requirement to remove federal rights of first refusal is in the public interest. As the Commission made clear in several orders, Order No. 1000 requires that federal

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PP 107, 227, 253 nn.231, 287 (cross-referenced at 136 FERC ¶ 61,051); NARUC Rehearing Request at 5 (citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at PP 227, 253 nn.231, 287).

<sup>270</sup> *See, e.g.*, Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 257.

<sup>271</sup> *See, e.g.*, Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 313.

<sup>272</sup> *See, e.g.*, Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 226. *See also*, Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 286 (stating that "Indeed, the Supreme Court has said that 'the history of Part II of the Federal Power Act indicates an overriding policy of maintaining competition to the maximum extent possible consistent with the public interest.' In requiring the elimination of federal rights of first refusal from Commission-jurisdictional tariffs and agreements, we are acting in accordance with our duty to maintain competition.").

rights of first refusal must be eliminated from Commission-jurisdictional tariffs and agreements.<sup>273</sup>

149. We continue to require the elimination of federal rights of first refusal from Commission-jurisdictional tariffs or agreements, but that is not the issue here. Rather, the issue is whether it is appropriate for the Commission to prohibit MISO from recognizing state and local laws and regulations when deciding whether MISO will hold a competitive solicitation for a transmission facility selected in the regional transmission plan for purposes of cost allocation. On balance, we conclude that the Commission should not prohibit MISO from recognizing state and local laws and regulations as a threshold issue. Regardless of whether state or local laws or regulations are expressly referenced in the MISO Tariff, some such laws or regulations may independently prohibit a nonincumbent transmission developer from developing a particular transmission project in a particular state, even if the nonincumbent transmission developer would otherwise be designated to develop the transmission project under MISO's regional transmission planning process. Indeed, in response to arguments about existing references to state-granted rights of first refusal in Commission-approved tariffs or agreements, the Commission explained that "such a right based on a state or local law or regulation would still exist under state or local law even if removed from the Commission-jurisdictional tariff or agreement and nothing in Order No. 1000 changes that law or regulation, for Order No. 1000 is clear that nothing therein is 'intended to limit, preempt, or otherwise affect state or local laws or regulations with respect to construction of transmission facilities.'"<sup>274</sup>

150. We find compelling the arguments petitioners expressed on rehearing regarding the potential for inefficiencies and delays that may occur if MISO must remove the provision requiring it to assign a transmission project that has been selected in the regional transmission plan for purposes of cost allocation to the incumbent transmission owner "within the scope, and in accordance with the terms, of any [applicable state or local laws or regulations] granting ... a right of first refusal."<sup>275</sup> In light of these arguments, we conclude that requiring MISO to remove this provision from its Tariff would result in a regional transmission planning process that does not efficiently account

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<sup>273</sup> See, e.g., *Cal. Indep. Sys. Operator Corp.*, 143 FERC ¶ 61,057 at P 118; *ISO New England Inc.*, 143 FERC ¶ 61,150 at P 227; First Compliance Order, 142 FERC ¶ 61,215 at P 200.

<sup>274</sup> Order No. 1000-A, 139 FERC ¶ 61,132 at P 381.

<sup>275</sup> See, *supra* P 123.

for the existence of state or local laws or regulations that impact the siting, permitting, and construction of transmission facilities. In particular, we find that ignoring these state or local laws or regulations at the outset of the regional transmission planning process would be counterproductive and inefficient, as it would require MISO's regional transmission planning process to expend time and resources to evaluate potential transmission developers for transmission projects that, under state or local laws or regulations, ultimately must be assigned to the incumbent transmission developer. Moreover, the designation of a transmission developer that is not eligible under state or local laws or regulations to develop a given transmission project selected in the regional transmission plan for purposes of cost allocation could hinder the possibility that needed transmission facilities would move forward. It could also unnecessarily delay the development of needed transmission facilities because MISO would still be required to evaluate potential transmission developers for a transmission project selected in the regional transmission plan for purposes of cost allocation that only the incumbent transmission developer may develop under state or local laws or regulations, postponing the development of the selected project. Indeed, one purpose of Order No. 1000 is to facilitate the likelihood that needed transmission facilities will move forward.<sup>276</sup> Petitioners have persuaded us that it is appropriate for MISO to recognize state or local laws and regulations as a threshold matter in the regional transmission planning process and, accordingly, we grant rehearing and find that MISO may retain its proposed State or Local Rights of First Refusal provision.<sup>277</sup>

(2) **Cost Allocation for Project with State Rights of First Refusal**

(i) **Summary of Requests for Rehearing or Clarification**

151. Illinois Commission states that it supports the Commission's ruling that transmission projects that are included in MISO's regional transmission plan for the purposes of cost allocation must proceed through MISO's competitive bidding process, even if such projects are subject to a state right of first refusal statute.<sup>278</sup> However,

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<sup>276</sup> See, e.g. Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at PP 43-47 (noting that the requirements in Order No. 1000 are designed to "increase the likelihood that transmission facilities in the transmission plan will move forward to construction.").

<sup>277</sup> See, *supra* P 123.

<sup>278</sup> Illinois Commission, Request for Rehearing, Docket No. ER13-187-002, at 5-6 (filed Apr. 18, 2013) (Illinois Commission Rehearing Request).

Illinois Commission asserts that the Commission must also eliminate regional cost sharing for transmission projects in states with a right of first refusal statute.<sup>279</sup> Illinois Commission argues that, where there is a state right of first refusal statute, a nonincumbent transmission developer will be at a competitive disadvantage in the competitive bidding process, and is therefore unlikely to participate in that process given the significant amount of time and money required to develop transmission proposals and/or bids. Thus, according to Illinois Commission, an incumbent transmission developer and the state authority located in a right of first refusal state will face little or no pressure to control costs or to develop the most efficient and cost-effective transmission project because, under MISO's regional cost allocation method, a significant share of the costs of such a project will be allocated to electricity consumers outside the state in which the project will be physically located. Illinois Commission contends that, without sufficient competition in MISO's competitive bidding process, states throughout the MISO region, whose electricity consumers are obligated to share in the costs of transmission projects located in states with state right of first refusal laws, cannot be assured that the most efficient and cost-effective project will be chosen and, thereby, that the rates they must pay for such project will be just and reasonable.<sup>280</sup>

152. Illinois Commission asserts that the only meaningful solution to address this issue is to eliminate regional cost sharing for a transmission project that is subject to a state or local right of first refusal. According to Illinois Commission, such a solution would ensure that all transmission project costs will be borne within the state that wishes to maintain a policy of favoring incumbent transmission owners within the state. Illinois Commission states that otherwise the Commission cannot be assured that the most efficient and cost-effective project will be undertaken or that the costs that electricity consumers throughout the MISO region will have to pay are just and reasonable.<sup>281</sup>

**(ii) Commission Determination**

153. We deny Illinois Commission's request for rehearing concerning transmission projects subject to state rights of first refusal. In Order No. 1000, the Commission did not specifically address whether transmission solutions selected as more efficient or cost-effective in the regional transmission plan, and which are subject to *state* rights of first refusal, should be eligible for regional cost allocation.

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<sup>279</sup> *Id.* at 7.

<sup>280</sup> *Id.* at 6-7.

<sup>281</sup> *Id.* at 7.

154. With respect to *federal* rights of first refusal, the Commission found that granting incumbent transmission providers a federal right of first refusal “effectively restricts the universe of transmission developers offering potential solutions for consideration in the regional transmission planning process.”<sup>282</sup> Highlighting the relationship between regional transmission planning and cost allocation, the Commission found that the removal of the federal right of first refusal, combined with cost allocation reforms, would “address disincentives that may be impeding participation by nonincumbent transmission developers in the regional transmission planning process.”<sup>283</sup> In Order No. 1000-A, the Commission further emphasized this relationship by stating that “if any costs of a new transmission facility are allocated regionally or outside of a public utility transmission provider’s retail distribution service territory or footprint, then there can be no federal right of first refusal associated with such transmission facility, except as provided in this order.”<sup>284</sup>

155. While Order No. 1000 addressed some disincentives that may deter nonincumbent transmission developers, the Commission recognized that the Order No. 1000 reforms did not address all disincentives to competition to develop transmission projects selected in the regional transmission plan for purposes of cost allocation. The Commission acknowledged that “there may be restrictions on the construction of transmission facilities by nonincumbent transmission providers under rules or regulations enforced by other jurisdictions.”<sup>285</sup>

156. Thus, while Order No. 1000 sought to remove barriers to competition in regional transmission planning processes, it did not purport to address every barrier to participation by nonincumbent transmission developers. The Commission’s decision to focus on *federal* (not state) right of first refusal provisions in Commission-jurisdictional tariffs was an exercise of remedial discretion designed to ensure that its nonincumbent transmission developer reforms do not result in the regulation of matters reserved to the

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<sup>282</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 284.

<sup>283</sup> *Id.* P 320.

<sup>284</sup> Order No. 1000-A, FERC Stats. & Regs. ¶ 31,132 at P 430.

<sup>285</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 287.

states.”<sup>286</sup> The Commission repeatedly emphasized that Order No. 1000 would not preempt those authorities vested in the states.<sup>287</sup>

157. Furthermore, while the competitive processes required in Order No. 1000 are a part of selecting the more efficient or cost-effective transmission solutions in the regional transmission plan for purposes of cost allocation, the regional transmission planning process is also an important tool for accomplishing this goal. We recognize that, even if a transmission project is subject to a state right of first refusal, the regional transmission planning process still results in the selection for planning and cost allocation purposes of transmission projects that are more efficient or cost-effective than would have been developed but for such processes. For all these reasons, we deny Illinois Commission’s request for rehearing.

(c) **Compliance**

(1) **Summary of Compliance Filings**

158. MISO proposes to remove section VIII.A (State or Local Rights of First Refusal) in its entirety from Attachment FF, as directed by the Commission in the First Compliance Order.<sup>288</sup>

159. MISO also proposes to revise the definition of Open Transmission Project as follows:

A Market Efficiency Project or Multi-Value Project contained in MTEP Appendix A that has been approved by the Transmission Provider Board and may contain one or more New Transmission Facilities, and pursuant to Applicable Laws and Regulations is eligible to be developed and owned

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<sup>286</sup> See *id.* P 377.

<sup>287</sup> See, e.g., *id.* P 107.

<sup>288</sup> MISO Compliance Transmittal at 9. In its transmittal letter, MISO notes that MISO Transmission Owners requested rehearing of the Commission’s determination regarding the applicability of the *Mobile-Sierra* doctrine to the Transmission Owners Agreement. MISO states that the inclusion of revisions in the its second compliance filing does not and should not be construed to waive any arguments that MISO Transmission Owners submitted in their request for rehearing. *Id.* at 5 n.11.

~~by a non-incumbent Transmission Owner subject to Section VIII.A of Attachment FF of the Tariff.~~<sup>[289]</sup>

160. In addition, MISO proposes to revise the Tariff to state that “Pursuant to Applicable Laws and Regulations, only New Transmission Facilities eligible under state law will be included in the Open Transmission Project.”<sup>290</sup>

(2) **Protests/Comments**

161. ATC/Duke/Transource, Illinois Commission, and LS Power state that MISO’s proposed revisions to the definition of Open Transmission Projects and to the Tariff language for Determination of Open Transmission Projects do not comply with the Commission’s directive in the First Compliance Order that MISO remove federal rights of first refusal from its Tariff.<sup>291</sup> LS Power argues that, by limiting Open Transmission Projects to projects that nonincumbent transmission owners are “eligible” to develop and own “pursuant to Applicable Laws and Regulations,” MISO appears to maintain a federal right of first refusal based on state or local law. LS Power further states that MISO does not explain what it means for a transmission project to be “eligible” under state or local law to be developed and owned by a nonincumbent transmission developer. Thus, LS Power asks that the Commission reject MISO’s proposed revisions to the definition of Open Transmission Project, as well as the similar revised Tariff language for Determination of Open Transmission Projects and anywhere else it was inserted in the Tariff.<sup>292</sup>

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<sup>289</sup> MISO, FERC Electric Tariff, Module A, § 1.477a (Open Transmission Project) (1.0.0). Applicable Laws and Regulations are “[a]ll duly promulgated applicable federal, state and local laws, regulations, rules, ordinances, codes, decrees, judgments, directives, or judicial or administrative orders, permits and other duly authorized actions of any Governmental Authority having jurisdiction over the Parties, their respective facilities and/or the respective services they provide.” MISO, FERC Electric Tariff, Module A, § 1.14 (0.0.0).

<sup>290</sup> MISO, FERC Electric Tariff, Attachment FF, § VIII.C.1 (Determination of Open Transmission Projects).

<sup>291</sup> ATC/Duke/Transource Protest at 5-7; Illinois Commission, Comments, Docket Nos. ER13-187-003 and ER13-187-004, at 3-8 (filed Aug. 21, 2013) (Illinois Commission Comments); LS Power Protest at 4-5.

<sup>292</sup> LS Power Protest at 4-5.

162. Likewise, ATC/Duke/Transource contend that MISO's proposed revision to the definition of Open Transmission Project does not comply with the requirements of the First Compliance Order. Moreover, ATC/Duke/Transource state that the revised Tariff language for Determination of Open Transmission Projects is ambiguous as to which transmission projects are open to competition, asserting that, as an example, MISO does not explain how it will determine whether a transmission facility will be eliminated from an Open Transmission Project, and if it traverses both a state with a right of first refusal and a state without a right of first refusal, whether all or just the portion the transmission project within a state with a state right of first refusal will be excluded from competition. Finally, ATC/Duke/Transource state that MISO should clarify how and at what point it will consider state laws during the transmission developer selection process.<sup>293</sup>

163. Illinois Commission argues that MISO's proposal goes beyond mere reference to state laws, effectively creating a federal right of first refusal for transmission facilities selected in a regional transmission plan for purposes of cost allocation. According to Illinois Commission, MISO defines Open Transmission Project in such a way that, if a state or local right of first refusal exists, there will be, by definition, no Open Transmission Projects as no such projects will be eligible for development or ownership by a nonincumbent transmission developer. Illinois Commission argues that, if a transmission project is not permitted to be classified as an Open Transmission Project due to a state or local right of first refusal law, then that project is automatically assigned to the incumbent transmission owner. Thus, Illinois Commission claims that MISO is effectively creating a federal right of first refusal out of a state or local right of first refusal by restricting the definition of an Open Transmission Project to a transmission project that is eligible to be developed and owned by a nonincumbent transmission owner pursuant to Applicable Laws and Regulations and codifying that restriction into a Commission-jurisdictional tariff.<sup>294</sup>

164. Illinois Commission states that it supports the Commission's decision to require MISO to conduct its competitive bidding process, even for transmission projects that would be constructed in states with state right of first refusal laws. Alternatively, Illinois Commission argues that if MISO's competitive bidding process is not used for such projects then they should not be subject to regional cost allocation outside the state in which the transmission project is physically located. Illinois Commission states that this

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<sup>293</sup> ATC/Duke/Transource Protest at 5, 7.

<sup>294</sup> Illinois Commission Comments at 5-6.

would ensure that other states do not bear extra costs due to the host state's preference for an incumbent transmission developer.<sup>295</sup>

165. Indiana Commission and Organization of MISO States encourage the Commission to accept MISO's proposed definition of Open Transmission Project and revised Tariff language for Determination of Open Transmission Projects recognizing Applicable Laws and Regulations.<sup>296</sup> Indiana Commission and Organization of MISO States argue that MISO's proposed language properly recognizes the effect of state laws and regulations on the eligibility of a particular transmission project in the competitive bidding process, as well as state and local jurisdictional authority.<sup>297</sup>

(3) Answer

166. MISO disagrees with commenters' suggestion that including consideration of Applicable Laws and Regulations in the definition of Open Transmission Projects effectively creates a federal right of first refusal. MISO states that it removed such language from proposed section VIII.A in compliance with the First Compliance Order. MISO argues, however, that the First Compliance Order recognized that "[w]hile state laws and regulations may not be used to automatically exclude bids to develop more efficient or cost-effective transmission solutions to regional needs, *it is not necessarily impermissible to consider the effect of the state regulatory process at appropriate points in the regional transmission planning process.*"<sup>298</sup> MISO states that it has revised its Tariff at the appropriate point to provide that the competitive bidding process will apply to any portion of an Open Transmission Project, where such portions of the transmission project are located in states that do not have state rights of first refusal. MISO argues that the revisions allow MISO to both recognize and appropriately manage and limit the potential geographic scope and impact of state rights of first refusal only to those transmission facilities located in states where such laws exist, while opening the rest of

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<sup>295</sup> *Id.* at 7-8.

<sup>296</sup> Indiana Commission Comments at 3; Organization of MISO States Comments at 3. Organization of MISO States states that the Illinois Commission does not agree with the Organization of MISO States on this issue. *See* Organization of MISO States Comments at 3 n.7.

<sup>297</sup> Indiana Commission Comments at 2-3; Organization of MISO States Comments at 3.

<sup>298</sup> MISO Answer at 10 (citing First Compliance Order, 142 FERC ¶ 61,215 at P 206) (emphasis added by MISO).

the transmission project to competing transmission developers in accordance with Order No. 1000.<sup>299</sup>

**(4) Commission Determination**

167. In light of our decision to grant rehearing, we find that MISO's proposed changes related to consideration of state law are moot. Specifically, we find that MISO does not have to remove section VIII.A (State or Local Rights of First Refusal) from Attachment FF as it proposed in its Second Compliance Filing. Accordingly, we direct MISO to submit, within 60 days of the date of the issuance of this order, a further compliance filing to restore VIII.A (State or Local Rights of First Refusal) to Attachment FF.

168. In addition, in response to the directive in the First Compliance Filing to delete section VIII.A (State or Local Rights of First Refusal) from its Tariff (and for which we grant rehearing), MISO proposes to add language to the Tariff that (1) defines an Open Transmission Project (i.e., a transmission project subject to MISO's competitive bidding process) as one that is eligible to be developed and owned by a nonincumbent transmission owner pursuant to Applicable Laws and Regulations<sup>300</sup> and (2) states that, "Pursuant to Applicable Laws and Regulations, only New Transmission Facilities"<sup>301</sup>

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<sup>299</sup> *Id.* at 11.

<sup>300</sup> MISO, FERC Electric Tariff, Module A, § 1.477a (Open Transmission Project). As noted earlier, Applicable Laws and Regulations are all duly promulgated applicable federal, state and local laws, regulations, rules, ordinances, codes, decrees, judgments, directives, or judicial or administrative orders, permits and other duly authorized actions of any Governmental Authority having jurisdiction over the Parties, their respective facilities and/or the respective services they provide. MISO, FERC Electric Tariff, Module A, § 1.14 (Applicable Laws and Regulations).

<sup>301</sup> A New Transmission Facility is defined as a New Transmission Line Facility or New Substation Facility. MISO, FERC Electric Tariff, Module A, § 1.455a (New Transmission Facility) (0.0.0).

MISO proposes to define a New Transmission Line Facility as:

An entire transmission line or section thereof, containing one or more new transmission circuits, where such line or new circuits do not exist prior to the construction of an associated Open Transmission Project as a facility classified as overhead, underground, or submarine transmission plant. New Transmission Line Facilities do not include upgrades,

(continued...)

eligible under state law will be included in the Open Transmission Project.”<sup>302</sup> Given our decision to grant rehearing of the directive that prompted these proposed changes, we find that these revisions are also moot. Accordingly, we direct MISO to submit, within 60 days of the date of the issuance of this order, a further compliance filing to delete these provisions from its Tariff.

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modifications and/or expansions to existing transmission facilities, as further described in this Section VIII.A of Attachment FF of the Tariff. MISO, FERC Electric Tariff, Module A, § 1.455b.

MISO proposes to define a New Substation Facility as:

A transmission substation that does not yet exist and that is proposed within a specific Open Transmission Project as an electrical substation containing equipment or components classified as transmission plant. New Substation Facilities do not include upgrades, modifications and/or expansions to existing substations owned by Transmission Owners that contain equipment or components classified as transmission plant, where such upgrades, modifications and/or expansions include but are not limited to: i) expanding or upgrading facilities within the substation footprint, ii) expanding the substation footprint within the current site boundaries or iii) procuring additional land adjacent to or near the existing substation site and expanding the substation footprint into or adding substation facilities on the additional land. New Substations Facilities also do not include newly constructed transmission substations where all transmission lines terminating at such substation are owned by an incumbent Transmission Owner as further described in Section VIII.A of Attachment FF of the Tariff. MISO, FERC Electric Tariff, Module A, § 1.454b.

<sup>302</sup> MISO, FERC Electric Tariff, Attachment FF, § VIII.C.1.

iii. **Projects with Upgrades and New Transmission Facilities (20 mile threshold)**

(a) **First Compliance Order**

169. In the First Compliance Order, the Commission found that MISO's proposal to consider as an upgrade a transmission project with less than 20 contiguous miles of new transmission line sections did not comply with the requirements of Order No. 1000 because MISO did not provide sufficient support to justify maintaining a federal right of first refusal for any transmission project that includes less than 20 contiguous miles of new transmission facilities.<sup>303</sup> The Commission recognized that it may be appropriate for MISO to establish a threshold under which a new transmission line circuit containing both new and upgraded transmission line sections should be considered an upgrade and thus not be subject to Order No. 1000's requirement to remove a federal right of first refusal. However, the Commission agreed with protestors that MISO had not provided sufficient support to demonstrate that the proposed threshold of 20 contiguous miles is appropriate. The Commission stated that MISO's proposal could allow a large new transmission project that is almost entirely made up of new transmission segments to be categorized as an upgrade so long as no new segment of the project is more than 20 contiguous miles. In addition, the Commission was concerned that certain projects under the 20 contiguous mile threshold could potentially qualify as a MVP or MEP. Therefore, the Commission directed MISO to file a further compliance filing to justify its proposal or to instead revise its Tariff to delete the 20 contiguous mile threshold for identifying when a transmission project that contains both upgrades to existing transmission facilities and new transmission facilities would qualify as a new

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<sup>303</sup> The Tariff language the Commission found did not comply stated:

If a proposed transmission project includes a combination of new transmission line sections and upgrades to existing transmission line sections, and the new transmission line sections are less than twenty (20) contiguous miles in total length, construction of the new transmission line sections will be considered a transmission upgrade for the purpose of retaining a right of first refusal. In either event, upgrades made to the existing transmission line sections will be considered transmission upgrades for the purpose of retaining a right of first refusal.

First Compliance Order, 142 FERC ¶ 61,215 at P 208 n.378 (citing MISO, FERC Electric Tariff, Attachment FF, § VIII.C.1.1.1 (8.0.0)).

transmission project. The Commission stated that it would defer judgment on the reasonableness of MISO's proposed mileage threshold until its review of MISO's further compliance filing.<sup>304</sup>

**(b) Summary of Compliance Filings**

170. In its compliance filing, MISO proposes to maintain the 20 contiguous mile threshold, without change,<sup>305</sup> and provides additional explanation and justification for the threshold. MISO states that the purpose of the proposed 20 contiguous mile threshold is to ensure that MISO is not required to include in the competitive bidding process small segments of new transmission lines that are interspersed among existing lines for which MISO has required upgrades, which would require multiple proposals to be submitted and evaluated for minor, relatively inexpensive "projects." MISO asserts that such an outcome would be highly inefficient and could impede reliability in outage scheduling coordination and system restoration.<sup>306</sup>

171. MISO argues that the proposed threshold is reasonable, both as to length and contiguity, in ensuring cost-effectiveness and efficiency in the procurement, maintenance, and operation of transmission line additions. MISO asserts that, if no transmission line threshold length is used, or a very short length is chosen, new transmission projects would inappropriately include even very small projects, each of which would not be cost-effective to bid out as such, for reasons similar to those associated with economies of scale.<sup>307</sup> MISO states that it previously illustrated the propriety of a line length threshold by describing a hypothetical scenario where a new 345 kV transmission circuit between two substations is facilitated by the first substation stringing a second circuit on its existing transmission line with a third substation, then bypassing the latter with a two-mile transmission line to the second substation. MISO states that the two-mile transmission line simply connects the new transmission circuit to the intended terminal. MISO argues that the potential savings from employing an inclusive evaluation process for such a two-mile line would most likely be far offset by the larger cost of the associated evaluation and regulatory processes.<sup>308</sup>

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<sup>304</sup> *Id.* PP 215-216.

<sup>305</sup> MISO, FERC Electric Tariff, MISO, FERC Electric Tariff, Attachment FF, § VIII.A.1.1.1.

<sup>306</sup> MISO Compliance Transmittal at 9.

<sup>307</sup> *Id.* at 10.

<sup>308</sup> *Id.* (citing MISO January 18, 2013 Answer at 53-54).

172. MISO states that the contiguity requirement is also reasonable because non-contiguous small new transmission line segments on a transmission owner's existing transmission line would be significantly inefficient to implement by collectively considering each segment to be a separate new transmission line project to be owned by a different entity or entities. MISO asserts that the resulting segmentation of the transmission line's ownership would unduly balkanize the transmission line's operation and maintenance.<sup>309</sup> MISO states that it previously illustrated this type of line segmentation by citing a project involving a "new" 100 mile 230 kV transmission circuit consisting of 75 miles of existing transmission line to be rebuilt and 25 miles of new transmission line composed of non-contiguous 5-mile sections dispersed at several points of the existing transmission line. MISO states that in the example, the small new transmission line sections were necessitated by right-of-way constraints that required alternative paths for those sections. MISO argues that in such a scenario, the need for efficiency in the entire 100-mile transmission line's implementation, operation, and maintenance outweighs any potential savings from either aggregating the new small transmission line sections as comprising one new transmission line project, or designating them as separate projects, not subject to a right of first refusal.<sup>310</sup>

173. MISO recognizes that the Commission expressed concern that the 20 contiguous mile threshold could result in treating a large project composed mostly of segments of less than 20 miles as an upgrade, or unduly denying MEP or MVP classification to a project of less than 20 miles. MISO states, however, that the Tariff's MEP or MVP criteria do not include a 20 mile threshold. Thus, according to MISO, a project of less than 20 miles with no line upgrades could be classified as an MEP or an MVP if it meets the Tariff's cost thresholds for such projects and, as such, could be subject to the competitive bidding process. MISO also argues that none of the parties that criticized the threshold cited or substantiated any specific examples to show that their objections are anything more than speculative. Finally, MISO notes that it will independently determine and recommend for approval by the MISO Board any project that appropriately falls within the 20 mile threshold.<sup>311</sup>

(c) **Protests/Comments**

174. Organization of MISO States expresses concern regarding the use of the word "contiguous," with regard to transmission projects that are a combination of upgrades and

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<sup>309</sup> *Id.*

<sup>310</sup> *Id.* (citing MISO January 18, 2013 Answer at 54-55).

<sup>311</sup> *Id.* at 10-11.

new facilities. Specifically, LS Power and Organization of MISO States argue that MISO's proposal could allow a large new transmission project of significant length and cost to be categorized as an upgrade so long as no new segment of the project is more than 20 contiguous miles.<sup>312</sup> LS Power and Organization of MISO States contend that MISO's further justification of the contiguity threshold still does not address their initial concern.<sup>313</sup>

175. LS Power further states that the examples provided by MISO in its second compliance filing are results-oriented and do not address the contention that any mileage limit is arbitrary.<sup>314</sup> As evidence, LS Power cites PJM Interconnection, L.L.C.'s (PJM) Artificial Island Request for Proposals, in which PJM identified a transmission problem and sought input on its solution from the market. LS Power avers that the results of PJM's exercise, which revealed a range of potential solutions both in cost and length, suggest that the MISO mileage threshold unreasonably excludes potentially more efficient or cost-effective solutions from the competitive bidding process. LS Power states that this is especially true when considering transmission projects involving river crossings, which nonincumbent transmission developers have successfully developed in the past, as such projects are often short but relatively expensive.<sup>315</sup>

176. ATC/Duke/Transource similarly disagree with MISO's claim that transmission projects of less than 20 contiguous miles are minor and relatively inexpensive projects for which the use of a competitive bidding process would be inefficient and impede reliability. ATC/Duke/Transource agree with the Commission's statement in the First Compliance Order that some projects less than 20 miles in length could qualify as an MVP or MEP.<sup>316</sup> To support its contention, ATC/Duke/Transource state that two or three transmission projects identified as candidate-preferred solutions for MEP cost sharing in the MTEP 2013 planning cycle included segments less than

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<sup>312</sup> LS Power Protest at 8; Organization of MISO States Comments at 8.

<sup>313</sup> Organization of MISO States Comments at 8.

<sup>314</sup> LS Power Protest at 6.

<sup>315</sup> *Id.* at 7-8.

<sup>316</sup> ATC/Duke/Transource Protest at 8 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 143 FERC ¶ 61,258, at P 216 (2013)).

20 contiguous miles and had estimated costs of \$64 million and \$57 million.<sup>317</sup> Thus, ATC/Duke/Transource conclude that, because these two projects could be considered upgrades under MISO's mileage threshold, MISO's proposed provisions would unreasonably exempt some large transmission projects from the competitive bidding process.<sup>318</sup> ATC/Duke/Transource add that transmission projects that meet the MVP or MEP criteria will necessarily be of significant size and cost and, therefore, ATC/Duke/Transource conclude that MISO has not justified any limitations on such projects solely related to their proposed length.<sup>319</sup> ATC/Duke/Transource also contend that MISO has not explained why the application of a competitive bidding process to transmission projects less than 20 miles in length will pose reliability concerns, while automatically assigning such a project to an incumbent transmission owner will not.<sup>320</sup>

177. In addition, ATC/Duke/Transource and LS Power aver that MISO's argument that it would be inefficient and costly to apply the competitive bidding process to less expensive projects is undermined by the fact that transmission developers who submit bids will fully fund the competitive bidding process.<sup>321</sup> ATC/Duke/Transource state that MISO should have no inefficiency concern where potential transmission developers believe it is worth placing a bid and paying for its evaluation.<sup>322</sup> LS Power adds that, because bidders finance the competitive bidding process, any consumer savings are true savings.<sup>323</sup>

178. According to LS Power, MISO has not supported its assertion that the 20 contiguous mile threshold ensures cost-effectiveness and efficiency in the procurement, maintenance, and operation of transmission line additions. LS Power also contends that nothing in MISO's definition of upgrade limits an upgrade to a single

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<sup>317</sup> *Id.* at 8-9 (citing MISO, Draft MTEP 2013, § 5.3 (Aug. 2, 2013), available at <https://www.misoenergy.org/Planning/TransmissionExpansionPlanning/Pages/MTEP13.aspx> (additional citation omitted)).

<sup>318</sup> *Id.* at 9.

<sup>319</sup> *Id.* at 10.

<sup>320</sup> *Id.* at 9-10.

<sup>321</sup> *Id.* at 9; LS Power Protest at 9.

<sup>322</sup> ATC/Duke/Transource Protest at 9.

<sup>323</sup> LS Power Protest at 9-10.

transmission owner's system. LS Power states that if upgrades to existing line segments included in a new transmission project are assigned to multiple incumbent transmission owners based on their existing transmission facilities, there would be no efficiency of maintenance or operation. LS Power argues that, to the extent a transmission developer can realize economies of scale in developing a transmission project, MISO should take that into account in the evaluation process. However, LS Power maintains that MISO should not be permitted to assume that such efficiencies exist prior to the market participants providing a factual basis for such a finding.<sup>324</sup>

179. In light of the above, LS Power recommends that the Commission reject any minimum mileage threshold as arbitrary, stating that MISO should allow the market to establish the minimum threshold below which the incumbent transmission owner will be the more efficient or cost-effective transmission developer.<sup>325</sup> According to LS Power, unless an entire transmission project is an upgrade as defined in Order No. 1000, the entire project should be subject to the competitive bidding process as an Open Transmission Project.<sup>326</sup> Alternatively, Organization of MISO States suggests that a reasonable approach to replacing the contiguous mileage threshold would be for MISO to establish a threshold of 20 total miles for an entire transmission project. Organization of MISO States also indicates that MISO could limit the number of such contiguous segments in a single transmission project for it to retain a right of first refusal.<sup>327</sup> However, Organization of MISO States agrees with MISO that it would seem to be unreasonable and inefficient for MISO to open to competitive bidding all small, non-contiguous new line segments on existing transmission owners' lines.<sup>328</sup>

(d) **Answer**

180. MISO states that the 20 contiguous mile threshold is just and reasonable, considering that regionally cost-allocated projects are typically large (e.g., the average length of MVPs is 115 miles). MISO argues that any possible benefit of competitively bidding the small portion of new facilities associated with a new transmission circuit that predominantly involves upgrading existing transmission lines would likely be

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<sup>324</sup> *Id.* at 8-9.

<sup>325</sup> *Id.* at 9.

<sup>326</sup> *Id.* at 10.

<sup>327</sup> Organization of MISO States Comments at 9.

<sup>328</sup> *Id.* at 8.

outweighed by the additional costs, risks, inefficiencies, and complexities in the competitive bidding, regulatory permitting, project implementation, and operations and maintenance processes.<sup>329</sup>

181. With regard to the contiguity requirement, MISO states that this requirement addresses situations where an upgraded transmission line has one or more small sections of nominally non-upgrade facilities included along the route of a project that otherwise entirely constitutes an upgrade to an existing transmission facility. MISO argues that having these small, disparate segments of new transmission circuit upgrade engineered, constructed, operated, and maintained by different entities is not efficient. In addition, MISO argues that, without the contiguity requirement to supplement the length threshold, it would be necessary to enter into a competitive bidding process if the relevant state regulatory processes approve or require a route that results in gaps in a new transmission line segment that was originally planned as an upgrade but that now includes potential non-upgrade segments resulting from route configurations and limitations. Lastly, MISO argues that should multiple developers be chosen to construct various short, non-upgrade segments of a transmission line within a single state, each developer would be required to initiate state proceedings for the siting and permitting of its assigned segment, resulting in multiple, duplicative proceedings. MISO asserts that such a process cannot be characterized as “more efficient.”<sup>330</sup>

**(e) Commission Determination**

182. We find that MISO has failed to sufficiently justify its proposed 20 contiguous mile threshold. We agree with protestors that the threshold, as proposed, may include an unnecessarily broad and not sufficiently justified spectrum of transmission projects, some of which should be eligible for selection in the regional transmission plan for purposes of cost allocation. For example, under the proposal a new transmission project with numerous contiguous segments less than 20 miles could retain a federal right of first refusal if even a small fraction of the transmission project is considered an upgrade.<sup>331</sup> Similarly, as ATC/Duke/Transource notes, under MISO’s upgrade proposal, an incumbent transmission owner could retain a federal right of first refusal for a new transmission project of less than 20 contiguous miles for which the transmission project

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<sup>329</sup> MISO Answer at 12-13.

<sup>330</sup> *Id.* at 13-14.

<sup>331</sup> First Compliance Order, 142 FERC ¶ 61,215 at PP 215-216. *See also* Organization of MISO States Comments at 8.

would otherwise, but for the exception, qualify as an MVP or MEP.<sup>332</sup> Therefore, we reject MISO's proposed 20 contiguous mile threshold and direct MISO to submit, within 60 days of the date of issuance of this order, a further compliance filing to delete the 20 contiguous mile threshold for identifying when a transmission project that contains both upgrades to existing transmission facilities and new transmission facilities would qualify as an upgrade and be excluded from the competitive bidding process.

183. However, while we reject MISO's proposal, we are not prohibiting all exceptions to the requirement to eliminate a federal right of first refusal that would exclude from the competitive bidding process certain minor and/or relatively inexpensive transmission projects containing both new transmission facilities and upgrades to existing transmission facilities. Therefore, MISO may propose an alternative exception that would classify as an upgrade certain transmission projects that include both new transmission facilities and upgrades to existing transmission facilities. For instance, MISO could propose an exception that places a minimum dollar threshold on the portion of a transmission project's capital costs that is related to new transmission facilities, or a minimum threshold on the percentage of total cost of a transmission project related to new transmission facilities. Under such a proposal, a transmission project containing both upgrades to existing transmission facilities and new transmission facilities for which the costs of the new transmission facilities did not meet a minimum dollar threshold or did not make up a minimum percentage of the project's total costs would be classified entirely as an upgrade and thus would not be open to competitive bidding. Transmission facilities containing both upgrades to existing facilities and new transmission facilities where the cost of the new transmission facilities do meet the minimum dollar or percentage threshold would be divided into segments such that the new transmission facility portions would be subject to competitive bidding. MISO could also propose a method or combinations of methods such as those that protestors suggest, including: (i) limiting the definition of upgrades; (ii) reducing the length of contiguous segments; and/or (iii) limiting the number of contiguous segments.

iv. **Upgrade Definition– Existing Transmission Lines**

(a) **First Compliance Order**

184. In the First Compliance Order, the Commission found that MISO's proposed definition of Upgrades to Existing Transmission Lines partially complied with the requirements of Order No. 1000 with respect to the elimination of federal rights of first

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<sup>332</sup> ATC/Duke/Transource Protest at 8-9.

refusal from Commission-jurisdictional tariffs and agreements.<sup>333</sup> The Commission generally found that MISO's proposal to define as upgrades the expansion, replacement, or modification to existing transmission line facilities complied with Order No. 1000 and the upgrades exemption provided therein.<sup>334</sup> However, the Commission was concerned about the provision in the proposed definition of Upgrades to Existing Transmission Lines regarding relocation, which stated that an upgrade included relocating the existing transmission line, or any portion thereof, for any purpose.<sup>335</sup> The Commission stated that it appreciated the need, as described in examples MISO provided, for allowing relocation of existing transmission facilities to qualify as an upgrade, but found that the specific examples may not be inclusive of all relocation scenarios and could possibly limit relocations to the specific examples provided by MISO. Therefore, the Commission directed MISO to file a further compliance filing to add language to the Tariff to instead include the specific criteria and/or principles MISO will use to evaluate whether a transmission project that relocates any portion of an existing transmission line facility qualifies as an upgrade, rather than leaving open-ended any reason for relocating a transmission line or limiting relocation to the examples that MISO provided.<sup>336</sup>

185. The Commission also raised concerns regarding the provision in the proposed definition of Upgrades to Existing Transmission Lines that included replacing single circuit structures with multi circuit structures. The Commission found that circumstances may exist where replacing single circuit structures with multi circuit structures on an existing transmission line may inappropriately qualify a new transmission line as an upgrade. The Commission stated that, in particular, it was concerned that replacement of a few single circuit structures with multi circuit structures, in order to allow for routing of a new, larger transmission line, may inappropriately qualify the entire new transmission facility as an upgrade. The Commission therefore directed MISO to file a further compliance filing to modify the Tariff language to provide more specific criteria for determining when replacing single circuit structures with multi circuit structures is defined as an upgrade.<sup>337</sup>

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<sup>333</sup> First Compliance Order, 142 FERC ¶ 61,215 at P 225; *see also* MISO, FERC Electric Tariff, Attachment FF, § VIII.C.1.1 (8.0.0).

<sup>334</sup> First Compliance Order, 142 FERC ¶ 61,215 at P 226.

<sup>335</sup> *See id.* P 218.

<sup>336</sup> *Id.* P 227.

<sup>337</sup> *Id.* P 228.

(b) **Requests for Rehearing or Clarification**

(1) **Summary of Requests for Rehearing or Clarification**

186. LS Power asserts that the Commission erred in accepting the following components of MISO's definition of Upgrade to Existing Transmission Lines because the components are vague and lack specificity: (1) "replacing an entire existing transmission line facility with a new transmission line facility on the same right of way or on different right of way if the replacement is driven by a relocation or requirement,"<sup>338</sup> and (2) "improving the performance or characteristics of the existing transmission for any reason."<sup>339</sup>

187. With respect to the first component, LS Power argues that the Commission previously clarified that the "issue is not whether the upgrade would be located in an existing right of way, but whether the new transmission facility is an upgrade to an incumbent transmission provider's own facilities."<sup>340</sup> Regarding the second component, LS Power argues that a new transmission facility could arguably improve the performance of an existing line, and the "for any reason" carve-out should not apply to new transmission facilities.<sup>341</sup> LS Power therefore contends that the Commission should mandate that MISO either remove the language or provide additional specificity to ensure that the definition is consistent with Order No. 1000.<sup>342</sup>

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<sup>338</sup> LS Power, Request for Clarification or Rehearing, Docket No. ER13-187-002, at 5 (filed Apr. 22, 2013) (LS Power Compliance Filing Rehearing Request) (citing MISO, FERC Electric Tariff, Attachment FF, § VIII.C.1.1.d (8.0.0) (emphasis added by LS Power)).

<sup>339</sup> LS Power Compliance Filing Rehearing at 5-6 (citing MISO, FERC Electric Tariff, Attachment FF, § VIII.C.1.1.g (8.0.0) (emphasis added by LS Power)). LS Power cites to the section that was submitted in MISO's first Order No. 1000 compliance filing; the relevant section in the instant filing is section VIII.A.1.1.h of Attachment FF.

<sup>340</sup> LS Power Compliance Filing Rehearing at 5 n.16 (citing Order No. 1000-A, 139 FERC ¶ 61,132 at P 427).

<sup>341</sup> LS Power Compliance Filing Rehearing at 6 n.17.

<sup>342</sup> LS Power Compliance Filing Rehearing at 6.

**(2) Commission Determination**

188. We deny LS Power’s request for rehearing. With regard to the component of MISO’s definition of Upgrade to Existing Transmission Lines relating to rights of way, MISO has proposed to modify this provision in its compliance filing to provide additional clarification and specificity.<sup>343</sup> Thus, LS Power’s argument that the provision as originally proposed is vague and lacks specificity has been overtaken by MISO’s proposal to revise the provision in its Tariff, the merits of which we address below. With regard to the component of MISO’s definition of Upgrade to Existing Transmission Lines relating to improvements to the existing transmission line, we disagree that it would allow a new transmission facility to qualify as an upgrade if it improves the performance or characteristics of the existing transmission system. The definition is limited to “any expansion, replacement or modification, for any purpose, made to existing transmission line facilities that are classified as transmission plant and owned by one or more Transmission Owners.”<sup>344</sup> As such, a new transmission facility cannot be read to be classified as an upgrade under this Tariff language, even if it did result in improved performance of an existing transmission facility. Therefore, we deny LS Power’s rehearing request.

**(c) Compliance**

**(1) Summary of Compliance Filings**

189. In its compliance filing, MISO revised its Tariff to provide specific criteria that MISO will use to evaluate whether a relocation of a transmission line and associated facilities qualifies as an upgrade.<sup>345</sup> Specifically, MISO proposes to add the following Tariff language:

Upgrades to existing transmission line facilities include any expansion, replacement or modification, for any purpose, made to existing transmission line facilities . . . for reasons including, but not limited to . . . (d) any requirement or

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<sup>343</sup> MISO, FERC Electric Tariff, Attachment FF, § VIII.A.1.1.e.

<sup>344</sup> *See id.* § VIII.A.1.1.

<sup>345</sup> MISO Compliance Transmittal at 11; *see also* MISO, FERC Electric Tariff, Attachment FF, § VIII.A.1.1. In its transmittal letter, MISO states that it has revised section VIII.B.1.1 of the Tariff, but the provisions dealing with upgrades to existing transmission lines are in section VIII.A.1.1 of Attachment FF of the revised Tariff. MISO Compliance Transmittal at 11.

request to relocate transmission line facilities owned by an incumbent Transmission Owner where the purpose of the relocation is not part of the core scope of an Open Transmission Project, including, but not limited to, relocations driven by aesthetics, highway expansion projects, other infrastructure expansion projects, projects to improve the reliability or performance of the Transmission System, projects to reduce the cost to operate and maintain the Transmission System, projects to interconnect new generation and load, and projects to accommodate the relocation of an existing substation.<sup>[346]</sup>

190. Furthermore, MISO proposes that upgrades to existing transmission lines include any expansion, replacement or modification, for any purpose, made to existing transmission line facilities due to:

any requirement or request to relocate existing transmission line facilities owned by an incumbent Transmission Owner to accommodate New Transmission Line Facilities associated with an Open Transmission Project, where such construction of the New Transmission Line Facilities requires or requests use of the incumbent Transmission Owner's right-of-way and, as a result, also requires or requests transfer of the existing transmission facilities to alternative right-of-way or an alternative position on the same right-of-way based on either mutual consent of the incumbent Transmission Owner and Selected Transmission Developer and/or the outcome of a state regulatory proceeding or court action.<sup>[347]</sup>

191. MISO states that the construction of new transmission facilities that displace existing transmission facilities may also be considered an upgrade based on other criteria in the Tariff.<sup>348</sup>

192. MISO also proposes to provide additional criteria it will use to determine if the replacement of a single circuit structure with multi circuit structures should be classified

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<sup>346</sup> MISO, FERC Electric Tariff, Attachment FF, § VIII.A.1.1.d.

<sup>347</sup> *Id.* § VIII.A.1.1.e.

<sup>348</sup> MISO Compliance Transmittal at 12.

as an upgrade.<sup>349</sup> MISO states that it proposes an approach that separates the portion of the work appropriately classified as an upgrade from the portions that may be considered new transmission infrastructure. Specifically, MISO proposes that it will use the following rules to determine what constitutes an upgrade when an Open Transmission Project includes a new transmission circuit that, in accordance with the project scope or state or local regulatory proceedings, in whole or in part must be installed on an existing transmission line: (a) if the structures associated with the existing transmission line are multi circuit structures and have spare positions to accommodate installation of one or more additional transmission circuit(s), installation of new transmission circuit(s) on these spare structure positions will be considered an upgrade;<sup>350</sup> (b) if the structures associated with the existing transmission line can be expanded to accommodate installation of one or more additional transmission circuit(s), expansion of the structure and installation of the new transmission circuit(s) will be considered an upgrade;<sup>351</sup> (c) if the structures associated with the existing transmission line are not multi circuit structures and cannot be expanded to accept additional circuits, do not have sufficient spare structure positions available to accommodate the new transmission circuit(s), or have spare structure positions that are reserved for future use by the incumbent transmission owner and not available for the new transmission circuit(s) in question, then acquisition of right of way, removal of the existing transmission line plant, construction of new transmission line structures, and transfer or replacement of existing transmission line conductors, insulators, and shield wires will be considered upgrades. Installation of new conductors and insulators associated with the new transmission circuits will not be considered an upgrade.<sup>352</sup> MISO states that its proposal for addressing upgrades where

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<sup>349</sup> *Id.*; *see also* MISO, FERC Electric Tariff, Attachment FF, § VIII.A.1.1.2. In its transmittal letter, MISO states that it has revised section VIII.B.1.1.g, but the provisions dealing with replacing single circuit structures with multi circuit structures are in section VIII.A.1.1.2 of Attachment FF of the revised Tariff.

<sup>350</sup> MISO, FERC Electric Tariff, Attachment FF, § VIII.A.1.1.2.a.

<sup>351</sup> *Id.* § VIII.A.1.1.2.b.

<sup>352</sup> *Id.* § VIII.A.1.1.2.c. This provision also references Account Nos. 350, 352, 353, 354, 355, 357, 359, and 359.1 (for transmission plant associated with rebuilding an existing transmission line) and Account Nos. 356 and 358 (for plant associated with existing and new transmission circuits) of the Commission's Uniform System of Accounts that are associated with facilities for which the incumbent transmission owner will have the right of first refusal to engineer, construct, own, operate, restore, maintain, and collect revenue. *Id.*

structures must be replaced to accommodate additional transmission circuits is not intended to apply to transmission facilities that are clearly upgrades to an existing facility, which MISO states will be assigned to the incumbent transmission owner under other provisions of the Tariff and Transmission Owners Agreement.<sup>353</sup>

193. Finally, MISO proposes that when both an incumbent transmission owner and Selected Transmission Developer<sup>354</sup> own plant associated with a rebuilt existing transmission line, these parties shall negotiate in good faith a joint-use agreement for these facilities that governs responsibilities (including who incurs associated costs) for permitting, engineering, construction, operations, maintenance, restoration, and facility access.<sup>355</sup> MISO's proposed Tariff language provides that this agreement must be executed and filed with the Commission, with a copy submitted to MISO; however, there is no obligation for either party to provide project implementation or operations and maintenance services for the other party's portion of the facility, outside of mutual coordination of activities.<sup>356</sup>

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<sup>353</sup> MISO Compliance Transmittal at 12. According to MISO, situations in which transmission facilities are clearly upgrades to existing facilities include the following: (1) installing new circuits on spare positions of existing structures; (2) replacing structures to accommodate reconductoring, resagging, or equipment replacement; (3) replacing structures to reconfigure existing circuits including terminal location changes, changes to the number of terminals, and/or splitting an existing circuit into multiple circuits; (4) replacing structures to accommodate relocation of an existing transmission circuit in response to an external request or requirement; (5) replacing structures to accommodate converting the voltage of one or more existing circuits to a higher voltage level; (6) replacing existing structures due to aging or damage; and (7) replacing existing structures to comply with codes, standards, and/or regulations or to improve reliability or performance of the existing facility. *Id.*

<sup>354</sup> MISO proposes to define a Selected Transmission Developer as the "Qualified Transmission Developer selected by [MISO] to construct, implement, own, operate, maintain, repair and restore one or more New Transmission facilities, pursuant to Attachment FF of [the] Tariff." MISO, FERC Electric Tariff, Module A, § 1.599a (Selected Transmission Developer) (1.0.0).

<sup>355</sup> MISO Compliance Transmittal at 12. *See also* MISO, FERC Electric Tariff, Attachment FF, § VIII.A.1.1.2.c.

<sup>356</sup> MISO, FERC Electric Tariff, Attachment FF, § VIII.A.1.1.2.c.

(2) Protests/Comments

194. Illinois Commission contends MISO has taken an overly expansive view of what constitutes an upgrade to existing transmission infrastructure, noting that the list of upgrades is contained in 11 subsections, some with multiple entries. Illinois Commission is concerned that the proposed Tariff language would serve to limit the number and type of transmission projects open to nonincumbent transmission developers.<sup>357</sup>

195. LS Power argues that, in providing criteria for determining when replacing a single circuit with multi circuit structures is defined as an upgrade, MISO asserts that all replacement structures to existing transmission lines are upgrades such that it will assign those facilities to an incumbent transmission owner, regardless of the relationship between the replacement structures and the overall transmission project.<sup>358</sup> LS Power states that MISO provides no basis for why an incumbent transmission owner should be granted a right of first refusal to develop a new transmission structure that is part of a new transmission line when the transmission owner's existing facilities "are not multi circuit structures and cannot be expanded to accept additional circuits, do not have sufficient spare structure positions available to accommodate the new transmission circuit(s), or have spare structure positions that are reserved for future use by the incumbent transmission owner and not available for the new transmission circuit(s) in question."<sup>359</sup> According to LS Power, new structures, new rights of way, and new lines are new transmission facilities, not upgrades, and only placing an old circuit on new facilities can be considered an upgrade. Thus, LS Power recommends that the Commission reject proposed section VIII.A.1.1.2.c of Attachment FF of the Tariff.<sup>360</sup>

196. LS Power also contends that MISO does not distinguish between an upgrade for purposes of assigning construction responsibility and an upgrade for purposes of

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<sup>357</sup> Illinois Commission Comments at 8-9.

<sup>358</sup> *Id.* at 11; *see also* MISO, FERC Electric Tariff, Attachment FF, § VIII.A.1.1.2.c.

<sup>359</sup> In its protest, LS Power cites to section VIII.B.1.1.2, but the provisions dealing with replacing single circuit structures with multi circuit structures are in section VIII.A.1.1.2 of Attachment FF of the revised Tariff. We will use the correct references hereinafter. *See* LS Power Protest at 12 (citing MISO, FERC Electric Tariff, Attachment FF, § VIII.A.1.1.2.c).

<sup>360</sup> *Id.* at 12-13.

ownership of an added conductor.<sup>361</sup> According to LS Power, MISO's proposed Tariff language appears to provide that both the construction and ownership of an additional conductor will be considered an "upgrade" that will be assigned to the incumbent transmission owner. LS Power requests clarification that MISO's proposed criteria for determining when replacing a single circuit with multi circuit structures is defined as an upgrade only apply to construction of the transmission facilities and that ownership of the conductors included in an Open Transmission Project remains with the Selected Transmission Developer.<sup>362</sup>

197. Lastly, LS Power disagrees with MISO's statement that replacing structures to accommodate higher voltage circuits in all instances clearly constitutes an upgrade to existing transmission facilities.<sup>363</sup> LS Power states that a 230 kV transmission facility and a 345 kV or 500 kV facility require substantially different transmission towers, conductor, rights-of-way corridors, and substations, and that replacing a lower voltage transmission facility with a higher voltage transmission facility because of load growth or other system needs is not an "upgrade" of an existing transmission facility, as that term was used in Order No. 1000, but is a new regional transmission project.<sup>364</sup>

### (3) Commission Determination

198. We find that the provisions in MISO's compliance filing comply with the directives in the First Compliance Order concerning the upgrade definition related to existing transmission lines because MISO has adequately revised its Tariff to: (1) provide specific criteria MISO will use to evaluate whether a transmission project that relocates any portion of an existing transmission line facility qualifies as an upgrade; and (2) provide specific criteria for determining when replacing single circuit structures with multi circuit structures is defined as an upgrade. We find that limiting the classification of transmission projects as upgrades to relocations that are not part of the core scope of

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<sup>361</sup> *Id.* at 13 (referencing MISO, FERC Electric Tariff, Attachment FF, § VIII.A.1.1.2.a-b).

<sup>362</sup> *Id.* at 14.

<sup>363</sup> *Id.* (citing MISO Compliance Filing at 12 ("situations, which are clearly upgrades to an existing facility and which will be assigned to the incumbent Transmission Owner under the existing Tariff and TO Agreement provisions [include] ... (5) replacing structures to accommodate converting the voltage of one or more existing circuits to a higher voltage level.")).

<sup>364</sup> *Id.* at 14-15.

an Open Transmission Project,<sup>365</sup> or that are necessary to accommodate new transmission facilities associated with an Open Transmission Project located in an existing right of way, appropriately recognizes the right of incumbent transmission owners to upgrade existing transmission facilities. In addition, MISO's proposal with respect to the installation of additional transmission circuits on existing transmission lines reasonably distinguishes between upgrades to existing structures and new transmission facilities and applies only to the limited portion of the Open Transmission Project that includes a transmission circuit that must be co-located with existing transmission circuits on the same structure. To the extent a new transmission line uses existing structures, we find that it is reasonable to classify the section of transmission circuit located on said structure as an upgrade. Similarly, it is reasonable to classify as an upgrade new transmission structures that replace structures supporting an existing transmission line, while also supporting a new transmission line.

199. We find that MISO's second new provision complies with Order No. 1000.<sup>366</sup> Under MISO's proposal, any transfer of an incumbent transmission owner's existing transmission facilities to an alternative right of way or an alternative position on the same right of way that is necessitated by a transmission facility selected in the regional transmission plan for purposes of cost allocation is subject to the mutual consent of the incumbent transmission owner and relevant transmission developer and/or the outcome of a state regulatory proceeding or court action. This is consistent with the Commission's findings that Order No. 1000 does not grant or deny transmission developers the ability to use rights-of-way held by other entities, even if transmission facilities associated with such uses of existing rights-of-way are selected in the regional transmission plan for purposes of cost allocation.<sup>367</sup> In addition, this provision does not automatically exclude a transmission facility that may use an existing right-of-way from being selected in the regional transmission plan for purposes of cost allocation.

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<sup>365</sup> We read the proposed Tariff language that "projects to reduce the cost to operate and maintain the Transmission System" in this provision to mean that it does not relate to reducing costs to operate by relieving congestion and/or other market related costs from a dispatch perspective of the larger MISO transmission system, but rather from an operational perspective for that particular transmission line on the transmission owner's "local" transmission system. *See* MISO, FERC Electric Tariff, Attachment FF, § VIII.A.1.1.d.

<sup>366</sup> *Id.* § VIII.A.1.1.e.

<sup>367</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 319.

200. We disagree with Illinois Commission that MISO's proposed Tariff revisions detailing what constitutes an upgrade to existing transmission infrastructure is overly expansive. We find that MISO's Tariff provides the necessary detail outlining the criteria and scope of what constitutes an upgrade to existing transmission facilities and, in doing so, does not imply that MISO is limiting the number and type of Open Transmission Projects nonincumbent transmission developers can develop. Rather, MISO's revised Tariff provisions provide transparency to stakeholders and certainty that MISO will not exercise undue discretion in categorizing transmission projects as upgrades without sufficient justification. Therefore, we find Illinois Commission's protest on this issue unpersuasive.

201. Furthermore, we disagree with LS Power's argument that the new structures, new rights-of-way, and new lines that are developed when the transmission owner's existing facilities "are not multi circuit structures and cannot be expanded to accept additional circuits, do not have sufficient spare structure positions available to accommodate the new transmission circuit(s), or have spare structure positions that are reserved for future use"<sup>368</sup> should be considered new transmission facilities, not upgrades, and that only placing an old circuit on new transmission facilities should be considered an upgrade. The Commission has stated that, "the term upgrade means an improvement to, addition to, or replacement of a part of, an existing transmission facility" and that, "[t]he term upgrades does not refer to an entirely new transmission facility."<sup>369</sup> In this instance, a new multi circuit tower is replacing an existing structure; the new multi circuit tower performs the same function with regard to the existing transmission facility as the existing tower. We find that MISO's proposal is consistent with the requirements of Order No. 1000. Therefore, we dismiss LS Power's request that the Commission reject proposed section VIII.A.1.1.2.c.

202. We also find unnecessary LS Power's requested clarification that MISO's proposed criteria apply only to construction of transmission facilities, and not ownership of the conductors included in an Open Transmission Project. The Tariff states that the incumbent transmission owner shall have the right to develop, own, and operate any transmission facilities classified as upgrades.<sup>370</sup> This is consistent with the Commission's statement in Order No. 1000 that the "reforms do not affect the right of an incumbent transmission provider to build, own and recover costs for upgrades to its own

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<sup>368</sup> *Id.* § VIII.A.1.1.2.c.

<sup>369</sup> Order No. 1000-A, 139 FERC ¶ 61,132 at P 426.

<sup>370</sup> MISO, FERC Electric Tariff, Attachment FF, § VIII.A.

transmission facilities.”<sup>371</sup> Thus, given our reading that only the portion of a conductor associated with the replaced transmission tower may be classified as an upgrade under this section of the revised Tariff,<sup>372</sup> we find this language to be consistent with the requirements of Order No. 1000, and we dismiss LS Power’s requested clarification.

203. Finally, we dismiss LS Power’s protest of MISO’s treatment of replacing tower structures to accommodate higher voltage circuits. The Commission accepted section VIII.A.1.1.b of Attachment FF in the First Compliance Order, and therefore this issue is outside the scope of the instant compliance filing.<sup>373</sup>

v. **Upgrade Definition – Transmission Substations**

(a) **First Compliance Order**

204. In the First Compliance Order, the Commission found that MISO’s proposed Tariff language allowing the acquisition of additional land adjacent to or near an existing substation and including on that land new transmission facilities to interconnect to the existing substation to qualify as an upgrade that maintains a federal right of first refusal partially complies with the requirements of Order No. 1000.<sup>374</sup> The Commission agreed with MISO that allowing a substation expansion to qualify as an upgrade, under certain conditions, would allow for situations where there is a need to expand, but no available land immediately adjacent to the existing substation’s footprint. However, the Commission found that MISO’s proposed language did not include clear limitations on or a definition of what land “near” an existing substation would qualify an expansion as an upgrade. Therefore, the Commission directed MISO to file a further compliance filing to provide examples in the Tariff to illustrate what constitutes land near an existing substation for purposes of qualifying as an upgrade and maintaining a federal right of first refusal, consistent with the examples MISO provided in its transmittal letter.<sup>375</sup>

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<sup>371</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 319.

<sup>372</sup> See MISO, FERC Electric Tariff, Attachment FF, § VIII.A.1.1.2. We reiterate that the portion of a conductor not associated with the replaced transmission tower may be classified as an upgrade under other sections of the Tariff.

<sup>373</sup> See First Compliance Order, 142 FERC ¶ 61,215 at P 226.

<sup>374</sup> *Id.* P 233.

<sup>375</sup> *Id.* P 234.

205. The Commission disagreed with MISO's proposal that the construction of a new substation that interconnects multiple existing transmission line facilities all owned by a single transmission owner or group of transmission owners should be considered an upgrade. The Commission stated that MISO had not provided sufficient support to demonstrate why a new substation that interconnects multiple lines should be considered an upgrade instead of a new transmission project. Accordingly, the Commission directed MISO to file a further compliance filing that removes the proposed language in the Tariff to treat as an upgrade the construction of a new substation that interconnects multiple existing transmission line facilities all owned by a single transmission owner or group of transmission owners or, in the alternative, provide further justification.<sup>376</sup>

(b) **Requests for Rehearing or Clarification**

(1) **Summary of Requests for Rehearing or Clarification**

206. LS Power states that MISO's current definition of upgrades to existing substations includes all cases where additional land adjacent to existing substations is needed for "the installation of additional plant."<sup>377</sup> LS Power asserts that such an expansive definition could potentially include a portion of a new transmission project that is largely unrelated to the existing substation, but that requires land that happens to be located adjacent to or near an existing transmission owner's substation. LS Power states that, for example, a new 70-mile 345 kV project that terminates at one end near an existing 69 kV substation and that requires the construction of an entirely new substation would be considered an "upgrade" if the new facility were built next to the old facility.<sup>378</sup>

207. LS Power asserts that MISO's interpretation of the Commission's definition of upgrade is an unmitigated attempt to expand the "upgrade" right of first refusal permitted by Order No. 1000. LS Power asks the Commission to clarify that the definition only applies to "upgrades" to the existing transmission facilities when necessitated by reliability concerns or economic factors that can be addressed by the substation upgrade alone, not to all additional plant installed on land adjacent to or near an existing

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<sup>376</sup> *Id.* P 235.

<sup>377</sup> LS Power Compliance Filing Rehearing Request at 2-3 (citing MISO, FERC Electric Tariff, Attachment FF, § VIII.C.1.2.e (8.0.0)).

<sup>378</sup> *Id.*

substation or to additions related to a new transmission line terminating at or near a substation.<sup>379</sup>

208. Alternatively, LS Power requests rehearing of the portion of the First Compliance Order related to the definition of upgrades for existing substations.<sup>380</sup> LS Power asserts that the issue is not whether a new transmission facility is located on land adjacent to an existing substation, but whether such new transmission facility is actually an upgrade to the incumbent transmission owner's own transmission facilities related to those facilities, or an entirely new transmission facility.<sup>381</sup> LS Power is concerned that, under MISO's definition, portions of new transmission facilities would not be competitively bid because all substation portions that in any way touch an existing substation would be assigned to the incumbent transmission owner that owns the substation. LS Power argues that maintaining such a definition is not just and reasonable, is unduly discriminatory to nonincumbent transmission developers, is bad for consumers, and will lead to other areas of the country replicating the expanded definition.<sup>382</sup>

## (2) Commission Determination

209. We deny LS Power's request for clarification and, in the alternative, rehearing. We do not find it appropriate to limit MISO's ability to classify an expansion to an existing substation as an upgrade beyond ensuring that the expansion is not actually a new transmission facility. As we discuss below, MISO's proposed clarification to this provision limits categorization of a new substation footprint as an upgrade to circumstances in which it can be reasonably classified as an improvement to, addition to, or replacement of the existing substation.

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<sup>379</sup> *Id.*

<sup>380</sup> *Id.* at 3.

<sup>381</sup> *Id.* at 4.

<sup>382</sup> *Id.* at 4-5 (citing RPPTF Working Session, MISO Filed Definition of "Upgrade" (April 18, 2013), *available at* <http://www.pjm.com/~media/committees-groups/task-forces/rpptf/20130418/20130418-a-miso-filed-definition-of-upgrade-to-aid-in-the-multi-driver-discussion.ashx>).

(c) **Compliance**

(1) **Summary of Compliance Filings**

210. In its compliance filing, MISO proposes to revise its Tariff to specify that upgrades to an existing substation include acquiring additional land “adjacent to,” rather than “adjacent to or near to,” an existing substation in conjunction with installation of additional plant within the boundaries of this additional land, including facilities to interconnect such plant to the existing substation plant.<sup>383</sup> In addition, MISO proposes to add a new Tariff section that provides that upgrades to an existing substation include developing an additional footprint near the existing substation to facilitate effective expansion of the existing substation.<sup>384</sup> MISO proposes to include in the Tariff examples of situations, similar to those included in MISO’s first compliance filing,<sup>385</sup> that would qualify as land near an existing substation for purposes of determining if substation expansion should be considered an upgrade to an existing transmission facility, as opposed to construction of a new transmission facility.<sup>386</sup> MISO’s proposed new Tariff section provides that:

Construction of a new substation footprint near an existing substation to facilitate expansion of the existing substation is considered an upgrade and is necessary when the transmission project calls for expansion of the existing substation and there is not sufficient space for such expansion. Upgrades through development of a second substation footprint can be accomplished in one of two ways. First, a second substation footprint can be developed near the existing substation footprint, and the two substation footprints will function electrically as a single substation and will be interconnected by bus extensions or connectors. An example would be expanding an existing substation that is landlocked

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<sup>383</sup> MISO, FERC Electric Tariff, Attachment FF, § VIII.A.1.2.e.

<sup>384</sup> *Id.* § VIII.A.1.2.f.

<sup>385</sup> MISO, Transmittal Letter, Docket Nos. ER13-187-000 and ER13-187-001, at 49-50 (filed Oct. 25, 2012).

<sup>386</sup> MISO Compliance Transmittal at 13. In its transmittal letter, MISO states that it has revised section VIII.B.1.2, but the provisions that include these examples are in section VIII.A.1.2.2 of Attachment FF of the revised Tariff.

by public roadways by developing a second substation footprint on the other side of one of the roads and then installing an overhead single span connector which would function as a substation bus to interconnect the two substation footprints. Second, an existing substation could be retired for many reasons such as but not limited to: lack of room for future expansions, physical conditions such as soil subsidence, earthquake reinforcement requirements, to prevent flood damage, regulatory/public necessity/economic reasons, and other similar factors. A new substation could be developed nearby on a different site and all transmission circuits into the existing substation could be rerouted to the new site, which is essentially the relocation of an existing substation. These scenarios represent upgrades to an existing substation when the intent of the transmission project produced by the transmission planning process is to expand the existing substation rather than develop a new substation or to relocate an existing substation for reasons not related to implementation of a regionally cost shared transmission project.<sup>[387]</sup>

211. In addition, MISO proposes to maintain the proposal it submitted as part of its initial compliance filing that the construction of a new substation that interconnects multiple existing transmission lines should be considered an upgrade, but provides further justification for this proposal. MISO notes that its originally proposed Tariff language provided examples delineating between the types of new substations that will be considered transmission upgrades for the purpose of retaining a right of first refusal and those that will not.<sup>388</sup> MISO states that the examples of such transmission upgrades include newly constructed switching substations to interconnect two existing transmission circuits at the point where they physically cross each other where such existing transmission circuits are owned by the same transmission owner. MISO asserts that these projects appropriately qualify as upgrades because allowing an incumbent transmission owner to retain the right to construct such upgrades will ensure continuity of

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<sup>387</sup> MISO, FERC Electric Tariff, Attachment FF, § VIII.A.1.2.2.

<sup>388</sup> MISO Compliance Transmittal at 13; *see also* MISO, FERC Electric Tariff, Attachment FF, § VIII.A.1.2.1. In its transmittal letter, MISO states that it has revised section VIII.B.1.2.1, but the provisions that include these examples are in section VIII.A.1.2.1 of Attachment FF of the revised Tariff.

ownership through the substation in question when a substation connects multiple transmission lines owned by a single transmission owner, which MISO argues will assist in relay coordination, compliance with applicable North American Electric Reliability Corporation (NERC) Reliability Standards (especially critical infrastructure protection security concerns), and minimization of contract path issues.<sup>389</sup>

212. MISO also claims that substations represent the most critical components of the bulk power system and that reliability of the bulk power system and ensuring adequate safety levels to personnel and the public are often tied to the ability of transmission owners to maintain adequate protection systems and straightforward switching procedures. MISO states that the triggering event of the recent outage in the Southwest was a switching error due to the disruption of an otherwise straightforward switching procedure, and that the risk of such an occurrence increases substantially where a major transmission substation is owned and operated by one party while all connecting transmission circuits and adjacent substations are owned and operated by another party. In addition, MISO states that many of the catastrophic reliability events that occur on the bulk power system are tied to system protection misoperations that occur after a short-circuit fault. MISO argues that when the development, installation, operation, and maintenance of a protection system for a specific transmission circuit must be divided between two or more entities, the risk of misoperation increases significantly.<sup>390</sup>

213. MISO further states that, to the extent that a substation is at the interconnection point between different transmission owners, ownership and operation of the substation will likely fall with one or the other, and to facilitate the interconnection, there is no choice but to face the additional risk associated with coordinated switching and system protection. MISO states that this additional risk is mitigated by devoting a high number of man-hours to facilitate the necessary coordination to address the risk, typically involving substantial costs, but that the risk remains significant even with such efforts. Accordingly, MISO argues to the extent that these situations can be minimized to only those instances where the systems of two different transmission owners interconnect, reliability risks, safety risks, and costs associated with such risks can be substantially reduced. MISO argues that, given that new substation facilities totally within the transmission system of a single transmission owner will represent a very small portion of the potential transmission infrastructure development opportunities open to competition

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<sup>389</sup> MISO Compliance Transmittal at 13-14.

<sup>390</sup> *Id.* at 14 (citing Arizona-Southern California Outages on September 8, 2011, Causes and Recommendations (April 27, 2012), *available at* <http://www.ferc.gov/legal/staff-reports/04-27-2012-ferc-nerc-report.pdf>).

under MISO's Order No.1000-compliant competitive bidding process, classifying such new substations as upgrades is just and reasonable, especially when considering the resulting reliability and safety benefits.<sup>391</sup>

(2) **Protests/Comments**

214. LS Power states that there is no logical or legal justification for MISO's conclusion that any transmission line terminating at an existing substation would result in a substation upgrade, even if an entirely new substation was constructed on new land, if the two substations are interconnected in any way. LS Power asserts that an upgrade was intended to preserve a right of first refusal for the existing transmission owner to upgrade its existing equipment and that no right is taken from an incumbent transmission owner when an entire facility, including the land it sits on, is new. LS Power argues that the same rationale that led the Commission to conclude that a new substation that interconnects multiple transmission lines is not an upgrade applies to expansion of substations onto new land. Accordingly, LS Power recommends that the Commission strike portions of MISO's proposed Tariff language and edit the remaining language as follows:

1.2 Upgrades to Existing Substations. Upgrades to existing substations include ~~any expansions~~, replacements or modifications made, in part or in whole, to any existing substation...These upgrades include, but are not limited to:

...

(e) acquiring additional land adjacent to the existing substation in conjunction with installation or additional plant within the boundaries of this additional land, including facilities to interconnect such plant to the existing substation plant where such additional plant is part of a transmission project for which the existing transmission owner is the sole developer. Substation additions outside the existing substation footprint to accommodate the development of new transmission line facilities shall not be considered upgrades of the existing substation; and

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<sup>391</sup> *Id.*

1.2.2 Construction of a new substation footprint near an existing substation to facilitate expansion of the existing substation is considered an upgrade if not part of a regionally cost allocated new transmission line facility and is necessary when the substation transmission project calls for expansion of the existing substation and there is not sufficient space for such expansion. ... These scenarios represent upgrades to an existing substation when the intent of the substation transmission project produced by the transmission planning process is to expand the existing substation.<sup>[392]</sup>

215. LS Power asserts that the Commission should require MISO to strike the provision that classifies as an upgrade the construction of a new substation that interconnects multiple existing transmission lines.<sup>393</sup> LS Power states that MISO's justification for this proposal is the same argument the Commission heard when it first proposed to eliminate the federal right of first refusal. LS Power claims that MISO offers no support for its assertion that retaining a right of first refusal and maintaining continuity of ownership for such upgrades will assist in relay coordination, compliance with applicable NERC Reliability Standards, especially critical infrastructure protection security concerns, and minimization of contract path issues. Further, LS Power notes that the Commission addressed this argument in Order No. 1000, concluding that "potentially increasing the number of asset owners through the elimination of a federal right of first refusal in Commission-jurisdictional tariffs and agreements does not, by itself, make it more difficult for system operators to maintain reliability."<sup>394</sup> LS Power contends that there is no justification for prohibiting competition to develop and own new substations based on reliability concerns, stating that coordination is required regardless of the total number of transmission owners and that all transmission owners must meet the NERC Reliability Standards. Finally, LS Power argues that MISO's reference to the "recent catastrophic outage in the Southwest" is completely off point, noting that all parties involved in that outage were incumbent transmission owners.<sup>395</sup>

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<sup>392</sup> LS Power Protest at 16-17 (referencing MISO, FERC Electric Tariff, Attachment FF, §§ VIII.A.1.2, VIII.A.1.2.2).

<sup>393</sup> *Id.* at 19 (referencing MISO, FERC Electric Tariff, Attachment FF, § VIII.A.1.2.1).

<sup>394</sup> *Id.* at 18 (citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 342 (cross-referenced at 136 FERC ¶ 61,051)).

<sup>395</sup> *Id.* at 18-19.

216. ATC/Duke/Transource state that MISO's proposed new Tariff section, which provides that upgrades to an existing substation include developing an additional footprint near the existing substation to facilitate effective expansion of the existing substation,<sup>396</sup> should be clarified so as not to limit substation-related projects that are open to competition. Specifically, ATC/Duke/Transource argue that the phrase "near the existing substation" could be interpreted as less than 20 miles, while the phrase "expansion of the existing substation" could include anything short of an entirely new substation. To alleviate disputes and uncertainty in the regional transmission planning process and to ensure that a federal right of first refusal is not unreasonably retained for new transmission facilities, ATC/Duke/Transource request that the Commission direct MISO to engage a stakeholder process to develop Tariff language that provides more detail and objectivity for determining when a new substation project is considered a new transmission facility or an upgrade. For instance, ATC/Duke/Transource suggest that any substation project relying on property of an existing substation would be considered an upgrade and that any substation project adjacent to or non-contiguous to an existing substation property would be a new transmission facility.<sup>397</sup>

**(3) Answer**

217. MISO states that LS Power raises issues regarding expansions to existing substations that were part of its rehearing request and are beyond the scope of the compliance proceeding and should therefore be rejected. MISO explains that the First Compliance Order agreed that allowing substation expansions to qualify as upgrades would allow for situations where expansion is necessary but there is no land available immediately adjacent to the existing substation's footprint. MISO asserts that it was directed by the Commission to provide examples in the Tariff of what would constitute as land near an existing substation for the purposes of qualifying as an upgrade but that the Commission did not require the changes sought by LS Power.<sup>398</sup>

218. MISO contends that it properly considered and explained the reliability reasons for treating substations interconnecting multiple transmission lines as upgrades in its compliance filing. MISO states that ownership of a new substation completely within the footprint of a single incumbent transmission owner is an issue of reliability and operational impacts of having multiple owners rather than an issue of incumbent

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<sup>396</sup> MISO, FERC Electric Tariff, Attachment FF, § VIII.A.1.2.f.

<sup>397</sup> ATC/Duke/Transource Protest at 10-11.

<sup>398</sup> MISO Answer at 15 (citing First Compliance Order, 142 FERC ¶ 61,215 at P 234).

transmission owners versus nonincumbent transmission developers. MISO explains that including multiple parties in substation operation will make switching tasks become more complex, require more communications and coordination, and increase the chance of a switching error, regardless of whether the parties involved are incumbent transmission owners or nonincumbent transmission developers. MISO further states that involving multiple parties in jointly developing, implementing, operating, and maintaining transmission protection systems will increase the chance of failures to properly operate protection systems. MISO asserts that these potential reliability problems lead to circumstances that are not efficient or cost-effective.<sup>399</sup> Similarly, MISO states that the Southwest outage highlights the risk of having multiple owners responsible for a single transmission facility. MISO argues that it should not be required to adopt provisions that compromise reliability in the name of competition, as this would cause real economic harm to consumers.<sup>400</sup>

219. MISO states that while circumstances may dictate multiple owners must be involved in switching operations or protections, to minimize overall risk these instances should be limited to tie lines connecting different transmission owners' systems. MISO asserts that any cost savings from competitively bidding new substations completely within the substation footprint of a single transmission owner would generally be offset by the additional cost of coordination and communication between parties, additional risk to reliability and safety, and real economic harm caused by reliability violations, blackouts, and system failures. MISO also notes that the 2012 NERC State of Reliability Report states that "every major system disturbance since the 1965 Northeast Blackout has been caused or exacerbated by protection system performance..." which highlights the significance of minimizing the risk of protection system misoperation.<sup>401</sup>

220. MISO also argues that LS Power's reliance on paragraph 342 of Order No. 1000 is misplaced. MISO asserts that the Commission was responding to arguments regarding multiple owners of different transmission facilities, and did not address issues pertaining to multiple owners of the same transmission facility, including substations. MISO states that having multiple owners operating the same transmission facility is a different matter that does pose reliability risks.<sup>402</sup>

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<sup>399</sup> *Id.* at 15-16.

<sup>400</sup> *Id.* at 16 n.37.

<sup>401</sup> *Id.* at 16-17 (citing 2012 NERC State of Reliability Report at 6).

<sup>402</sup> *Id.* at 18 (citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 342).

221. In addition, MISO states that upgrades to existing transmission facilities are exempted from the nonincumbent transmission developer mandates under Order No. 1000. MISO asserts that LS Power's argument that substations interconnecting existing transmission lines should be subject to development by nonincumbent transmission developers presumes that, despite such circumstances, such facilities should not be considered upgrades. MISO states that LS Power has not identified any factors that could eliminate reliability or other risks associated with multiple ownership of a single substation that connects the transmission lines of an existing transmission owner.<sup>403</sup>

#### (4) Commission Determination

222. We find that the provisions in MISO's compliance filing partially comply with the directives in the First Compliance Order concerning the upgrade definition related to transmission substations because MISO has clarified when construction of a new substation footprint near an existing substation may be considered an upgrade. However, MISO has not sufficiently justified retaining a federal right of first refusal for new substations that interconnect multiple existing transmission lines.<sup>404</sup> Accordingly, we direct MISO to submit, within 60 days of the date of issuance of this order, a further compliance filing that removes this Tariff section in its entirety.

223. We accept MISO's proposed clarifications of when construction of a new substation footprint near an existing substation may be considered an upgrade.<sup>405</sup> MISO's proposal is appropriately limited to circumstances in which the new substation could reasonably be considered an improvement to, addition to, or replacement of, the existing substation, consistent with the requirements of Order No. 1000.<sup>406</sup>

224. We decline to require the modifications proposed by LS Power. The Commission has previously stated that an upgrade may include the expansion of an existing right-of-way.<sup>407</sup> Contrary to the statements of LS Power, MISO does not propose to categorize a new substation as an upgrade if it is connected to an existing substation "in any way."

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<sup>403</sup> *Id.* at 18-19.

<sup>404</sup> MISO, FERC Electric Tariff, Attachment FF, § VIII.A.1.2.1.

<sup>405</sup> *Id.* § VIII.A.1.2.2.

<sup>406</sup> *See* Order No. 1000-A, 139 FERC ¶ 61,132 at P 426.

<sup>407</sup> *Id.* P 427.

Rather, it must be connected to the existing substation in such a way that it will function electrically as a single substation.<sup>408</sup> Further, to qualify as an upgrade, a transmission project must call for expansion of the existing substation and there is not sufficient space for such expansion within the existing substation footprint.<sup>409</sup> Given these limitations, we find it appropriate for MISO to categorize certain new substation footprints<sup>410</sup> as upgrades to the existing substation.

225. Similarly, we do not require the clarification requested by ATC/Duke/Transource and accept MISO's proposal that upgrades to an existing substation include developing an additional footprint near the existing substation to facilitate effective expansion of the existing substation.<sup>411</sup> Regarding the meaning of the phrase "near the existing substation," we find it reasonable for MISO to base this phrase on electrical behavior rather than distance. We note that because the new substation footprint must "function electrically as a single substation" with the existing substation it is unlikely that the footprints of the two substations would be separated by more than a nominal distance.<sup>412</sup> Moreover, to specify a distance beyond which a substation would be considered a different substation would not allow for appropriate geographic considerations that may be unique for each substation expansion.

226. However, we find that MISO has not sufficiently justified retaining a federal right of first refusal for new substations that interconnect multiple existing transmission lines.<sup>413</sup> In Order No. 1000-A, the Commission found that the term "upgrade" was defined as "an improvement to, addition to, or replacement of a part of, an existing transmission facility."<sup>414</sup> In the First Compliance Order, the Commission found that MISO had not provided sufficient support for classifying a new substation that interconnects multiple existing transmission lines as an upgrade – in other words, that

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<sup>408</sup> MISO, FERC Electric Tariff, Attachment FF, § VIII.A.1.2.2.

<sup>409</sup> *Id.* § VIII.A.1.2.2.

<sup>410</sup> *See id.* *See also supra* P 223.

<sup>411</sup> *See* MISO, FERC Electric Tariff, Attachment FF, § VIII.A.1.2.f.

<sup>412</sup> For example, two substations separated by a several mile-long line would likely require bus protection that would prevent operation as a single substation.

<sup>413</sup> MISO, FERC Electric Tariff, Attachment FF, ¶ VIII.A.1.2.1.

<sup>414</sup> Order No. 1000-A, 139 FERC ¶ 61,132 at P 426.

MISO had not shown that the proposal meets one of the three characteristics provided by the Commission.<sup>415</sup> MISO has not made such a demonstration. In addition, we reject MISO's claim that not allowing it to automatically classify any new substation that interconnects multiple existing transmission lines as an upgrade compromises reliability in the name of competition. LS Power correctly notes that in Order No. 1000 the Commission found that potentially increasing the number of asset owners through the elimination of a federal right of first refusal does not, by itself, make it more difficult for system operators to maintain reliability.<sup>416</sup> The Commission also noted, however, that a proposed transmission facility's impact on reliability is an important factor that transmission owners may consider when evaluating whether to select a proposed transmission facility in the regional transmission plan for purposes of cost allocation.<sup>417</sup> Similarly, in the case of a competitive bidding process like MISO has proposed, MISO can consider, for example, a potential transmission developer's ability to coordinate switching tasks and transmission protection systems with other entities when evaluating competing bids.<sup>418</sup> Moreover, to the extent that a new substation qualifies as an upgrade pursuant to other provisions of the Tariff, the incumbent transmission owner may appropriately maintain a federal right of first refusal for such substation. Accordingly, we direct MISO to submit, within 60 days of the date of issuance of this order, a further compliance filing that removes this Tariff section in its entirety.

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<sup>415</sup> First Compliance Order, 142 FERC ¶ 61,215 at P 235.

<sup>416</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 342.

<sup>417</sup> *Id.* P 342.

<sup>418</sup> For example, proposed section VIII.E.5 of Attachment FF requires MISO to evaluate a New Transmission Proposal Applicant's capability to perform switching of substations. MISO, FERC Electric Tariff, Attachment FF, § VIII.E.5. MISO proposes to define a New Transmission Proposal Applicant as a "Qualified Transmission Developer or Transmission Owner qualified under Section VIII.B.2.b of Attachment FF that submits a New Transmission Proposal in response to a Transmission Proposal Request." MISO, FERC Electric Tariff, Module A, § 1.455d (New Transmission Proposal Applicant) (1.0.0). MISO proposes to define a Qualified Transmission Developer as a "Transmission Owner, ITC, or Non-owner Member that submits a Transmission Developer Application and is subsequently found by [MISO] to meet the minimum requirements for a Qualified Transmission Developer as outlined in Section VIII.B of Attachment FF of the Tariff." *Id.* § 1.528a (Qualified Transmission Developer) (1.0.0).

**vi. Upgrade Definition – Right-of-Way\*****(a) First Compliance Order**

227. In the First Compliance Order, the Commission found that MISO’s proposed exception to the requirement to eliminate a federal right of first refusal that instead would allow an incumbent transmission owner to retain a federal right of first refusal associated with an existing right-of-way was not permitted by Order No. 1000.<sup>419</sup> Specifically, MISO proposed to allow a transmission owner to maintain a federal right of first refusal for any new transmission facility built on that transmission owner’s right-of-way if such right-of-way contains improvements owned by the transmission owner and is classified as transmission plant. The Commission stated that, while it acknowledged in Order No. 1000 that its reforms “are not intended to alter an incumbent transmission provider’s use and control of its existing rights-of-way[,]” that Order No. 1000 does not “grant or deny transmission developers the ability to use rights-of-way held by other entities, even if transmission facilities associated with such upgrades or uses of existing rights-of-way are selected in the regional transmission plan for purposes of cost allocation[,]” and that the “retention, modification, or transfer of rights-of-way remain subject to relevant law or regulation granting the rights-of-way[,]”<sup>420</sup> it did not find that as part of a compliance filing, a public utility transmission provider may add a federal right of first refusal for a new transmission facility built on an existing right-of-way. The Commission therefore directed MISO to file a further compliance filing revising the proposed Tariff language to remove the proposed Tariff language related to rights-of-way.<sup>421</sup>

**(b) Summary of Compliance Filings**

228. In its compliance filing, MISO explains that the intent of its original proposal to permit an incumbent transmission owner to retain a federal right of first refusal associated with an existing right-of-way, if such right-of-way contained improvements owned by the transmission owner and classified as transmission plant, was to address functionally equivalent capital replacement of existing transmission line facilities due to wear and tear and similar factors. MISO states that it has removed the original language of this provision and replaced it with text that more clearly communicates its intent to classify the functionally equivalent capital replacement of an existing facility as an

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<sup>419</sup> See First Compliance Order, 142 FERC ¶ 61,215 at P 244.

<sup>420</sup> *Id.* (citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 319).

<sup>421</sup> *Id.*

upgrade.<sup>422</sup> Specifically, MISO proposes to state that “[u]pgrades to existing transmission line facilities include . . . functionally equivalent capital replacement of an entire existing transmission line facility, or any portion thereof, with a new transmission line facility due to aging, deterioration, damage, poor performance, aesthetics, high operating and maintenance costs, or other similar reasons.”<sup>423</sup>

229. In addition, MISO proposes to include in the definition of an upgrade to an existing transmission line:

Any requirement or request to relocate existing transmission line facilities owned by an incumbent Transmission Owner to accommodate New Transmission Line Facilities associated with an Open Transmission Project, where such construction of the New Transmission Line Facilities requires or requests use of the incumbent Transmission Owner’s right-of-way and, as a result, also requires or requests transfer of the existing transmission facilities to alternative right-of-way or an alternative position on the same right-of-way based on either mutual consent of the incumbent Transmission Owner and Selected Transmission Developer and/or the outcome of a state regulatory proceeding or court action.<sup>[424]</sup>

In explaining this category of upgrades, MISO also states that “the construction of new transmission facilities that displace the existing transmission facilities may also be considered an upgrade based on other upgrade criteria contained in the Tariff.”<sup>425</sup>

230. Furthermore, in addressing upgrades involving replacement of existing structures to accommodate additional transmission circuits, MISO provides that the incumbent transmission owner shall have a right of first refusal for all plant associated with existing transmission circuits booked to Account Nos. 350, 352, 353, 355, 357, 359, and 359.1 of

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<sup>422</sup> MISO Compliance Transmittal at 15.

<sup>423</sup> MISO, FERC Electric Tariff, Attachment FF, § VIII.A.1.1.f.

<sup>424</sup> *Id.* § VIII.A.1.1.e.

<sup>425</sup> MISO Compliance Transmittal at 12.

the Commissions Uniform System of Accounts.<sup>426</sup> MISO explains that this right of first refusal includes, among other things, “any additional right-of-way required.”<sup>427</sup>

(c) **Protests/Comments**

231. LS Power, Illinois Commission, and ATC/Duke/Transource object to MISO’s proposed new Tariff language. LS Power states that, rather than simply deleting the provision as required by the First Compliance Order, MISO attempts to rewrite the provision to obtain the same result and offers no explanation as to the situations this provision is intended to address.<sup>428</sup> Illinois Commission argues that by eliminating the prior reference to existing rights of way and substituting language referencing a “functionally equivalent capital replacement” that may be developed due a large variety of reasons, MISO has expanded the scope of the right of first refusal. Further, Illinois Commission argues that this right of first refusal appears to exist in perpetuity, as the effect of the revision would be to grandfather in a transmission owner’s existing transmission system, precluding any nonincumbent transmission developer from developing any upgrades or capital replacements to that system.<sup>429</sup>

232. According to ATC/Duke/Transource, MISO’s statement that the intent of its proposed provision is to address functionally equivalent capital replacement of existing transmission line facilities due to wear and tear and similar factors is not clear and could be interpreted to create a federal right of first refusal.<sup>430</sup> Further, ATC/Duke/Transource argue that existing Tariff provisions already address MISO’s concern by providing that upgrades to existing transmission line facilities include “any expansion, replacement or modification, for any purpose, made to existing transmission line facilities that are classified as transmission plant.”<sup>431</sup> Further, they contend that the Tariff already provides for replacement of existing transmission facilities for various reasons, including replacing

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<sup>426</sup> MISO, FERC Electric Tariff, Attachment FF, § VIII.A.1.1.2.c.

<sup>427</sup> MISO Compliance Transmittal at 12.

<sup>428</sup> LS Power Protest at 19-20.

<sup>429</sup> Illinois Commission Comments at 9-10.

<sup>430</sup> ATC/Duke/Transource Protest at 13 (citing MISO Compliance Transmittal at 15).

<sup>431</sup> *Id.* at 13 (referencing MISO, FERC Electric Tariff, Attachment FF, § VIII.A.1.1).

inadequate, aging, or defective components.<sup>432</sup> Thus, ATC/Duke/Transource argue that the Commission should reject MISO's new proposed Tariff provision as ambiguous and unnecessary and, thus, contrary to Order No. 1000.<sup>433</sup>

233. LS Power raises a concern about MISO's statement that "the construction of new transmission facilities that displace the existing transmission facilities *may also be considered an upgrade based on other upgrade criteria contained in Tariff.*"<sup>434</sup> LS Power states that it is unclear to which Tariff section MISO is referring and the Commission should require MISO to identify the relevant Tariff provision and the basis upon which MISO asserts that additional transmission projects can be considered upgrades, or to strike the provision.<sup>435</sup>

234. With respect to MISO's proposal regarding the relocation of existing transmission facilities needed to accommodate new transmission facilities that require use of a right of way, ATC/Duke/Transource argue that MISO improperly invokes the location of a transmission facility on an incumbent transmission owner's right of way to classify the project as an upgrade.<sup>436</sup> ATC/Duke/Transource state that, based on Tariff language that defines upgrades to existing transmission line facilities as including "any expansion" to existing facilities, it is not clear that a right of first refusal would apply only to the relocated facility and not to new transmission facilities.<sup>437</sup> ATC/Duke/Transource argue that this uncertainty is further exacerbated by MISO's reference in its transmittal letter to the relocation of an existing line "and associated facilities qualif(ying) as an upgrade," including specifically those "associated with an Open Transmission Project that require use of the incumbent's right-of-way."<sup>438</sup> ATC/Duke/Transource argue that the

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<sup>432</sup> *Id.* (referencing MISO, FERC Electric Tariff, Attachment FF, § VIII.A.1.1.g).

<sup>433</sup> *Id.*

<sup>434</sup> LS Power Protest at 14 (citing MISO Compliance Transmittal at 12) (emphasis added by LS Power).

<sup>435</sup> *Id.*

<sup>436</sup> *Id.* at 13-14 (citing MISO, FERC Electric Tariff, Attachment FF, § VIII.A.1.1.e).

<sup>437</sup> *Id.* at 14 (referencing MISO, FERC Electric Tariff, Attachment FF, § VIII.A.1.1).

<sup>438</sup> *Id.* (citing MISO Compliance Transmittal at 11-12).

Commission should reject MISO's proposed Tariff section because it potentially maintains a federal right of first refusal for any new transmission facility built on a right of way that contains an incumbent transmission owner's facilities.<sup>439</sup>

235. With respect to upgrade issues associated with a multi circuit transmission facility replacing an existing single circuit transmission facility, Illinois Commission expresses concern with MISO's proposal to grant a right of first refusal to incumbent transmission owners for rebuilding existing transmission lines booked to certain cost categories, i.e., Account Nos. 350, 352, 353, 355, 357, 359, and 359.1 of the Commission's Uniform System of Accounts.<sup>440</sup> Illinois Commission states that these account numbers are associated with transmission plant, noting in particular that Account 350 is for land and land rights. Illinois Commission argues that this proposed language does not comply with the Commission's directive in the First Compliance Order to remove the federal right of first refusal language associated with the use of existing rights of way and should thus be rejected.<sup>441</sup>

**(d) Answer**

236. MISO asserts that the proposed revisions do not create a right of first refusal for entirely new transmission facilities. Rather, MISO states that they provide incumbent transmission owners with the limited ability to replace existing transmission facilities due to age and deterioration. MISO contends that, while the First Compliance Order found that Order No. 1000 does not permit MISO to create a right of first refusal for new transmission facilities built on an existing right of way, the Commission acknowledged the right of incumbent transmission owners to build upgrades to their own transmission facilities. MISO explains that this section is only intended to address capital replacement of transmission facilities due to aging, wear and tear, deterioration, or damage. Therefore, in its compliance filing, MISO removed language related to rights of way and duplicative language, and revised this section to ensure its subject matter was clear. MISO states that the term "functionally equivalent" was used to account for the fact that new lines may not be exactly the same as the line being replaced due to changes in technology and standards over time. MISO contends that because the key drivers of these replacements are aging, wear and tear, deterioration, or damage, this kind of capital

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<sup>439</sup> *Id.*

<sup>440</sup> Illinois Commission Comments at 10 (referencing MISO, FERC Electric Tariff, Attachment FF, § VIII.A.1.2.c).

<sup>441</sup> *Id.*

improvement falls within the definition of upgrades to existing transmission facilities as defined in Order No. 1000.<sup>442</sup>

(e) **Commission Determination**

237. We partially accept MISO's proposed new language. MISO states that it removed the unclear original language of the provision and replaced it with text that more clearly communicates its original intent to classify the functionally equivalent capital replacement of an existing facility as an upgrade.

238. Specifically, we find that MISO's proposal to treat as an upgrade the functionally equivalent capital replacement of an entire existing transmission line facility, or any portion thereof, with a new transmission line facility due to aging, deterioration, damage, poor performance, aesthetics, high operating and maintenance costs, or other similar reasons, partially complies with Order No. 1000. In Order No. 1000-A, the Commission clarified that "the term upgrades means an improvement to, addition to, or replacement of a part of, an existing transmission facility. The term upgrades does not refer to an entirely new transmission facility."<sup>443</sup> Under MISO's proposal, the functionally equivalent capital replacement of an entire existing transmission line facility with an entirely new transmission line would be treated as an upgrade. This is inconsistent with the Commission's clarification that the term upgrade refers to the replacement of only a part of an existing transmission line and does not include an entirely new transmission facility. We therefore direct MISO to submit, within 60 days of the date of this order, a further compliance filing to revise section VII.A.1.1.f of the Tariff so that an upgrade includes the functionally equivalent capital replacement of only a portion of an existing transmission line facility but not the functionally equivalent capital replacement of an entire existing transmission line facility. We find that this change to MISO's Tariff also adequately addresses LS Power's concern about the statement in MISO's Compliance Transmittal Letter.<sup>444</sup>

239. We disagree with ATC/Duke/Transource's assertion that it is unclear whether MISO's proposal regarding the relocation of existing transmission facilities needed to accommodate new transmission facilities that require use of an existing right of way would apply to the relocated transmission facility and not to new transmission facilities. This section refers only to the relocation of "existing transmission facilities to alternative

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<sup>442</sup> MISO Answer at 7-9.

<sup>443</sup> Order No. 1000-A, 139 FERC ¶ 61,132 at P 426.

<sup>444</sup> *See supra* n.425.

right-of-way or an alternative position on the same right-of-way” and not to any new transmission facilities.<sup>445</sup> Thus, MISO’s proposal is consistent with Order No. 1000.

240. Finally, we disagree with Illinois Commission that the references to specific accounts with regard to replacement of single circuit towers with multi circuit towers creates a federal right of first refusal for such facilities.<sup>446</sup> References to these accounts provide additional specificity to the general descriptions of what MISO will consider an upgrade and assign to the incumbent transmission owner. With regard to Account 350, this corresponds to acquisition of an additional right-of-way, which is considered an upgrade for the limited purpose of the replacement of existing towers to support new transmission circuits. This language specifically applies to new rights-of-way. Furthermore, as discussed above, we find that this provision is consistent with the definition of upgrades under Order No. 1000.<sup>447</sup>

**b. Qualification Criteria**

241. Order No. 1000 required each public utility transmission provider to revise its tariff to establish appropriate qualification criteria for determining an entity’s eligibility to propose a transmission project for selection in the regional transmission plan for purposes of cost allocation.<sup>448</sup> These criteria must not be unduly discriminatory or preferential when applied to either an incumbent transmission provider or a nonincumbent transmission developer.<sup>449</sup> In addition, public utility transmission providers must adopt procedures for timely notifying transmission developers of whether they satisfy the region’s qualification criteria and allowing them to remedy any deficiencies.<sup>450</sup>

242. Order No. 1000-A clarified that it would be an impermissible barrier to entry to require a transmission developer to demonstrate, as part of the qualification criteria, that

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<sup>445</sup> MISO, FERC Electric Tariff, Attachment FF, § VIII.A.1.1.e.

<sup>446</sup> *Id.* § VIII.A.1.2.c.

<sup>447</sup> *See supra* PP 198-203.

<sup>448</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at PP 225, 323.

<sup>449</sup> *Id.* P 323.

<sup>450</sup> *Id.* P 324.

it has, or can obtain, state approvals necessary to operate in a state to be eligible to propose a transmission facility.<sup>451</sup>

**i. First Compliance Order**

243. In the First Compliance Order, the Commission found that MISO's proposal to determine whether a transmission developer is qualified to submit a New Transmission Proposal<sup>452</sup> to construct and own an Open Transmission Project partially complied with the qualification criteria requirements of Order No. 1000. The Commission found that, except for the requirement to be a transmission owner or Non-owner Member,<sup>453</sup> MISO did not explain, and the Tariff did not provide, what qualification criteria a transmission developer must meet to submit a New Transmission Proposal in response to a Transmission Proposal Request;<sup>454</sup> instead, the proposed Tariff revisions combined qualification criteria and the information MISO would use to evaluate New Transmission Proposals without distinguishing between the two. The Commission stated that, without knowing what the qualification criteria are, it could not determine whether the criteria are unduly discriminatory or preferential. Therefore, the Commission directed MISO to revise its Tariff to explicitly state what qualification requirements must be satisfied for a transmission developer to make a New Transmission Proposal in the MTEP.<sup>455</sup>

244. In addition, the Commission found that the one explicit bidder qualification criteria that MISO did propose – that a transmission developer must be a transmission

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<sup>451</sup> Order No. 1000-A, 139 FERC ¶ 61,132 at P 441.

<sup>452</sup> A New Transmission Proposal is defined as a “proposal to construct, implement, own, operate, maintain, repair, and restore all New Transmission Facilities associated with an Open Transmission Project, in response to a Transmission Proposal Request.” MISO, FERC Electric Tariff, Module A, § 1.455c (New Transmission Proposal) (0.0.0).

<sup>453</sup> A Non-owner Member is defined as “a member which is not an owner.” MISO, FERC Electric Tariff, MISO Rate Schedules, MISO Transmission Owner Agreement, Article 1, § I.N (Non-owner Member) (0.0.0).

<sup>454</sup> A Transmission Proposal Request is defined as “[a]n invitation, including associated requirements, posted by the Transmission Provider on its website, to submit a New Transmission Proposal.” MISO, FERC Electric Tariff, Module A, § 1.671b (Transmission Proposal Request) (0.0.0).

<sup>455</sup> First Compliance Order, 142 FERC ¶ 61,215 at P 271.

owner or Non-Owner Member to qualify to submit a New Transmission Proposal – complies with Order No. 1000. The Commission stated that this qualification criterion is fair and not unreasonably stringent when applied to either an incumbent transmission provider or nonincumbent transmission developer and is not unduly discriminatory or preferential.<sup>456</sup>

**ii. Summary of Compliance Filings**

245. MISO proposes a new prequalification process, which details the process and requirements that a transmission developer must satisfy to be considered a Qualified Transmission Developer<sup>457</sup> eligible to submit a New Transmission Proposal in the MTEP.<sup>458</sup> MISO states that each Qualified Transmission Developer Applicant<sup>459</sup> must submit a nonrefundable application fee of \$20,000 to cover the cost associated with the processing, review, and certification of Transmission Developer Applications.<sup>460</sup> The entity also must agree to comply with the general requirements for Qualified Transmission Developers.<sup>461</sup> MISO proposes to use the prequalification process to:

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<sup>456</sup> *Id.* P 272.

<sup>457</sup> MISO proposes to define Qualified Transmission Developer as “[a] new Transmission Owner, [independent transmission company], or Non-owner Member that submits a Transmission Developer Application and is subsequently found by the Transmission Provider to meet the minimum requirements for a Qualified Transmission Developer as outlined in [s]ection VIII.B of Attachment FF of the Tariff.” MISO, FERC Electric Tariff, Module A, § 1.528a (Qualified Transmission Developer) (1.0.0).

<sup>458</sup> MISO, FERC Electric Tariff, Attachment FF, § VIII.B.2.

<sup>459</sup> MISO proposes to define Qualified Transmission Developer Applicant as “[a]n entity that submits a Transmission Developer Application.” MISO, FERC Electric Tariff, Module A, § 1.528b (Qualified Transmission Developer Applicant) (0.0.0).

<sup>460</sup> MISO, FERC Electric Tariff, Attachment FF, § VIII.B.2.a.1. MISO proposes to define Transmission Developer Application as “[t]he application submitted by a Qualified Transmission Developer Applicant to the Transmission Provider to become certified as a Qualified Transmission Developer by the Transmission Provider.” *Id.* § 1.667b (Transmission Developer Application) (0.0.0).

<sup>461</sup> MISO, FERC Electric Tariff, Attachment FF, § VIII.B.3.b-VIII.B.3.f; MISO Compliance Transmittal at 15. In its transmittal letter, MISO points to sections VIII.B.2.b through VIII.B.2.f, but the General Requirements for Qualified Transmission Developers are in sections VIII.B.3.a through VIII.B.3.f of Attachment FF of the revised Tariff.

(1) review the Transmission Developer Applications of all entities who desire to become Qualified Transmission Developers to determine whether those entities meet all of the requirements to be a Qualified Transmission Developer; (2) remove Qualified Transmission Developer status from entities no longer desiring to be Qualified Transmission Developers or no longer meeting the requirements; and (3) review updated information contained in yearly renewal submissions from existing Qualified Transmission Developers to ensure that each continues to meet all the requirements to be a Qualified Transmission Developer.<sup>462</sup> Under its proposal, MISO will administer the prequalification process each spring to determine the Qualified Transmission Developers who will be authorized to submit proposals in the next solicitation for Transmission Proposal Requests. MISO will post on its website in January of each year an invitation and application template for prospective transmission developers that are not already Qualified Transmission Developers to submit an application. Each Qualified Transmission Developer Applicant will have at least 30 days to submit their application.<sup>463</sup>

246. MISO proposes to include in the Tariff the criteria that must be met for an entity to become a Qualified Transmission Developer. MISO states that the rationale for these proposed criteria is to verify the capability of a potential transmission developer to plan, procure, construct, operate, and maintain a substantial transmission project before allowing participation in the bidding process or selection as the transmission developer of an MVP or MEP. MISO divides the proposed new criteria into the following five categories: (1) general requirements; (2) project implementation requirements; (3) operations, maintenance, repair, and replacement requirements; (4) legal requirements; and (5) financial requirements.<sup>464</sup> MISO states that these criteria are in essence “pre-qualification criteria” for entities that seek to become Qualified Transmission Developers and are separate from the criteria MISO will use to evaluate specific New Transmission Proposals.<sup>465</sup>

247. MISO proposes general requirements for Qualified Transmission Developers, which specify that the Qualified Transmission Developer Applicant must be a

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<sup>462</sup> MISO, FERC Electric Tariff, Attachment FF, § VIII.B.2.

<sup>463</sup> *Id.* § VIII.B.2.a.

<sup>464</sup> *Id.* §§ VIII.B.3-B.7.

<sup>465</sup> MISO Compliance Transmittal at 19-20 (referencing MISO, FERC Electric Tariff, Attachment FF, § VIII.B.3). *See also* MISO, FERC Electric Tariff, Attachment FF, § VIII.E.

transmission owner or Non-owner Member<sup>466</sup> in good standing and must maintain such status throughout the prequalification process. The Qualified Transmission Developer Applicant must also submit written commitments that, if designated as the Selected Transmission Developer, it will: (1) execute the Transmission Owners Agreement; (2) comply with all Applicable Laws and Regulations, codes, and standards governing engineering, design, construction, operation and maintenance of transmission facilities; (3) register with NERC as the transmission owner, transmission operator, and transmission planner, as defined by NERC, for the transmission facilities that the Qualified Transmission Developer Applicant will own; (4) become a Local Balancing Authority or make arrangements to contract with an existing Local Balancing Authority; (5) comply with Part 4 of the FERC Form 715 (Transmission Planning Reliability Criteria) Transmission Planning Criteria and Guidelines on file with the Commission and established by each incumbent transmission owner to whose existing transmission facilities the new transmission facilities would interconnect; and (6) comply with all interconnection standards and requirements, including NERC Facilities Design, Connections, and Maintenance Reliability Standards, published by each incumbent transmission owner to whose existing transmission facilities the new transmission facilities would interconnect.<sup>467</sup>

248. MISO proposes project implementation requirements, which require submission of documentation related to the Qualified Transmission Developer Applicant's business structure, key personnel, and historical practices. MISO states that these requirements ensure that a Qualified Transmission Developer Applicant has sufficient capabilities and competencies to implement Open Transmission Projects. Specifically, MISO proposes that a Qualified Transmission Developer Applicant submit the following documentation: (1) its proposed project implementation management teams and the types of resources it plans to utilize, including relevant capability and experience (e.g., in-house labor, contractors, and other transmission providers); (2) its record regarding project management, route and site evaluation, regulatory permitting, engineering and design, land surveying, right of way and land acquisition, material and equipment procurement, construction, and commissioning of transmission facilities, including its performance as a

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<sup>466</sup> To become a Non-owner Member, a transmission developer must fill out the application on the MISO website and pay a \$15,000 membership fee and annual dues. *See* MISO, Application for Non-Transmission Owning Members, at <https://www.midwestiso.org/StakeholderCenter/Members/Pages/BecomingaMember.aspx>.

<sup>467</sup> MISO Compliance Transmittal at 15-16. *See also* MISO, FERC Electric Tariff, Attachment FF, §§ VIII.B.3.b–3.f.

project manager and in meeting project milestones and estimated budgets; (3) résumés or job descriptions for key management personnel who will be involved in the relevant aspects of developing and constructing transmission projects; (4) documentation outlining its business practices related to project implementation and demonstrating how such business practices are consistent with Good Utility Practice to ensure proper project management, route and site evaluation, regulatory permitting, engineering and design, land surveying, right of way and land acquisition, material and equipment procurement, construction, and commissioning of transmission facilities; (5) its procedures and historical practices for acquiring rights of way and land and for managing right of way and land acquisition for transmission projects, or, if it has none, a detailed description of its plan for doing so; (6) its procedures and historical practices for mitigating the impact of transmission facilities on affected landowners and for addressing public concerns regarding transmission facilities, or, if it has none, a detailed description of its plan for doing so; and (7) documentation describing its project cost monitoring, reporting, and containment capabilities that it intends to apply to any assigned transmission project. MISO proposes that it may require a Qualified Transmission Developer Applicant to submit additional information as part of any Transmission Proposal Request, including information specific to the transmission project and/or locations in question.<sup>468</sup>

249. MISO proposes operations, maintenance, repair, and replacement requirements, which require submission of documentation related to certain historical practices of the Qualified Transmission Developer Applicant. MISO states that it requires this submission to ensure that a Qualified Transmission Developer Applicant has sufficient capabilities and competencies to adequately perform the following operations, maintenance, testing, inspection, repair, and replacement tasks once a transmission project is in service: (1) forced outage response for transmission line circuits and substations; (2) switching for transmission line circuits and substations; (3) transmission line emergency repair and substation emergency repair and testing; (4) transmission line and substation preventative and/or predictive maintenance; (5) maintenance and management of spare parts, spare structures, and/or spare equipment inventories for substations and/or transmission lines, including description of any agreements to share spare equipment, spare parts, and/or spare structures with other transmission entities; (6) real-time operations monitoring and control capabilities; and (7) major facility replacements or rebuilds required as a result of catastrophic destruction or natural aging through normal wear and tear, including financial strategy to facilitate timely

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<sup>468</sup> MISO Compliance Transmittal at 20-22 (citing MISO, FERC Electric Tariff, Attachment FF, §§ VIII.B.4.a–4.h).

replacements and/or rebuilds.<sup>469</sup> MISO proposes that it may require a Qualified Transmission Developer Applicant to further demonstrate its qualifications to operate, maintain, test, inspect, and replace specific new transmission facilities associated with an Open Transmission Project as part of any Transmission Proposal Request.<sup>470</sup>

250. MISO proposes legal requirements, which require Qualified Transmission Developer Applicants to submit a summary of legal and regulatory registrations and violations. This proposal requires Qualified Transmission Developer Applicants to submit a list of each state within the MISO footprint where the entity is authorized to conduct business and a demonstration of legal status of the entity in each state where the entity is authorized to conduct business. Under this proposal, a Qualified Transmission Developer Applicant must be legally qualified to conduct business in at least one state within the MISO footprint. In addition, once a Qualified Transmission Developer Applicant is certified as a Qualified Transmission Developer, MISO may require a Qualified Transmission Developer to provide additional information for each specific New Transmission Proposal it submits to demonstrate appropriate legal status in states or localities where it proposes to construct the New Transmission Facilities associated with the Open Transmission Project (e.g., state law may require the Qualified Transmission Developer to be legally qualified to conduct business in the state prior to soliciting business, including responding to a Transmission Proposal Request to develop new transmission facilities within the state, etc.).<sup>471</sup> MISO's proposal would also require Qualified Transmission Developer Applicants to provide: (1) a summary of all legal and/or regulatory violations in the preceding five years as found by federal or state courts, federal regulatory agencies, state public utility commissions, other regulatory agencies, or attorneys general; (2) a summary of all instances of alleged violations of any laws or regulatory requirements in the previous five years; and (3) a supporting affidavit from an authorized company officer, including an attestation that the information provided is true and accurate and that, once deemed qualified, the applicant will comply with all applicable requirements in the Tariff, Business Practices Manuals, or other applicable MISO documents or agreements.<sup>472</sup> MISO proposes to also include an

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<sup>469</sup> *Id.* at 22 (citing MISO, FERC Electric Tariff, Attachment FF, §§ VIII.B.5.a-5.k).

<sup>470</sup> MISO, FERC Electric Tariff, Attachment FF, § VIII.B.5.1.

<sup>471</sup> MISO Compliance Transmittal at 22 (citing MISO, FERC Electric Tariff, Attachment FF, § VIII.B.6.a).

<sup>472</sup> *Id.* at 22-23 (citing MISO, FERC Electric Tariff, Attachment FF, §§ VIII.B.6.a-6.d).

ongoing duty to provide an update to MISO as soon as reasonably practical should there be any material changes to an applicant's (or relevant parent's) information.<sup>473</sup> MISO also states that it may require Qualified Transmission Developers for a specific New Transmission Proposal to submit additional information to demonstrate either status as a public utility with condemnation authority in states or localities where the New Transmission Facilities associated with the Open Transmission Project are to be constructed or the ability to obtain such status in all such states or localities.<sup>474</sup>

251. MISO proposes financial requirements, which require Qualified Transmission Developer Applicants to provide certain financial information to ensure that applicants have sufficient financial wherewithal to perform the activities necessary to design, finance, and manage the construction of a substantial transmission project.<sup>475</sup> Under this proposed section, a Qualified Transmission Developer Applicant must provide: (1) a financial plan demonstrating that it has adequate capital resources (e.g., current assets, revolving lines, commercial paper, letter of credit, stock or bond issuance, or other sources of liquidity) available to allow it to implement Open Transmission Projects on schedule and to operate and maintain associated New Transmission Facilities after the facilities are in service;<sup>476</sup> (2) an investment grade credit rating from Moody's Investor Services, Inc., Standard and Poor's Rating Group and/or other Nationally Recognized Statistical Rating Organization as recognized by the Securities and Exchange Commission, which it must maintain at all times;<sup>477</sup> (3) general financial information, including two years of audited financial statements with notes to the financials and a signed commitment that it is not aware of any material events or circumstances that would likely result in a material adverse weakness in financial strength throughout

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<sup>473</sup> *Id.* at 23 (citing MISO, FERC Electric Tariff, Attachment FF, § VIII.B.6.d).

<sup>474</sup> *Id.* at 23 n.62.

<sup>475</sup> *Id.* at 23-24.

<sup>476</sup> MISO, FERC Electric Tariff, Attachment FF, § VIII.B.7.a.

<sup>477</sup> *Id.* § VIII.B.7.b. Such credit rating information may pertain to a parent company in lieu of the Qualified Transmission Developer Applicant if the parent company is making a written guarantee in a form acceptable to MISO. The focus of the review will be on the entity's unsecured, senior long-term debt ratings (not supported by third-party enhancements). If unsecured, senior long-term debt ratings are not available, MISO may consider Issuer Ratings. *Id.*

implementation of any transmission project it might be awarded;<sup>478</sup> and (4) a summary of any history of bankruptcy, dissolution, merger, or acquisition of the Qualified Transmission Developer Applicant or any predecessors in interest for the current calendar year and the five calendar years immediately preceding its submission of the application.<sup>479</sup> The Qualified Transmission Developer Applicant also has an ongoing duty to provide an update to MISO as soon as reasonably practical should there be any material changes to that Qualified Transmission Developer Applicant's (or its relevant parent's) financial information.<sup>480</sup>

252. To the extent MISO finds the Transmission Developer Application deficient of data necessary to support all qualification requirements, it proposes to notify the applicant by e-mail within thirty days of receipt, and the Qualified Transmission Developer Applicant will have 30 days from notification to submit the additional data required. MISO also proposes that no additional cure period will be allowed for the purpose of gaining qualification.<sup>481</sup> MISO will certify those Qualified Transmission Developer Applicants that meet the requirements for qualification and will notify a Qualified Transmission Developer Applicant of its decision within 180 days of receipt of each Transmission Developer Application.<sup>482</sup> If MISO does not certify a Qualified Transmission Developer Applicant, it will provide the Qualified Transmission Developer Applicant with a written explanation detailing its determination within 30 days after notification. MISO will also update on its website the list of Qualified Transmission Developers within thirty 30 days of providing notification to the Qualified Transmission Developer Applicants found to be qualified.<sup>483</sup> Those Qualified Transmission Developer

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<sup>478</sup> *Id.* § VIII.B.7.c. This information may pertain to a parent company in lieu of the Qualified Transmission Developer Applicant if the parent company is making a written guarantee in a form acceptable to MISO. *Id.*

<sup>479</sup> *Id.* § VIII.B.7.d. This information must also be submitted for any parent company if the parent company is making a written guarantee in a form acceptable to MISO. *Id.*

<sup>480</sup> MISO Compliance Transmittal at 23-24 (citing MISO, FERC Electric Tariff, Attachment FF, § VIII.B.7.e).

<sup>481</sup> MISO, FERC Electric Tariff, Attachment FF, § VIII.B.2.a.2.

<sup>482</sup> *Id.* § VIII.B.2.a.3. In the first year of such process, notification will be made within 270 days of receipt of each Transmission Developer Application. *Id.*

<sup>483</sup> *Id.* § VIII.B.2.a.4.

Applicants who have not submitted the required information or who MISO judges not to be Qualified Transmission Developers will not be authorized to submit a New Transmission Proposal in the current-year MTEP and Qualified Transmission Developer Applicants who are not satisfied with the outcome of the qualification process may request alternative dispute resolution under the Tariff within 30 calendar days of receiving from MISO written explanation of its decision to deny the application.<sup>484</sup> All information submitted with Transmission Developer Applications for Qualified Transmission Developer status will be considered confidential under the Tariff and will not be publicly posted or shared with any individual, except MISO employees and/or MISO contractors that have executed an appropriate non-disclosure agreement.<sup>485</sup> The Executive Oversight Committee<sup>486</sup> shall have the exclusive and final authority to approve or reject Transmission Developer Applications and certify Qualified Transmission Developers.<sup>487</sup>

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<sup>484</sup> MISO Compliance Transmittal at 19 (citing MISO, FERC Electric Tariff, Attachment FF, § VIII.B.9).

<sup>485</sup> *Id.* (citing MISO, FERC Electric Tariff, Attachment FF, § VIII.B.8).

<sup>486</sup> *See* MISO, FERC Electric Tariff, Attachment FF, § VIII.B.2.a.6. MISO proposes to define the Executive Oversight Committee as:

A committee consisting of three or more executive staff of [MISO], including at least one officer, that is charged with overseeing all [MISO] staff and consultants involved in evaluating Transmission Developer Applications submitted by Qualified Transmission Developer Applicants and New Transmission Proposals submitted by New Transmission Proposal Applicants in response to a Transmission Proposal Request. The committee will have exclusive and final decision making authority over certification of Qualified Transmission Developers and selection of Selected Transmission Developers. The committee shall possess the specific technical, financial, and regulatory expertise necessary for evaluation of Transmission Developer Applications and New Transmission Proposals. MISO, FERC Electric Tariff, Module A, § 1.210a (Executive Oversight Committee) (0.0.0).

<sup>487</sup> MISO, FERC Electric Tariff, Attachment FF, § VIII.B.2.a.6. MISO proposes that a group of individual, certified Qualified Transmission Developers that desire to be

(continued...)

253. In January of each year, MISO proposes to send a notification to each existing Qualified Transmission Developer requesting confirmation that the Qualified Transmission Developer continues to meet the requirements for being a Qualified Transmission Developer.<sup>488</sup> In response to the renewal invitation, Qualified Transmission Developers must: (1) update data currently on file with MISO regarding qualification requirements that were used previously to establish or confirm the entity as a Qualified Transmission Developer if such data has materially changed; (2) explain how any changes to data currently on file with MISO do not invalidate the Qualified Transmission Developer's status; and (3) submit such updates, including a signed confirmation that the Qualified Transmission Developer still meets all qualification requirements, within 90 days of the date MISO requests such data.<sup>489</sup> MISO states that it may, if necessary, within 90 days of receipt of a Qualified Transmission Developer renewal submission, request clarification or further explanation to ensure the Qualified Transmission Developer continues to meet the qualification requirements.<sup>490</sup> MISO states it will notify the Qualified Transmission Developer within 180 days of the initial notification as to whether or not it meets the requirements for qualification.<sup>491</sup> MISO states that in the event a Qualified Transmission Developer no longer meets the qualification requirements, a Qualified Transmission Developer may seek re-qualification during any subsequent annual qualification process.<sup>492</sup>

254. MISO proposes that a Qualified Transmission Developer that desires to terminate its status as a Qualified Transmission Developer may do so at any time by notifying MISO. Upon such notification, MISO states that it will update the list of Qualified Transmission Developers within 30 days of notification. MISO states that a Qualified

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certified as a joint venture eligible to be a Qualified Transmission Developer shall be automatically qualified if the joint venture: (i) provides the necessary guarantees to utilize their respective resources to support the joint venture, and (ii) submits a Transmission Developer Application in accordance with section VIII of Attachment FF to seek status as a Qualified Transmission Developer. *Id.* § VIII.B.2.a.5.

<sup>488</sup> *Id.* § VIII.B.2.a.6.d.

<sup>489</sup> *Id.* § VIII.B.2.d.1.

<sup>490</sup> *Id.* § VIII.B.2.d.2.

<sup>491</sup> *Id.* § VIII.B.2.d.3.

<sup>492</sup> *Id.* § VIII.B.2.d.4.

Transmission Developer may renew its status as Qualified Transmission Developer by seeking re-qualification during any subsequent annual qualification process.<sup>493</sup>

255. Finally, MISO proposes to add a new Tariff section that states:

A Transmission Owner is automatically qualified to submit New Transmission Proposals and be selected as the Selected Transmission Developer for any Open Transmission Project where each group of contiguous New Transmission Facilities associated with the Open Transmission Project connects to an existing transmission facility owned by the Transmission Owner.<sup>494</sup>

256. Moreover, MISO proposes that an incumbent transmission owner will be assumed to fulfill the project implementation requirements and the operations, maintenance, repair, and replacement requirements for Open Transmission Projects that connect to its system.<sup>495</sup>

257. MISO states that its new proposed Tariff section is consistent with the directive in Order No. 1000 that “[t]he qualification criteria should allow for the possibility that an existing public utility transmission provider *already satisfies* the criteria.”<sup>496</sup> MISO asserts that an existing entity’s current status as a transmission owner in a given pricing zone is sufficient evidence that the transmission owner is already qualified to submit proposals involving transmission facilities that will connect to the transmission owner’s existing facilities. MISO also argues that this is a reasonable and fairly defined recognition of the capabilities that have previously been determined to be possessed by a transmission owner with regard to its transmission facilities in its own pricing zone. MISO further argues this provision is narrowly tailored to those situations where the new transmission facilities will interconnect to the incumbent transmission owner’s existing

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<sup>493</sup> *Id.* § VIII.B.2.c.

<sup>494</sup> MISO Compliance Transmittal at 20; *see also* MISO, FERC Electric Tariff, Attachment FF, § VIII.B.2.b. Although MISO points to section VIII.B.1.b, this revised language is in section VIII.B.2.b of Attachment FF of the revised Tariff.

<sup>495</sup> MISO, FERC Electric Tariff, Attachment FF, §§ VIII.B.4.i, VIII.B.5.m.

<sup>496</sup> MISO Compliance Transmittal at 20 (referencing MISO, FERC Electric Tariff, Attachment FF, § VIII.B.2.b) (citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 324 (emphasis added by MISO)).

system. MISO explains that any incumbent transmission owner that seeks to compete for transmission projects that do not interconnect to its existing system will be required to become a Qualified Transmission Developer.<sup>497</sup>

### iii. Protests/Comments

258. ATC/Duke/Transource and LS Power take issue with MISO's proposed application fee of \$20,000. LS Power states that while it does not object to a reasonable fee for an application to be a Qualified Transmission Developer, MISO has not justified \$20,000 as the appropriate amount to cover the necessary evaluation of qualifications. LS Power notes that PJM and New York Independent System Operator, Inc. (NYISO) have no qualification fee and that Southwest Power Pool, Inc.'s (SPP) fee is \$6,000.

259. ATC/Duke/Transource also argue that because, under MISO's proposal, incumbent transmission owners would automatically be qualified for certain Open Transmission Projects,<sup>498</sup> incumbent transmission owners would not have to pay the fee. ATC/Duke/Transource argue that MISO has not shown that its proposal that only nonincumbent transmission developers submit an application and pay the application fee is not unduly discriminatory.<sup>499</sup> Similarly, LS Power argues that it is unclear whether the fee is required for both nonincumbent transmission developers and incumbent transmission owners, noting that the definition of Qualified Transmission Developer is "[a] Transmission Owner, ITC or Non-owner Member that submits a Transmission Developer Application." LS Power argues that because it is unclear whether the phrase, "that submits a Transmission Developer Application," modifies the entire sentence, or is only intended to apply to Non-owner Members, it is unsure whether an incumbent transmission owner bidding to develop an Open Transmission Project, where each group of contiguous New Transmission Facilities associated with the Open Transmission Project connects to its existing transmission facilities, must nevertheless submit the application and the evaluation fee.<sup>500</sup>

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<sup>497</sup> *Id.*

<sup>498</sup> See MISO, FERC Electric Tariff, Attachment FF, § VIII.B.2.b. Under this proposed section, a transmission owner is automatically qualified to submit New Transmission Proposals for any Open Transmission Project where each group of contiguous New Transmission Facilities associated with the Open Transmission Project connects to an existing transmission facility owned by the transmission owner.

<sup>499</sup> ATC/Duke/Transource Protest at 16-17.

<sup>500</sup> LS Power Protest at 20-21.

260. LS Power also protests MISO's proposed notification period.<sup>501</sup> LS Power notes that MISO proposes that, on an ongoing basis, it will take 180 days to determine whether an entity meets the requirements for qualification and 270 days to make the determination in year one. LS Power argues that this notification period is another delay tactic. In contrast, LS Power points out that PJM began accepting qualification packages in May 2013 and on July 22, 2013, PJM posted to their website that nine entities, including new entrants such as the LS Power, were qualified.<sup>502</sup>

261. LS Power and Organization of MISO States take issue with the general requirements for Qualified Transmission Developer Applicants. LS Power asserts that the requirements to provide written commitments<sup>503</sup> provide MISO with no information regarding the qualifications of a Qualified Transmission Developer Applicant to plan, procure, construct, operate, and maintain a substantial transmission project and should therefore be struck absent explanation from MISO as to how they assist MISO in determining a Qualified Transmission Developer Applicant's qualifications to develop a transmission project.<sup>504</sup> LS Power asserts that the proposed written commitment to register with NERC for all transmission facilities that the Qualified Transmission Developer will own, if selected as the Selected Transmission Developer for current or future Open Transmission Projects, is improper under Order No. 1000 as a qualification requirement because Order No. 1000 already requires such commitment.<sup>505</sup> Organization of MISO States states that the proposed written commitment to comply with current requirements and standards regarding interconnection of transmission facilities published by each transmission owner to which the new transmission facility will interconnect, appears to place a significant burden on potential nonincumbent transmission developers and incumbent transmission owners could potentially use this subsection to foreclose

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<sup>501</sup> *Id.* at 21; *see also* MISO, FERC Electric Tariff, Attachment FF, § VIII.B.2.a.3.

<sup>502</sup> LS Power Protest at 21-22 (citing PJM website <http://www.pjm.com/planning/rtep-development/expansion-plan-process/ferc-order-1000/pre-qualification.aspx>).

<sup>503</sup> *See* MISO, FERC Electric Tariff, Attachment FF, §§ VIII.B.3.c-3.g.

<sup>504</sup> LS Power Protest at 24, 26-27. LS Power further asserts that the certifications would be equally meaningless as an evaluation tool for transmission project proposals and should be struck in their entirety rather than simply transferred to the transmission project evaluation section.

<sup>505</sup> *Id.* at 26 (citing Order No. 1000-A, 139 FERC ¶ 61,132 at P 444); *see also* MISO, FERC Electric Tariff, Attachment FF, § VIII.B.3.d.

competition.<sup>506</sup> According to Organization of MISO States, it is unclear who is responsible for ensuring the reasonableness of the incumbent transmission owner's interconnection requirements and standards, which Organization of MISO States asserts appropriately lies with MISO. Organization of MISO States argues that interconnection requirements and standards that are overly difficult (or impossible) to comply with will likely reduce the number of potential competitive transmission developers, thus urging the Commission to ensure that this provision is not used to foreclose competition.<sup>507</sup>

262. Some protesters disagree with MISO's proposed implementation requirements for Qualified Transmission Developer Applicants. ATC/Duke/Transource argue that the information required could be impossible or burdensome to provide at the transmission developer qualification stage, especially for nonincumbent transmission developers.<sup>508</sup> Organization of MISO States similarly argues that the proposed implementation requirements section, along with the proposed operations, maintenance, repair, and replacement requirements section, require the Qualified Transmission Developer Applicant to submit voluminous documentations regarding its ability to develop and maintain transmission projects.<sup>509</sup>

263. Protesters argue that the proposed implementation requirements and the operations, maintenance, repair, and replacement requirements are not appropriate to evaluate during the transmission developer qualification process. For instance, ATC/Duke/Transource argue that some of the implementation requirements are premature at the transmission developer qualification stage, such as documentation of an applicant's record for project management, route and site evaluation, regulatory permitting, engineering and design, land surveying, right of way and land acquisition, material and equipment procurement, construction, and project commissioning. ATC/Duke/Transource also contend that the proposed qualification criteria overlap with the proposed information requirements, stating that operational requirements should not be considered at both the qualification stage and the evaluation stage of the regional transmission planning process. ATC/Duke/Transource state that the information proposed to be included under the proposed project implementation requirements could easily change by the time a project is evaluated in the competitive bidding process.

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<sup>506</sup> Organization of MISO States Comments at 3-4 (citing MISO, FERC Electric Tariff, Attachment FF, § VIII.B.3.g).

<sup>507</sup> *Id.*

<sup>508</sup> ATC/Duke/Transource Protest at 17.

<sup>509</sup> Organization of MISO States Comments at 5.

Moreover, ATC/Duke/Transource state that some of the information could change on a project by project basis, for instance if the developer intends to operate one project but contract out the operation on another project.<sup>510</sup> Similarly, Organization of MISO States argues that these two sections of proposed qualifications requirements appear to be more appropriately required as part of a transmission developer's New Transmission Proposal on an Open Transmission Project, rather than at the developer qualification stage. It contends that while MISO's evaluation of a potential transmission developer's ability to develop and maintain transmission projects could occur either during the qualification process or the New Transmission Proposal evaluation process, the scope and scale of a proposed transmission project should be one of the main factors on which MISO's evaluation should be based. Thus, Organization of MISO States argues that it is premature for MISO to assess a potential transmission developer's ability to develop and maintain transmission projects at the transmission developer qualification stage.<sup>511</sup> LS Power claims that the proposed implementation requirement requiring submission of additional data from a transmission developer once it has been certified as a Qualified Transmission Developer does not relate to qualification of new transmission developers.<sup>512</sup> LS Power argues that the provision should be struck, asserting that it is unclear why MISO proposes to include this provision in the qualification section and for what purpose the information will be used. LS Power states that to the extent that the

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<sup>510</sup> ATC/Duke/Transource Protest at 17-18.

<sup>511</sup> Organization of MISO States Comments at 4-5.

<sup>512</sup> MISO, FERC Electric Tariff, Attachment FF, § VIII.B.4.h states:

Once a Qualified Transmission Developer, [MISO] may require submission of additional data related to the policies, processes, methods, capabilities, experience, and past performance of New Transmission Proposal Applicants regarding project implementation when deemed necessary by [MISO], including aspects specific to the transmission project and/or locations in question as part of any Transmission Proposal Request. Furthermore, [MISO] may require inclusion of additional information regarding project implementation capabilities, including but not limited to, existing capabilities and past experience regarding project implementation as part of any New Transmission Proposal.

provision relates to project submission data, it should be in the information requirements.<sup>513</sup>

264. ATC/Duke/Transource and LS Power request additional clarification regarding the proposed operations, maintenance, repair, and replacement requirements. ATC/Duke/Transource explain that MISO's proposal requires a Qualified Transmission Developer Applicant to submit extensive information in support of its capabilities and competencies to perform various operational tasks but note that MISO does not include a specific description of the type of information it would deem acceptable to demonstrate the Qualified Transmission Developer Applicant's technical competency, nor does MISO specify one manner of calculating or presenting the information. ATC/Duke/Transource further state that there are many terms used in this section, such as "switching for substations"<sup>514</sup> that are vague and potentially subject to different interpretations. ATC/Duke/Transource contend that, aside from showing that a potential transmission developer has appropriate personnel with the appropriate transmission operations training (which could include relevant NERC certifications), or that it has the capability to contract for such personnel, it is not clear how a new potential transmission developer would have this kind of information prior to the construction phase of a transmission project, which could make nonincumbent transmission developers seem less qualified to participate in the transmission developer selection process. They further argue that MISO will not be able to use this information to determine a potential transmission developer's qualification because not all potential transmission developers are likely to calculate the required information in the same manner. ATC/Duke/Transource argue that the Commission should require MISO to further justify and clarify these requirements or remove them.<sup>515</sup> LS Power states that MISO should be required to clarify that the Qualified Transmission Developer Applicant must either possess "or have the ability to obtain" sufficient capabilities and competencies related to operations, maintenance, repair and replacement. LS Power argues that the Commission has agreed that it is sufficient

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<sup>513</sup> LS Power Protest at 27.

<sup>514</sup> MISO, FERC Electric Tariff, Attachment FF, § VIII.B.5.d. This proposed section requires Qualified Transmission Developer Applicants to submit documentation that they possess sufficient capabilities to perform switching for substations.

<sup>515</sup> ATC/Duke/Transource Protest at 18-19.

for a prospective transmission developer to demonstrate that it can contract for the required services rather than to establish that it has all such services in-house.<sup>516</sup>

265. LS Power also argues that the requirement regarding replacements or rebuilds<sup>517</sup> is unclear as to what information MISO seeks and what MISO will do with that information at the transmission developer qualification stage and, without further clarification, should be struck. LS Power states that this qualification requirement is similar to the qualification requirement in *Tampa Electric Co.* that a prospective transmission developer demonstrate an ability to address major losses, where Commission stated that “[w]e find unclear what is intended by Florida Parties’ proposed qualification criterion that a transmission developer demonstrate its ability to assume liability for major losses resulting from any failure of transmission facilities.”<sup>518</sup>

266. ATC/Duke/Transource and LS Power protest the proposed legal requirements that a transmission developer must establish or submit as part of the transmission developer qualification process. LS Power asks that the Commission require MISO to strike the entire proposed legal requirement section as inappropriately vague and designed as a barrier to entry, arguing that MISO’s role is not to determine whether or not an entity is legally qualified to do business within the MISO footprint, but rather to determine whether a proposed new entrant is financially and technically qualified.<sup>519</sup> With respect to MISO’s proposed legal requirement for submission of a list of each state within the MISO footprint that the Qualified Transmission Developer Applicant is authorized to conduct business,<sup>520</sup> LS Power asserts that MISO makes no effort to establish why simply

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<sup>516</sup> LS Power Protest at 28 (citing *PJM Interconnection, L.L.C., et al.*, 142 FERC ¶ 61,214, at P 278 (2013) (PJM First Compliance Order)).

<sup>517</sup> MISO, FERC Electric Tariff, Attachment FF, § VIII.B.5.k. This proposed section requires Qualified Transmission Developer Applicants to submit documentation that it possesses sufficient capabilities to perform major facility replacements or rebuilds required as a result of catastrophic destruction or natural aging.

<sup>518</sup> LS Power Protest at 28 (citing *Tampa Electric Co., et al.*, 143 FERC ¶ 61,254, at P 151 (2013) (Florida Parties First Compliance Order)).

<sup>519</sup> *Id.* at 29-30.

<sup>520</sup> MISO, FERC Electric Tariff, Attachment FF, § VIII.B.6.a. This proposed section states in part that “[t]here must be at least one state within the Transmission Provider footprint where the Qualified Transmission Developer is legally qualified to conduct business.”

being qualified to do business in one of the states in the MISO footprint provides any more of an “acceptable level of risk” for a transmission project not in that state than not being currently qualified to do business anywhere. ATC/Duke/Transource contend that the proposed requirement for Qualified Transmission Developer Applicants to submit a list of each state within the MISO footprint where the applicant is authorized to conduct business is discriminatory, as it could prohibit new nonincumbent transmission developers who have not yet sought authorization to conduct business in a state within MISO’s footprint from participating in the MTEP process, as well as inconsistent with the Commission’s statement in Order No. 1000-A that it would be an impermissible barrier to entry to require a transmission developer to demonstrate at the qualification stage that it either has or can obtain state approvals necessary to operate in a state, including state public utility status and the right to eminent domain.<sup>521</sup> Further, ATC/Duke/Transource and LS Power both argue that this proposed requirement is similar to requirements that the Commission rejected in past Order No. 1000 compliance orders.<sup>522</sup>

267. LS Power argues that, while the information requested in the legal requirements for: (1) a summary of legal and/or regulatory violations during the past five years,<sup>523</sup> and (2) a summary of any and all instances in which the Qualified Transmission Developer Applicant is currently under investigation or is a defendant in a proceeding...for violation of any laws, including regulatory requirements during the past five years,<sup>524</sup> is not in itself objectionable, MISO should be required to establish that it is requiring the same

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<sup>521</sup> ATC/Duke/Transource Protest at 19-20 (citing Order No. 1000-A, 139 FERC ¶ 61,132 at P 441).

<sup>522</sup> LS Power cites the Commission’s finding in the Florida First Compliance Order that a proposed qualification criterion, which required a prospective transmission developer to demonstrate that it could obtain the necessary licensing in applicable cities, counties, and states, was inconsistent with Order No. 1000-A, while ATC/Duke/Transource points to the Commission’s directive in the SPP First Compliance Order requiring removal of a proposed qualification criterion that required an entity to demonstrate its ability to comply with applicable local, state and federal requirements. LS Power Protest at 30 (citing Florida First Compliance Order, 143 FERC ¶ 61,254 at P 150); ATC/Duke/Transource Protest at 19-20 (citing *Southwest Power Pool, Inc.* 144 FERC ¶ 61,059 (2013) (SPP First Compliance Order)).

<sup>523</sup> MISO, FERC Electric Tariff, Attachment FF, § VIII.B.6.b.

<sup>524</sup> *Id.* § VIII.B.6.c.

information from existing transmission owners regardless of whether they are “automatically qualified” with respect to other provisions. This includes the requirement for an affidavit from an authorized officer of the Qualified Transmission Developer Applicant.<sup>525</sup> LS Power contends that neither MISO’s transmittal letter nor the Tariff clearly establishes that the information requirements of the proposed legal requirements are required equally of incumbent transmission owners and nonincumbent transmission developers alike. Otherwise, LS Power argues, the provisions should be struck.<sup>526</sup>

268. LS Power also states that, in its transmittal letter, MISO asserts that it may require Qualified Transmission Developers for a specific New Transmission Proposal to submit additional information to demonstrate either status as a public utility with condemnation authority in states or localities where the New Transmission Facilities associated with the Open Transmission Project are to be constructed or the ability to obtain such status as a public utility with condemnation authority in all states or localities where New Transmission Facilities associated with the Open Transmission Project are to be constructed.<sup>527</sup> LS Power argues that MISO appears to be asserting that after “qualification,” it will nevertheless erect another barrier as it relates to bidding on specific Open Transmission Projects that would require demonstration of public utility status or eminent domain rights. LS Power argues that, although not supported by any Tariff provisions, requiring such “additional information” is inappropriate and the Commission should very clearly admonish MISO of such. LS Power argues that MISO cannot determine an entity to be a Qualified Transmission Developer but then require additional information before that Qualified Transmission Developer is permitted to bid on an Open Transmission Project.<sup>528</sup>

269. LS Power also protests the proposed financial requirements that a transmission developer must meet as part of the transmission developer qualification process as unduly discriminatory and unduly restrictive. LS Power argues that a narrow set of financial qualification criteria focused on credit ratings, parental guarantees, or audited financial statements improperly restricts the types of information that can be submitted to establish financial viability, while providing no flexibility to submit alternative information. LS Power argues that MISO’s requirement to require both a credit rating and financial statements is even more stringent than the financial criteria proposed in the Southeastern

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<sup>525</sup> *See id.*

<sup>526</sup> LS Power Protest at 30-31.

<sup>527</sup> *Id.* at 31 (citing MISO Compliance Transmittal at 23 n.62).

<sup>528</sup> *Id.*

Regional Transmission Planning (SERTP) region, which the Commission found were unfair and unreasonably stringent and did not provide appropriate flexibility.<sup>529</sup> Further, LS Power argues that these narrow criteria would preclude entities such as stand-alone transmission companies from participation. LS Power states that requiring transmission projects to be constructed only by entities with established credit ratings, a rated parent entity who will guarantee all project obligations, or required financial statements for some group of affiliated companies will effectively disqualify a large group of independent power companies, as this approach would be directly counter to how independent power producers have approached financing of infrastructure projects. As support, LS Power points to the Public Utility Commission of Texas' (Texas Commission) Competitive Renewable Energy Zone (CREZ) process, in which the Texas Commission found that Cross Texas Transmission, the LS Power public utility affiliate in Texas, was creditworthy. LS Power indicates that the Texas Commission agreed with testimony, which stated that a stand-alone transmission company without a credit rating, a statement of assets, or a parent guarantee can nevertheless establish that it is creditworthy to finance and operate a significant transmission expansion.<sup>530</sup>

270. ATC/Duke/Transource and LS Power protest MISO's proposal that an incumbent transmission owner is assumed to fulfill the qualification requirements for Open Transmission Projects that connect to the incumbent transmission owner's system.<sup>531</sup> ATC/Duke/Transource argue that MISO's developer qualification process is discriminatory because it does not apply equally to incumbent transmission owners and nonincumbent transmission developers. ATC/Duke/Transource state that an incumbent transmission owner would be automatically qualified to submit New Transmission Proposals if the proposed Open Transmission Project connects to its existing transmission

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<sup>529</sup> *Id.* at 32-33 (citing *Louisville Gas and Electric Co. and Kentucky Utilities Co.*, 144 FERC ¶ 61,054 (2013) (SERTP First Compliance Order)). In the SERTP First Compliance Order, the Commission found that the filing parties' proposed financial qualification criteria (i.e., a requirement to have and maintain a certain credit rating and the ability to provide documentation showing capability to finance U.S. energy projects equal to or greater than the cost of the proposed transmission project) was lacking in appropriate flexibility because the proposal failed to provide an alternative, such as allowing financial statements in lieu of a credit rating. SERTP First Compliance Order, 144 FERC ¶ 61,054 at PP 143, 154.

<sup>530</sup> LS Power Protest at 35.

<sup>531</sup> ATC/Duke/Transource Protest at 16-18 (citing MISO, FERC Electric Tariff, Attachment FF, §§ VIII.B.2.b, VIII.B.4.i, VIII.B.5.m); LS Power Protest at 22-24.

facilities. ATC/Duke/Transource contend that qualification requirements must apply to both incumbent transmission owners and nonincumbent transmission developers or else they will be unduly discriminatory.<sup>532</sup>

271. LS Power argues that MISO's proposed Tariff language as written is overly broad and the phrase "each group of contiguous New Transmission Facilities associated with the Open Transmission Project" is vague.<sup>533</sup> Specifically, LS Power states that, if the phrase refers to an Open Transmission Project where only one connection is to the existing transmission facilities of the transmission owner being exempted, the provision is overly broad. LS Power objects to the automatic qualification of incumbent transmission owners solely on the basis that a segment of a new transmission facility connects to an existing transmission facility of that owner if the qualification also applies to facilities outside that incumbent transmission owner's zone. According to LS Power, there is no reason to believe that the incumbent transmission owner at the connection point has any more experience or expertise than a nonincumbent transmission developer to develop a transmission project outside of its zone simply because the project connects with its system at one point. LS Power contends that if that was not the intent of MISO's proposal, it should clarify the language.<sup>534</sup>

272. LS Power further argues that existing owners that lack significant recent new construction experience should not be automatically qualified to build new projects that are inconsistent with their recent experience. LS Power asserts that, to be qualified to build Open Transmission Projects, incumbent transmission owners should be required, as nonincumbent transmission developers are, to establish their qualifications to do so, and

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<sup>532</sup> ATC/Duke/Transource Protest at 16 (citing SPP Compliance Order, 144 FERC ¶ 61,059 at P 225).

<sup>533</sup> LS Power Protest at 23 (citing MISO, FERC Electric Tariff, Attachment FF, § VIII.B.2.b). MISO, FERC Electric Tariff, Attachment FF, § VIII.B.2.b states:

A Transmission Owner is automatically qualified to submit New Transmission Proposals and be selected as the Selected Transmission Developer for any Open Transmission Project where *each group of contiguous New Transmission Facilities associated with the Open Transmission Project* connects to an existing transmission facility owned by the Transmission Owner. (Emphasis added).

<sup>534</sup> LS Power Protest at 23.

that any automatic qualification should be limited to demonstrated capabilities.<sup>535</sup> LS Power further asserts that, to the extent the Commission upholds the required qualification criteria, before MISO can automatically qualify an incumbent transmission owner, MISO should be required to establish that it maintains for that transmission owner the information it is requiring from nonincumbent transmission developers seeking to qualify or provide the Commission with a just and reasonable, non-discriminatory reason why it is necessary for MISO to have such information for nonincumbent transmission developers, but not for incumbent transmission owners.<sup>536</sup>

iv. **Answer**

273. Contrary to LS Power's and ATC/Duke/Transource's protests, MISO states that its proposed \$20,000 application fee and 180-day review period are fair. MISO reiterates that the fee is necessary to recover the cost associated with review of a Transmission Developer Application, which MISO has estimated to be, on average, between 80 and 120 man-hours.<sup>537</sup> MISO argues that the fact that other regions have determined that they require different application fees does not make its proposal unjust and unreasonable. MISO states that the protestors have not shown reason why the experience and context of other regions are comparable to those of MISO and therefore should be considered in the calculation of MISO's application fee. MISO clarifies that when an Open Transmission Project includes contiguous New Transmission Facilities that connect with an existing transmission facility of a transmission owner, that transmission owner is not required to become a Qualified Transmission Developer in order to submit a New Transmission Proposal for that project. MISO states that the transmission owner would be subject to a \$20,000 application fee if the New Transmission Facilities do not connect to its existing system.<sup>538</sup> MISO states that its proposed 180-day review period will not introduce delays into the New Transmission Proposal review process because Qualified Transmission Developer Applicants will be notified of approval or rejection at least three months prior to the posting date for the first round of Transmission Proposal Requests. MISO states

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<sup>535</sup> *Id.* at 23-24.

<sup>536</sup> *Id.* at 24.

<sup>537</sup> MISO Answer at 28-29. MISO states that this estimate includes overhead, multiple staff, and potential outside consultant to review the financial, project implementation, operations and maintenance capabilities that are included in each Transmission Developer Application.

<sup>538</sup> *Id.* at 31.

that this timeline is driven by the conclusion of the MTEP cycle and the approval of the MISO Board.<sup>539</sup>

274. MISO states that contrary to LS Power's protest, the proposed general requirements for Qualified Transmission Developer Applicants to submit certain written commitments provide MISO with assurance that, if selected to construct a New Transmission Facility, a Qualified Transmission Developer Applicant will undertake certain steps that are necessary to implement transmission projects and own, operate and maintain transmission facilities.<sup>540</sup> MISO notes that these requirements were proposed in its first Order No. 1000 compliance filing and were not rejected in the First Compliance Order. MISO states that it determined that it would be more efficient to obtain certain commitments from potential transmission developers at the time of qualification rather than each time a Qualified Transmission Developer submits a New Transmission Proposal for a specific project.<sup>541</sup>

275. Specifically, MISO disagrees with Organization of MISO States that the requirement for a Qualified Transmission Developer Applicant to submit a written commitment that it will comply with current interconnection requirements and standards, if selected as a Selected Transmission Developer, would place a significant burden on potential nonincumbent transmission developers. MISO argues that its proposal does not present the opportunity for incumbent transmission owners to exclude new entrants, but appropriately recognizes the reality and necessity of the interconnection requirements of incumbent transmission owners. MISO explains that all entities desiring to connect directly to a transmission owner's system must fulfill the transmission owner's interconnection requirements. Additionally, MISO states that the requirement to document the interconnection requirements for transmission, generator, and end-user interconnections is included in NERC Reliability Standard FAC-001. MISO states that this NERC requirement has not been changed and will be applied to all entities, including other existing transmission owners, in a non-discriminatory fashion. MISO continues that, contrary to Organization of MISO States' desire, it is not appropriate nor necessary for MISO to judge the just and reasonableness of a transmission owner's interconnection requirements because they have been developed over many years of designing and operating the transmission system in a safe, reliable, and efficient manner and will be

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<sup>539</sup> *Id.* at 29-30.

<sup>540</sup> *Id.* at 32 (referencing MISO, FERC Electric Tariff, Attachment FF, §§ VIII.B.3.c-f).

<sup>541</sup> *Id.* at 32-33.

applied in a non-discriminatory manner to ensure any interconnection will not degrade the existing level of the system.<sup>542</sup>

276. MISO states that there is no merit to Organization of MISO States' claims that the proposed project implementation requirements are more appropriate as part of a New Transmission Proposal than the Transmission Developer Application. MISO states that, similarly, LS Power and ATC/Duke/Transource are incorrect in their assertion that these requirements should be struck or applied at a different stage. MISO states that timely acquisition of an entity's project implementation and operations and maintenance capabilities is necessary to avoid granting Qualified Transmission Developer status to entities that are unqualified. MISO continues that this result would contravene Order No. 1000's expressed purpose in requiring a qualification process.<sup>543</sup>

277. MISO argues that, despite LS Power's allegations to the contrary, the operations, maintenance, repair, and replacement requirements, and specifically a demonstration that the Qualified Transmission Developer Applicant possesses sufficient capabilities to perform major facility replacements or rebuilds required as a result of catastrophic destruction or natural aging, do not need to be clarified.<sup>544</sup> MISO states that it proposes to require Qualified Transmission Developer Applicants to provide this information to demonstrate that they possess, or can acquire, the necessary capabilities for performing operations and maintenance tasks, which could include: (1) documentation of existing staff, contractors, locations, policies, procedures, tools, equipment, and inventory; or (2) a detailed business plan describing the resources (including staff, contractors, warehouses, material suppliers, tools, and equipment) that will be obtained. However, MISO also states it could include a description of policies and procedures that will be used to perform such tasks should the applicant ultimately be designated the Selected Transmission Developer.<sup>545</sup>

278. In response to LS Power's request that all the proposed legal requirements be struck, MISO notes that LS Power did not contest all of the subsections and, therefore,

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<sup>542</sup> *Id.* at 25 (referencing MISO, FERC Electric Tariff, Attachment FF, § VIII.B.3.g).

<sup>543</sup> *Id.* at 33-34 (citing Order No. 1000, FERC Stats. Regs. ¶ 31,323 at P 323).

<sup>544</sup> *Id.* at 35 (referencing MISO, FERC Electric Tariff, Attachment FF, § VIII.B.5.k).

<sup>545</sup> *Id.* at 35-36.

the Commission should reject the prospect of striking the entire section.<sup>546</sup> With regard to ATC/Duke/Transource's argument that the legal requirement to provide a list of states in which a Qualified Transmission Developer Applicant is authorized to conduct business and have such authorization in at least one state within the MISO footprint would exclude entities from participating in the MTEP process, MISO states that no entity is excluded from MTEP participation and the proposed requirement applies only to entities that wish to become qualified to submit New Transmission Proposals. MISO states that LS Power's reference to Order No. 1000-A is inappropriate because MISO is proposing to place this requirement on entities that wish to develop a transmission facility that has already been proposed in the MTEP process and approved by the MISO Board, not those entities that wish to propose a facility.<sup>547</sup> MISO adds that the Commission rejected LS Power's argument in Order No. 1000 that the qualification criteria should be limited to technical and financial capabilities and ruled that "each transmission planning region [is permitted] the flexibility to formulate qualification criteria that best fit its transmission planning processes and addresses the particular needs of the region."<sup>548</sup> With regard to MISO's proposed legal requirement that places an ongoing duty on a Qualified Transmission Developer Applicant to provide an update if there are any material changes in its submitted information, MISO states that the requirement is necessary to properly evaluate a Qualified Transmission Developer Application. MISO therefore concludes that its proposed legal requirements are all just and reasonable and do not contradict the Commission's directives in Order No. 1000-A. Finally, in response to LS Power's comment that MISO should be required to establish that it is requiring the same information from existing transmission owners regardless of whether they are "automatically qualified" for certain provisions, MISO states that its legal requirements will also apply to incumbent transmission owners applying to become Qualified

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<sup>546</sup> *Id.* at 36 (noting that LS Power did not find subsections (b) and (c) of MISO, FERC Electric Tariff, Attachment FF, § VIII.B.6 to be objectionable).

<sup>547</sup> *Id.* at 37 (citing LS Power Protest at 29-31). MISO notes that LS Power cites to the following statement from Order No. 1000-A, "it would be an impermissible barrier to entry to require, as part of the qualification criteria, that a transmission developer demonstrate that it either has, or can obtain, state approvals necessary to operate in a state, including state public utility status and the right to eminent domain, *to be eligible to propose a transmission facility.*" See Order No. 1000-A, 139 FERC ¶ 61,132 at P 441 (emphasis added by LS Power).

<sup>548</sup> MISO Answer at 37-38 (citing Order No. 1000-A, 139 FERC ¶ 61,132 at P 441).

Transmission Developers for purposes of submitting proposals to develop transmission facilities outside their respective footprints.<sup>549</sup>

279. MISO disagrees with LS Power's argument that the use of credit ratings and audited financial statements as financial requirements are overly narrow and would not provide MISO with enough flexibility to evaluate the capability of a Qualified Transmission Developer Applicant. MISO states that credit ratings should continue to be recognized and evaluated as a reliable means of determining the financial standing of a Qualified Transmission Developer Applicant. However, MISO states that after review of statements and comments on this subject, it has determined that other types of evidence of financial standing should be permitted and considered as well. MISO states that it is willing to submit a compliance filing to modify its proposed financial requirements to allow an entity with no credit rating, or with one below investment grade, to submit other information in support of its financial capability to construct the transmission facility in a timely manner and to maintain and operate it reliably for the long term. Therefore, MISO proposes to revise its proposed financial requirements "to establish the credit rating as a qualitative factor, not a definitive hurdle, to determine if a Qualified Transmission Developer Applicant has the necessary financial qualifications to become a Qualified Transmission Developer."<sup>550</sup> MISO adds that although it is willing to make these revisions, it reiterates its requirement to provide two years of audited financial statements, as it is even more important to the extent that an investment grade credit rating is no longer required. MISO states that without the financial statements, it would be extremely difficult to judge an entity's liquidity, assets, equity, and/or cash flows, which are important factors used by lenders. Moreover, MISO states that, because many projects are long-term in nature, it is just and reasonable to require financial statements that demonstrate financial capability over the long-term.<sup>551</sup>

280. Finally, in response to arguments made by LS Power and ATC/Duke/Transource, MISO states that it is fair to presume that an incumbent transmission owner has the capability to implement, operate and maintain an Open Transmission Project that interconnects with its own system because it has already been deemed qualified to implement, operate, and maintain the system to which the New Transmission Facilities will be connected. MISO states that it is not proposing to automatically assign a transmission project to an incumbent transmission owner but allowing incumbent

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<sup>549</sup> *Id.* at 36-38.

<sup>550</sup> *Id.* at 39.

<sup>551</sup> *Id.* at 39-40.

transmission owners to pre-qualify to compete for the right to build the facilities that are connected to its transmission system.<sup>552</sup>

v. **Commission Determination**

281. We find that MISO's proposed qualification criteria partially comply with the requirements of the First Compliance Order and Order No. 1000. MISO has complied with the requirement to revise its Tariff to explicitly state what qualification requirements a transmission developer must satisfy before being able to bid for a transmission facility. In addition, MISO has proposed qualification requirements that, in general, provide a potential transmission developer the opportunity to demonstrate that it has the necessary financial and technical expertise to develop, construct, own, operate, and maintain transmission facilities. However, MISO must make certain revisions to its proposed qualification criteria to ensure that they are not unduly discriminatory or preferential and that they are fair and not unreasonably stringent when applied to either the incumbent transmission owners or nonincumbent transmission developers, as discussed below.

282. We find that MISO's proposed application fee of \$20,000 is just and reasonable. We disagree with ATC/Duke/Transource's and LS Power's concerns and find reasonable MISO's answer that it based its estimate of the costs for evaluating an application on the number of man-hours required. Furthermore, we agree with MISO that the membership fees and/or application fees in other transmission planning regions are not necessarily indicative of costs that are specific to the MISO region. The \$20,000 application fee also applies only to a transmission developer's initial application<sup>553</sup> and, once it qualifies, a transmission developer will not have to pay the \$20,000 as part of the annual renewal update.<sup>554</sup> In addition, as ATC/Duke/Transource point out, it would be unduly discriminatory for MISO to exempt incumbent transmission owners from having to pay this fee. However, with our rejection of MISO's proposal to allow incumbent transmission owners to automatically qualify,<sup>555</sup> all potential transmission developers, whether incumbent or nonincumbent, will have to meet the qualification requirements in the Tariff and must be assessed the \$20,000 qualification application fee.

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<sup>552</sup> *Id.* at 31-32.

<sup>553</sup> MISO, FERC Electric Tariff, Attachment FF, § VIII.B.2.a.1 (New Qualified Transmission Developers) (which includes the \$20,000 application fee).

<sup>554</sup> *Id.* § VIII.B.2.a.6.d (Renewing Qualified Transmission Developers) (which does not include the \$20,000 application fee).

<sup>555</sup> *See infra* P 294.

283. We accept MISO's proposal to notify potential transmission developers whether they meet the qualification requirements within 180 days of receiving each application.<sup>556</sup> We disagree with LS Power that MISO's proposed 180-day review period is a delay tactic. We find persuasive MISO's explanation that the proposal will not introduce delays into the competitive bidding process because transmission developers will be notified of whether they meet the qualification requirements at least three months before MISO requests bids for specific transmission facilities and approximately 180 days before bids are actually due.

284. We also disagree with Organization of MISO States' and LS Power's concerns about MISO's proposed general requirement that a transmission developer submit written commitments to comply with current requirements and standards in order to qualify. We agree with MISO that, in MISO, these requirements must be met by any entity that wishes to interconnect with a transmission owner's system and that these requirements have been developed over the course of many years of transmission owners designing and operating the system.<sup>557</sup> In addition, although LS Power is correct that a transmission developer will have to comply with relevant standards even absent a written commitment to do so, we find it reasonable for MISO to require a transmission developer to provide written commitments as part of their application to become a qualified transmission developer. However, we will require MISO to revise the requirement that an entity provide a written commitment to register with NERC upon being designated a Selected Transmission Developer. Depending on the nature of its operations and assets, a Selected Transmission Developer may not have fulfilled the requirements necessary to register with NERC at the time MISO designates that entity as a Selected Transmission Developer. Instead, we find it appropriate that transmission developers provide a written commitment that they will register with NERC in accordance with the guidelines and timing that NERC requires. Therefore, we direct MISO to submit, within 60 days of the date of issuance of this order, a further compliance filing to revise its requirement that a transmission developer sign a written commitment to register with NERC upon being designated the Selected Transmission Developer to delete that language and replace it

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<sup>556</sup> We also accept MISO's proposal to extend the notification period to 270 days for the first year. MISO states that it expects the number of applicants seeking qualification will be much higher in the first year than in subsequent years, necessitating more time to process applications. MISO Answer at 30.

<sup>557</sup> The transmission owner's facility connection requirements address, among other things, connection requirements for interconnecting entities transmission facilities. *See* Reliability Standard FAC-001-1 (Facility Connection Requirements).

with language that allows a Selected Transmission Developer to register with NERC in accordance with NERC's registration guidelines.

285. We find unpersuasive Organization of MISO States, LS Power, and ATC/Duke/Transource's argument that MISO's proposed transmission project implementation, operations, and maintenance requirements should not be considered at the transmission developer qualification stage. We agree with MISO that these requirements will allow it to assess a potential transmission developer's financial and technical resources to construct, own, and operate a transmission project, consistent with the requirements of Order No. 1000. In the context of a competitive bidding model like MISO has proposed, there will be overlap between the qualification criteria and the information a qualified transmission developer must submit with a bid to develop a specific transmission facility. We find it reasonable for MISO to perform a check at the qualification stage to make sure a potential transmission developer meets minimum technical and financial criteria to ensure that MISO does not receive, and have to evaluate, bids from an unqualified transmission developer. Though we acknowledge that MISO's proposed qualification requirements potentially require a potential transmission developer to provide a substantial amount of information, we find that it is reasonable for MISO to require this information and it is not unduly burdensome or discriminatory so as to deter transmission developers from participating in MISO's competitive bidding process.

286. However, we agree with ATC/Duke/Transource's and LS Power's protests that MISO must clarify what information a potential transmission developer can submit to show that it meets the proposed operations and maintenance requirements. Specifically, we agree that MISO has not made clear how an entity should calculate or present any evidence in support of its ability to perform the required operational tasks, several of which, as ATC/Duke/Transource point out, are vague and potentially subject to different interpretations. We therefore direct MISO to submit, within 60 days of the date of issuance of this order, a compliance filing that revises its Tariff to specify the information it requires a potential transmission developer to submit to show that it meets the qualification requirements.

287. In addition, we agree with LS Power that MISO should clarify in its Tariff that, to meet the operations and maintenance requirements, a transmission developer may demonstrate that it either possesses or has the ability to obtain sufficient capabilities and competencies relating to MISO's operations and maintenance requirements. However, with respect to a transmission developer's ability to obtain sufficient capabilities and competencies relating to MISO's operations and maintenance requirements, we note that it is likely insufficient for a transmission developer to only submit a list of contractors

with which it could contract if selected and nothing more. We also note that the Commission has rejected as unreasonably stringent a proposal to require the transmission developer to provide executed contracts to satisfy the qualification criteria.<sup>558</sup> Therefore, we direct MISO to submit, within 60 days of the date of issuance of this order, a further compliance filing that revises its Tariff to allow entities to provide evidence of their ability to obtain sufficient capabilities with regard to operations and maintenance in a Qualified Transmission Provider Application to satisfy the operations and maintenance qualification requirements.

288. We also find that the requirement that a transmission developer provide information regarding its previous record of construction, operation, and maintenance of transmission facilities within and outside the MISO controlled grid is unreasonably stringent. We find that the proposed requirement could effectively prohibit transmission developers from submitting proposals to construct and own an Open Transmission Project if the transmission developer itself does not have experience constructing, operating, or maintaining transmission facilities, even though the transmission developer could rely on contractors with such experience. Accordingly, we direct MISO to submit, within 60 days of the date of issuance of this order, a further compliance filing that revises its Tariff to allow a potential transmission developer to submit a detailed plan for constructing, operating, and maintaining transmission facilities in the absence of a previous record regarding construction, operation, and maintenance of transmission facilities.

289. We reject LS Power's request that MISO clarify what it intends to do with the information relating to the requirement to have sufficient capability and competencies related to major facility replacement or rebuilds required as a result of catastrophic destruction or natural aging through normal wear and tear, including financial strategy to facilitate timely replacement and/or rebuilds. However, we find that that Tariff requires clarification as to the types of information that could be submitted to MISO in order to fulfill this information requirement. In its answer, MISO states that the information an entity could submit to meet this requirement includes: (1) documentation of existing staff, contractors, locations, policies, procedures, tools, equipment, and inventory; or (2) a detailed business plan describing the resources (including staff, contractors, warehouses, material suppliers, tools, and equipment) and required competencies that will be obtained

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<sup>558</sup> *Southwest Power Pool, Inc.*, 144 FERC ¶ 61,059, at P 227 (2013) (“Requiring executed contracts to qualify to submit a bid creates an impermissible barrier to entry and does not comply with the requirement that qualification criteria be fair and not unreasonably stringent when applied to either the incumbent transmission provider or nonincumbent transmission developer.”).

to perform the required operations and maintenance tasks.<sup>559</sup> Thus, consistent with MISO's answer, we direct MISO to submit, within 60 days of the date of issuance of this order, a compliance filing to revise its Tariff to provide such examples of information that may be submitted to fulfill the requirement to have sufficient capability and competencies related to major facility replacement or rebuilds required as a result of catastrophic destruction or natural aging through normal wear and tear, including financial strategy to facilitate timely replacement and/or rebuilds.

290. However, we find unpersuasive LS Power's argument that this requirement is similar to a proposed requirement in the Florida Parties' First Compliance Order, under which an entity was required to demonstrate that it had the ability to assume liability for major losses resulting from failure of transmission facilities.<sup>560</sup> There, the Commission found that it was unclear how a prospective transmission developer would demonstrate its ability to assume liability for major losses resulting from any failure of transmission facilities ability and required the filing parties to explain why this information is necessary and not unduly discriminatory when transmission developers are already required to demonstrate their financial resources.<sup>561</sup> In this case, MISO is requiring that a Qualified Transmission Developer Applicant indicate the process and financial strategy it would use to handle a major facility replacement and/or rebuild in a timely manner. We find it reasonable for MISO to require this information to ensure that a Qualified Transmission Developer Applicant has a plan in place in case it needs to replace or rebuild a transmission facility.

291. We disagree with LS Power that the entirety of MISO's proposed legal requirements should be removed from the qualification criteria. As mentioned above, in Order No. 1000-A, the Commission rejected LS Power's argument that the qualification criteria should be limited to technical and financial capabilities and ruled that "each transmission planning region [is permitted] the flexibility to formulate qualification criteria that best fit its transmission planning processes and addresses the particular needs of the region."<sup>562</sup>

292. However, we find that MISO's proposed legal requirement that a Qualified Transmission Developer Applicant be authorized to do business in at least one state

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<sup>559</sup> MISO Answer at 35.

<sup>560</sup> Florida Parties First Compliance Order, 143 FERC ¶ 61,254 at P 151.

<sup>561</sup> *Id.*

<sup>562</sup> Order No. 1000-A, 139 FERC ¶ 61,132 at P 440.

within the MISO footprint to be unjust and unreasonable and unduly discriminatory. In Order No. 1000-A, the Commission ruled: “it would be an impermissible barrier to entry to require, as part of the qualification criteria, that a transmission developer demonstrate that it either has, or can obtain, state approvals necessary to operate in a state, including state public utility status and the right to eminent domain.”<sup>563</sup> We disagree with MISO’s interpretation of Order No. 1000-A that the requirement for a transmission developer to demonstrate it has approval to operate within a state is an impermissible barrier to entry only for entities that plan to *propose* a transmission facility for potential selection in the regional transmission plan for purposes of cost allocation under a sponsorship model, but not those applying to *develop* a transmission facility that has already been selected in the regional transmission plan for purposes of cost allocation under a competitive bidding model. In Order No. 1000-A, the Commission determined that requiring proof of such authorization is unacceptable during the qualification process and, in MISO, qualification criteria serve as the basis for a transmission developer to become eligible to bid on a transmission facility that has been selected in the regional transmission plan for purposes of cost allocation. The Commission was discussing the qualification requirements in general, and did not distinguish between a competitive bidding or sponsorship model. Therefore, we direct MISO to submit, within 60 days of the date of issuance of this order, a further compliance filing revising its Tariff language to remove the legal requirement that a transmission developer be authorized to do business in at least one state in the MISO footprint from its qualification criteria.

293. With regard to MISO’s proposed financial qualification requirements, we agree with LS Power and find that MISO’s proposal is unfair and unreasonably stringent. Specifically, MISO’s proposal lacks appropriate flexibility because it fails to provide an alternative, such as allowing financial statements in lieu of a credit rating.<sup>564</sup> However,

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<sup>563</sup> *Id.* P 441. Later, in the Florida Parties First Compliance Order, the Commission found that requiring a prospective transmission developer to demonstrate that it could obtain the necessary licensing in applicable cities, counties, and states was inconsistent with Order No. 1000-A and required Tampa Electric, Florida Power and Florida Power & Light to remove the requirement that an entity demonstrate its ability to comply with applicable local, state, and federal regulations. Florida Parties First Compliance Order, 143 FERC ¶ 61,254 at P 150.

<sup>564</sup> See SERTP First Compliance Order, 144 FERC ¶ 61,054 at P 154 (citing, *e.g.*, *South Carolina Elec. & Gas Co.*, 143 FERC ¶ 61,058, at P 145 (2013); *Black Hills Power, Inc.*, 123 FERC ¶ 61,020, at P 20 (2008) (affirming that “transmission providers should not automatically determine that an applicant is not creditworthy if it does not have a credit rating or that credit rating is below investment grade”)); see also *Policy Statement on Electric Creditworthiness*, Policy Statement on Credit-Related Issues for

(continued...)

we find reasonable the proposal MISO offers in its answer to revise its proposed financial qualification requirements to allow an entity with no credit rating, or with one below investment grade, to submit other information in support of its financial capability to construct the transmission facility in a timely manner and to maintain and operate it reliably for the long term, and to “establish the credit rating as a qualitative factor, not definitive hurdle, to determine if a Qualified Transmission Developer Applicant has the necessary financial qualifications.”<sup>565</sup> Therefore, we direct MISO to submit, within 60 days of the date of issuance of this order, a further compliance filing that revises its Tariff to establish that a Qualified Transmission Developer Applicant may submit alternative financial information other than a credit rating to satisfy the financial qualification requirements.

294. We find unduly discriminatory MISO’s proposals to exempt incumbent transmission owners from having to meet the qualification requirements to bid on a new transmission facility when the transmission facility connects to an existing transmission facility owned by the incumbent transmission owner.<sup>566</sup> Although Order No. 1000 states that qualification criteria should allow for the possibility that an existing public utility transmission provider already satisfies the criteria,<sup>567</sup> this does not mean that MISO can exempt an incumbent transmission owner from having to meet the qualification criteria if it is proposing a transmission facility for selection in the regional transmission plan for purposes of cost allocation.<sup>568</sup> The Commission stressed that, “appropriate qualification criteria should be fair and not unreasonably stringent when applied to either the incumbent transmission owner or nonincumbent transmission developers.”<sup>569</sup> Further, these criteria must not be unduly discriminatory or preferential and must provide each

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Electric OATT Transmission Providers, Independent System Operators and Regional Transmission Organizations, 109 FERC ¶ 61,186, at PP 13-14 (2004).

<sup>565</sup> MISO Answer at 39-40.

<sup>566</sup> MISO, FERC Electric Tariff, Attachment FF, §§ VIII.B.2.b, VIII.B.4.i, VIII.B.5.m.

<sup>567</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 324.

<sup>568</sup> The Commission rejected similar proposals to exempt incumbent transmission owners from having to meet the qualification requirements in the Florida and ISO-NE transmission planning regions. *See* Florida Parties First Compliance Order, 143 FERC ¶ 61,254 at P 130; ISO-NE First Compliance Order, 143 FERC ¶ 61,150 at P 270.

<sup>569</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 324

potential transmission developer the opportunity to demonstrate that it has the necessary financial resources and technical expertise to develop, construct, own, operate, and maintain transmission facilities.<sup>570</sup> We are not persuaded by MISO's argument that an incumbent transmission owner already has demonstrated its qualification to develop and maintain a new transmission facility simply because it has constructed and maintained the system to which the new transmission facility will be connected. Accordingly, we direct MISO to submit, within 60 days of the date of issuance of this order, a further compliance filing to remove the provisions in its Tariff that exempt incumbent transmission owners from having to satisfy some or all of the qualification requirements.<sup>571</sup>

295. We agree with LS Power that MISO should not require the specified "additional information" from an entity that MISO has already designated as a Qualified Transmission Developer.<sup>572</sup> We find that requiring additional information would be inappropriate given that MISO has already designated an entity as a Qualified Transmission Developer at this stage. It appears the additional information that MISO may require would be related to a specific bid a Qualified Transmission Developer may submit.<sup>573</sup> While it is appropriate for MISO to require project-specific information from a Qualified Transmission Developer as part of the information requirements for submitting a bid, MISO may not require such project-specific information as part of the qualification process to reevaluate whether a transmission developer that MISO already found to be qualified to submit a bid is no longer qualified to do so. Accordingly, we direct MISO to submit, within 60 days of the date of issuance of this order, a further compliance filing to delete the proposed provision.

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<sup>570</sup> *Id.* P 323.

<sup>571</sup> We find that this compliance directive addresses contentions raised by LS Power, Organization of MISO States, and ATC/Duke/Transource that the qualification criterion requiring a prospective transmission developer to provide a history of meeting transmission project schedules should apply to incumbent transmission owners. This directive also resolves LS Power's argument that MISO's proposed Tariff language that "each group of contiguous New Transmission Facilities associated with the Open Transmission Project" is vague and overly broad.

<sup>572</sup> MISO, FERC Electric Tariff, Attachment FF, §§ VIII.B.4.h.

<sup>573</sup> For example, the provision states that the additional information includes "aspects specific to the transmission project and/or locations in question as part of any Transmission Proposal Request." *Id.* § VIII.B.4.h.

**c. Information Requirements**

296. Order No. 1000 required each public utility transmission provider to identify in its tariff the information that a prospective transmission developer must submit in support of a transmission project proposed in the regional transmission planning process.<sup>574</sup> The information requirements must be sufficiently detailed to allow a proposed transmission project to be evaluated comparably to other transmission facilities proposed in the regional transmission planning process. The information requirements must be fair and not be so cumbersome as to effectively prohibit transmission developers from proposing transmission facilities, yet not be so relaxed that they allow for relatively unsupported proposals.<sup>575</sup> Order No. 1000 also required each public utility transmission provider to identify in its tariff the date by which a transmission developer must submit information on a proposed transmission project to be considered in a given transmission planning cycle.<sup>576</sup>

**i. First Compliance Order**

297. In the First Compliance Order, the Commission found that MISO's proposed information requirements for the submission of New Transmission Proposals to construct and own Open Transmission Projects partially complied with the requirements of Order No. 1000.<sup>577</sup> The Commission found that MISO's proposed information requirements are "not so cumbersome that they effectively prohibit transmission developers from proposing transmission projects yet not . . . so relaxed that they allow for relatively unsupported proposals."<sup>578</sup>

298. However, with respect to MISO's proposed deposit requirement, which required a New Transmission Proposal Applicant to pay the lesser of one percent of the projected project costs or \$500,000 as a deposit to cover the expense to evaluate the New Transmission Proposals, the Commission found that the amount of the deposit had not been justified and directed MISO to provide an explanation as to how it decided on the lesser of one percent or \$500,000 as the amount required for a deposit. The Commission

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<sup>574</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 325.

<sup>575</sup> *Id.* P 326.

<sup>576</sup> *Id.* P 325.

<sup>577</sup> First Compliance Order, 142 FERC ¶ 61,215 at P 296.

<sup>578</sup> *Id.* P 297 (citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 326).

also required MISO to revise its Tariff to: (1) clarify how it will calculate costs it will incur to evaluate New Transmission Proposals for the purpose of determining whether a refund of the deposit will be needed; (2) clarify whether or not disqualified New Transmission Proposal Applicants will get their deposit back immediately upon disqualification or must wait 30 days after the designation of the Selected Transmission Developer to receive deposit refunds;<sup>579</sup> and (3) provide that interest will be paid on any bid deposits that are refunded to a transmission developer.<sup>580</sup>

299. On the issue of who must develop an implementation schedule for a proposed transmission facility, the Commission found MISO's proposed Tariff language was unclear. Thus, the Commission directed MISO to file Tariff revisions to make clear that: (1) a transmission developer must include in a New Transmission Proposal a development schedule that generally indicates the required steps, such as the granting of state approvals, necessary to develop and construct the transmission facility such that it meets the needs of the region; and (2) MISO will establish a date by which state approvals to construct must have been achieved that is tied to when construction must begin to timely meet the need that the project is selected to address.<sup>581</sup>

## ii. Summary of Compliance Filings

300. MISO proposes several Tariff revisions to comply with the Commission's directives regarding MISO's proposed deposit requirements. First, MISO proposes to provide for interest to be paid on any bid deposits that are refunded to a transmission developer. MISO clarifies that for refunds to disqualified New Transmission Proposal Applicants, consistent with other refunds, it will refund deposit funds, with interest, on a pro rata basis to disqualified transmission developers 30 days after designation of the Selected Transmission Developer. The relevant portion of the Tariff section now provides:

Any funds remaining after the evaluation of all New Transmission Proposals submitted in response to a Transmission Proposal Request, including refunds to New Transmission Proposal Applicants who are judged unqualified by the Transmission Provider, shall be refunded

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<sup>579</sup> Disqualified New Transmission Proposal Applicants are those deemed not qualified for the particular transmission project and/or those New Transmission Proposal Applicants whose proposals were not selected.

<sup>580</sup> First Compliance Order, 142 FERC ¶ 61,215 at PP 300-301.

<sup>581</sup> *Id.* P 304.

on a pro rata basis to each New Transmission Proposal Applicant within thirty (30) days following the designation of the Selected Transmission Developer, including interest payable at a rate consistent with 18 CFR § 35.19a.<sup>[582]</sup>

301. Second, with regard to calculation of costs incurred by MISO and the appropriate amount of New Transmission Developer Applicants' deposits to be refunded, MISO clarifies that it shall evaluate all New Transmission Proposals submitted in response to each Transmission Proposal Request together, and track all time and expenses specifically associated with the evaluation of all such New Transmission Proposals. The deposits of all New Transmission Proposal Applicants will be applied equally to the cost of evaluating all the New Transmission Proposals, which MISO states is essentially pooling such funds to cover the costs of evaluating all proposed solutions. As noted above, any funds remaining after all New Transmission Proposals have been evaluated will be refunded on a pro rata basis to each New Transmission Proposal Applicant, including interest.<sup>583</sup>

302. Third, MISO proposes to eliminate the previous deposit requirement that was equal to the lesser of one percent of estimated project cost or \$500,000. Instead, MISO proposes to require a deposit of \$100,000 for each New Transmission Proposal. MISO states that it decided to lower the deposit requirement based on further consultation with stakeholders and consideration of the concerns raised in response to its prior proposal. To ensure that the New Transmission Proposal Applicants, and not MISO (or ultimately retail ratepayers), will bear the full cost associated with evaluating their proposals, MISO proposes to bill any shortfall associated with the evaluation of the New Transmission Proposals submitted in response to each Transmission Proposal Request to all New Transmission Proposal Applicants on a pro rata basis and require payment of such shortfall within 30 days of MISO providing notice.<sup>584</sup> MISO argues that this proposal appropriately balances the need to ensure that transmission developers bear the cost of evaluating the proposals they may submit with concerns that a deposit amount of \$500,000 could potentially limit the number of New Transmission Proposals received. MISO states that the deposit also helps to ensure that Qualified Transmission Developers submitting New Transmission Proposals are serious and intend to pursue the transmission

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<sup>582</sup> MISO, FERC Electric Tariff, Attachment FF, § VIII.C.2.b.

<sup>583</sup> MISO Compliance Transmittal at 16-17 (referencing MISO, FERC Electric Tariff, Attachment FF, § VIII.C.2.b).

<sup>584</sup> *Id.* at 17. *See also* MISO, FERC Electric Tariff, Attachment FF, § VIII.C.2.b.

project if selected. According to MISO, the proposed deposit is just and reasonable, especially given that all unspent deposit amounts will be refunded with interest.<sup>585</sup>

303. With respect to the Commission's directives regarding implementation schedules for proposed transmission facilities, MISO proposes to provide that a New Transmission Proposal must include a "detailed project implementation schedule for each New Transmission Facility, driven by the required in-service date, which must include proposed schedules for route and site evaluation, regulatory permitting, land acquisition, engineering and design, land surveying, material procurement, construction, and commissioning for all New Transmission Facilities."<sup>586</sup> MISO states that it has also revised the Tariff to explicitly provide that:

The Transmission Provider will include in th[e] report [which explains the basis for Selected Transmission Developer selection] a date(s) by which state approval(s) to construct must be achieved based upon when construction must begin to timely meet the Transmission Issue to be addressed by the Open Transmission Project(s) and taking into account the project implementation schedule(s) provided by the Selected Transmission Developer in its New Transmission Proposal.<sup>[587]</sup>

304. Further, MISO proposes to revise the Tariff to state that the Transmission Proposal Request will also "specify additional requirements or qualification criteria of a specific state(s) related to specific New Transmission Facilities to be located within that state's(s') boundaries" that must be included in a New Transmission Proposal.<sup>588</sup> In addition, MISO proposes that a New Transmission Proposal must include documentation of project implementation capabilities, and of operations, maintenance, repair, and replacement capabilities, relative to the applicable locations and jurisdictions where the New Transmission Facilities will be constructed.<sup>589</sup> Similarly, MISO proposes to provide that documentation of project implementation capabilities, and of operations,

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<sup>585</sup> *Id.*

<sup>586</sup> *Id.* See also MISO, FERC Electric Tariff, Attachment FF, § VIII.C.3.a.

<sup>587</sup> MISO, FERC Electric Tariff, Attachment FF, § VIII.E.8.

<sup>588</sup> *Id.* § VIII.C.2.c.

<sup>589</sup> *Id.* §§ VIII.C.3.d-3.e.

maintenance, repair, and replacement capabilities, must include a description of existing and/or planned capabilities to be used by the New Transmission Proposal Applicant to perform a list of tasks in the locations and jurisdictions where the New Transmission Facilities associated with the Open Transmission Project are to be located.<sup>590</sup>

305. Finally, MISO proposes that an incumbent transmission owner is assumed to fulfill the project implementation requirements and the operations, maintenance, repair, and replacement requirements for Open Transmission Projects that connect to its system.<sup>591</sup>

**iii. Protests/Comments**

306. LS Power contends that MISO's proposed \$100,000 deposit requirement is too high and is unsubstantiated. It requests that MISO provide the basis for its conclusion to require \$100,000 to evaluate each project submission.<sup>592</sup>

307. Organization of MISO States states that it is concerned that MISO's proposal to collect project proposal evaluation costs that exceed the \$100,000 deposit will create uncertainty for prospective bidders. Organization of MISO States contends that, while it acknowledges that any shortfall is likely to be recovered through MISO's uplift charge, the uncertainty of project proposal evaluation costs will discourage transmission developers from submitting transmission projects to MISO for evaluation. To reduce this uncertainty, Organization of MISO States asserts that MISO should be required to provide potential transmission developers with an estimate of their share of the total project evaluation costs and any potential surcharge necessary to make up for a shortfall should those costs exceed the deposits.<sup>593</sup>

308. Organization of MISO States also contends that MISO's proposed language referencing "New Transmission Proposal Applicants who are judged unqualified" in the proposed Tariff section dealing with deposits and refunds,<sup>594</sup> and not applicant

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<sup>590</sup> *Id.* §§ VIII.C.7-8.

<sup>591</sup> *Id.*

<sup>592</sup> LS Power Protest at 36.

<sup>593</sup> Organization of MISO States Comments at 5-6.

<sup>594</sup> *See* MISO, FERC Electric Tariff, Attachment FF, § VIII.C.2.b. This proposed section states in relevant part that, "[a]ny funds remaining after the evaluation of all New Transmission Proposals submitted in response to a Transmission Proposal Request, including refunds to New Transmission Proposal Applicants who are judged unqualified

qualifications,<sup>595</sup> is misplaced.<sup>596</sup> Organization of MISO States states that MISO needs to clarify its proposal as to whether MISO will allow unqualified transmission developers to submit transmission proposals. Organization of MISO States states that, if this is MISO's intent, a New Transmission Proposal Applicant submitting a New Transmission Proposal that is later deemed to be unqualified should not have to wait up to 30 days after MISO designates a Selected Transmission Developer to receive its refunded deposit. Organization of MISO States argues that the transmission developer selection process, which could take up to six months, is an unreasonably long time for a potential transmission developer who was disqualified prior to the transmission proposal evaluation process to wait for its refund.<sup>597</sup>

309. With respect to MISO's proposal that the Transmission Proposal Request will also "specify additional requirements or qualification criteria of a specific state(s) related to specific New Transmission Facilities to be located within that state's(s') boundaries" that must be included in a New Transmission Proposal, LS Power contends that MISO's proposal is an improper attempt to re-insert the state right of first refusal language that the Commission rejected in the First Compliance Order.<sup>598</sup>

310. Similarly, in response to MISO's proposal that documentation of the New Transmission Proposal Applicant's project implementation capabilities and operations, maintenance, repair, and replacement capabilities must include a description of existing and/or planned capabilities to be used by the New Transmission Proposal Applicant to perform a list of tasks in the locations and jurisdictions where the New Transmission Facilities associated with the Open Transmission Project are to be located, LS Power objects to the inclusion of the phrase "in the location and jurisdictions where the New Transmission Facilities...are to be located."<sup>599</sup> LS Power states that this phrase clearly

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by the Transmission Provider, shall be refunded on a pro rata basis to each New Transmission Proposal Applicant."

<sup>595</sup> *See id.* § VIII.B.

<sup>596</sup> Organization of MISO States Comments at 7.

<sup>597</sup> *Id.* at 6-7.

<sup>598</sup> LS Power Protest at 36-37 (citing First Compliance Order, 142 FERC ¶ 61,215 at P 205).

<sup>599</sup> *Id.* at 38 (referencing MISO, FERC Electric Tariff, Attachment FF, §§ VIII.C.7-8).

favors incumbent transmission owners, as new entrants are unlikely to have experience in the area around the new transmission facility because MISO has had a right of first refusal in place largely prohibiting them from obtaining the experience MISO seeks to now require. LS Power states that MISO has offered no explanation as to why it should matter where a transmission developer has acquired experience building and operating transmission lines.<sup>600</sup>

311. Lastly, LS Power also states that MISO's proposed submission requirements for New Transmission Proposals exempts incumbent transmission owners from submitting the information because under MISO's proposal, an incumbent transmission owner is assumed to fulfill the project implementation requirements for Open Transmission Projects that connect to the incumbent transmission owner's system.<sup>601</sup> LS Power argues that it is inappropriate to assume that an incumbent transmission owner has certain capabilities for purposes of transmission project submission and evaluation and that all qualified transmission developers should thus be required to submit the same information. LS Power states the Commission should reject this exemption.<sup>602</sup>

**iv. Answer**

312. MISO states that LS Power's argument that MISO's proposed \$100,000 deposit is too high is unsubstantiated. MISO states that it has reduced the deposit requirement from \$500,000 to \$100,000, which is reasonable for the nature and magnitude of Open Transmission Projects. MISO states that the Commission has already approved a \$100,000 deposit requirement for funding the study of an interconnection project involving a generating facility with a capacity of 6 MW to 20 MW, which generally requires a minimum voltage threshold of 100 kV. Comparatively, MISO states, an MVP has a minimum voltage threshold of 100 kV and an MEP has a minimum voltage threshold of 345 kV. MISO states that because a \$100,000 deposit requirement is reasonable for smaller projects, it should be considered reasonable for larger, regionally allocated, MVP and MEP projects.<sup>603</sup>

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<sup>600</sup> *Id.*

<sup>601</sup> *Id.* at 37 (referencing MISO, FERC Electric Tariff, Attachment FF, §§ VIII.C.7-8).

<sup>602</sup> *Id.* at 37-38.

<sup>603</sup> MISO Answer at 19-20.

313. MISO explains that it usually anticipates study costs in the tens of thousands of dollars, so it is reasonable to expect that the cost will be substantially greater where the evaluation involves a significant number of different proposals to construct MEPs and MVPs to be assessed and compared at the same time. MISO adds that the deposit amount accounts for the uncertainty and variability of how many New Transmission Proposals it will receive in response to each Transmission Proposal Request. MISO asserts that the scope of each Open Transmission Project can vary greatly – from a relatively small MEP that may cost \$5 million to an MVP that may cost several hundred million dollars. MISO argues that even for an MEP that costs \$5 million, the proposed \$100,000 deposit requirement would be a small percentage of an Open Transmission Project’s costs. MISO states that its proposed amount also serves to prevent the submission of purely speculative or duplicative New Transmission Proposals that would exacerbate MISO’s ability to evaluate proposals in a timely manner, which would increase costs and hinder cost-effective and efficient transmission development.<sup>604</sup>

314. MISO also states that Organization of MISO States’ concern that MISO’s proposed surcharge creates unnecessary uncertainty is unfounded. First, MISO states that it agrees with Organization of MISO States that MISO should strive to provide potential developers with an accurate estimate of their share of the total project evaluation costs and any potential surcharge. MISO states that, in the event that the deposit does not cover all study costs, the costs of evaluating proposals should not be spread pro rata among MISO customers through the uplift charge. MISO states that the provisions for the proposed surcharge are just and reasonable because they ensure that the costs for evaluating the New Transmission Proposals are borne fully by the entities submitting the proposals who stand to benefit if their proposal is selected. Finally, MISO notes it will reevaluate the deposit requirement if the deposit amount consistently varies substantially from the actual evaluation costs.<sup>605</sup>

315. MISO states that Organization of MISO States’ concern that MISO will allow unqualified transmission developers to submit New Transmission Proposals and unreasonably delay deposit refunds is unfounded and is a result of a misinterpretation of MISO’s proposal to provide “refunds to New Transmission Proposal Applicant who are judged unqualified.” MISO states that, as an independent RTO, it has no incentive to engage in such conduct. MISO states that the phrase “judge unqualified” refers to those applicants whose proposals were not selected. MISO explains that while an entity may be approved as generally qualified as a Qualified Transmission Developer, it may not

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<sup>604</sup> *Id.* at 20-21.

<sup>605</sup> *Id.* at 21-22.

have the specific qualifications uniquely required to build a particular Open Transmission Project. With respect to the timing of refunds, MISO notes that all New Transmission Proposals will be evaluated together with a final selection to be made at the conclusion of the process. It is only after the Selected Transmission Developer is chosen that MISO will know which applicants are “judged unqualified,” and at this point all entities that submitted New Transmission Proposals will receive their pro rata share of any deposit refunds that may remain.<sup>606</sup>

316. MISO states that it is not attempting to reinsert the state right of first refusal into the Tariff when it referenced state-specific qualification criteria related to New Transmission Facilities located within that state’s boundaries. MISO states that this language contemplates any state-specific requirements, including those entirely unrelated to rights of first refusal. MISO states its inclusion of this provision is consistent with Commission precedent that “it is not necessarily impermissible to consider the effect of the state regulatory process at appropriate points in the regional transmission planning process,” and that “such consideration could be appropriate.”<sup>607</sup> MISO provides an example of a state law or regulation that does not prohibit a nonincumbent transmission owner from developing transmission infrastructure but might require that a transmission owner to employ local staff and maintain a local office for performing tasks related to operations and maintenance. MISO states that any such state-specific requirements need to be identified in a Transmission Proposal Request for transmission facilities within a state so that MISO can determine if the New Transmission Proposal Applicant meets all state-specific requirements.<sup>608</sup>

317. MISO also argues that the Commission should reject protestors’ objections with the language “in the locations and jurisdictions where the New Transmission Facilities...are to be located,” in the information requirements for project implementation, operations, and maintenance and disputes that it favors incumbent transmission owners. MISO states that the geography, climate, administrative processes, and regulatory requirements vary significantly among the different jurisdictions within its footprint. Therefore, for a specific Open Transmission Project, MISO asserts that it is necessary to ensure New Transmission Proposal Applicants have the capabilities, or a viable strategy to gain the capabilities, to implement transmission projects and operate

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<sup>606</sup> *Id.* at 27-28.

<sup>607</sup> First Compliance Order, 142 FERC ¶ 61,215 at P 206.

<sup>608</sup> MISO Answer at 22-23 (referencing MISO, FERC Electric Tariff, Attachment FF, § VIII.C.2.c).

and maintain transmission facilities in the specific state(s) where the Open Transmission project and associated facilities are located. MISO states that an entity in Indiana may be suited to develop transmission in Indiana but not Texas. MISO also states that an entity that has historically operated in unique circumstances, such as submarine transmission development in coastal areas, may be better suited to develop an Open Transmission Project employing that technology. MISO states that it will evaluate all applicants' plans, though relevant experience should be considered. MISO states that this requirement is not unduly discriminatory because it relates to all potential transmission developers.<sup>609</sup>

v. **Commission Determination**

318. We find that the MISO's proposed information requirements for the submission of bid proposals to construct and own Open Transmission Projects partially comply with the requirements of the First Compliance Order and Order No. 1000.

319. We find that MISO complied with the Commission's directives in the First Compliance Order with regard to the refund of deposit requirements. Specifically, we find that MISO's proposal to refund deposit funds, with interest, on a *pro rata* basis to disqualified New Transmission Proposal Applicants 30 days after designation of the Selected Transmission Developer complies with the Commission's directives that MISO clarify the manner in which it will calculate the refund to disqualified transmission developers, clarify when disqualified applicants will receive their refund, and provide that interest will be paid on any bid deposits. We find reasonable MISO's clarification that it will track its time and expenses over the course of the evaluation of all New Transmission Proposals, subtract those costs from the total amount of deposits MISO received, and then distribute any remaining funds to all New Transmission Proposal Applicants that were "judged unqualified" on a *pro rata* basis.

320. We disagree with LS Power that MISO's proposed \$100,000 deposit requirement is too high and unsubstantiated. We find just and reasonable MISO's proposed \$100,000 deposit amount, which was reduced from the lesser of \$500,000 or one percent of estimated transmission project costs. We accept MISO's proposal and justification for requiring a \$100,000 deposit requirement because the anticipated costs of simultaneously evaluating multiple Open Transmission Projects will be significant.<sup>610</sup> We also find reasonable MISO's argument that its deposit requirement should prevent speculative or duplicative New Transmission Proposals. As MISO noted in its answer, we encourage

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<sup>609</sup> *Id.* at 23-25.

<sup>610</sup> *Id.* at 19-21.

MISO to reevaluate the deposit requirement if the deposit amount consistently varies substantially from the actual evaluation costs.

321. While we agree with Organization of MISO States that MISO's proposed surcharge to make up for a shortfall should the evaluation costs exceed the deposits could create uncertainty for prospective bidders, we find that MISO's proposal puts New Transmission Proposal Applicants on notice that additional costs may be assigned. MISO has committed to providing New Transmission Proposal Applicants with a relatively accurate estimate of their share of the New Transmission Proposal costs and any potential surcharge.<sup>611</sup> MISO reduced its proposed deposit requirement from \$500,000 to \$100,000, but MISO has committed to reviewing the deposit requirement as it gains experience from evaluating New Transmission Proposals. Should the \$100,000 deposit vary substantially from the actual costs, MISO states that it will propose a different deposit amount with the Commission.<sup>612</sup> To the extent that MISO's New Transmission Proposal evaluation costs exceed the deposit requirement, we find it reasonable for MISO to collect the additional costs through a surcharge to New Transmission Proposal Applicants who stand to benefit if their proposal is selected, given that MISO reduced the deposit requirement. Further, we find that MISO's surcharge protects MISO customers from bearing the costs of evaluating New Transmission Proposals in the event the \$100,000 deposit does not cover all the associated costs. We therefore accept MISO's proposed surcharge.

322. With respect to Organization of MISO States' concern that MISO will unreasonably delay refunds to transmission developers that submit bids but "who are judged unqualified,"<sup>613</sup> MISO clarified in its answer that the phrase "judged unqualified" in the proposed Tariff language refers to bids from qualified transmission developers whose proposals were not chosen.<sup>614</sup> Thus, MISO cannot identify which New Transmission Proposal Applicants will be "judged unqualified" until after the evaluation stage is completed and the Selected Transmission Developer is chosen. However, we find that, by using the phrase "judged unqualified," MISO's proposed language is not clear and implies that a transmission developer must qualify again during the evaluation process. Therefore, consistent with MISO's clarification, we direct MISO to submit, within 60 days of the date of issuance of this order, a further compliance filing revising

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<sup>611</sup> *Id.* at 21.

<sup>612</sup> *Id.* at 22.

<sup>613</sup> MISO, FERC Electric Tariff, Attachment FF, § VIII.C.2.b.

<sup>614</sup> MISO Answer at 27.

the “who are judged unqualified” language to instead state “who are not chosen as the Selected Transmission Developer.”

323. We disagree with LS Power that MISO’s inclusion in each request for proposal a list of any additional requirements or qualification criteria of a specific state related to New Transmission Facilities located within that state’s boundaries necessarily results in the reinsertion of a federal right of first refusal based on state laws or regulations.<sup>615</sup> As the Commission stated in the First Compliance Order, it is not necessarily impermissible to consider the effect of the state regulatory process at appropriate points in the regional transmission planning process.<sup>616</sup> MISO may need certain state-specific information in a Transmission Proposal Request to properly evaluate a New Transmission Proposal Applicant’s ability to satisfy certain state-specific requirements, and its Tariff requires it to list in its request for proposals the specific requirements it will consider.<sup>617</sup>

324. Similarly, we also reject LS Power’s protest that MISO is incorrect in requiring the location and jurisdictions where New Transmission Facilities are to be located in the project implementation, operations, and maintenance data submission categories. We agree with MISO’s response that the geography, climate, administrative processes, and regulatory requirements vary significantly among the different jurisdictions within its footprint so it is necessary for MISO to request this information for it to consider during the evaluation stage. Therefore, we find it is not unduly discriminatory for MISO to require a new transmission proposal applicant to submit such information. We discuss how MISO may use this information in the evaluation of transmission developer bids in the Evaluation section below.<sup>618</sup>

325. However, we agree with LS Power that MISO’s proposed information requirements for New Transmission Proposals are unduly discriminatory because they exempt incumbent transmission owners from having to submit some of the information that nonincumbent transmission developers must submit.<sup>619</sup> Similar to our directive with

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<sup>615</sup> MISO, FERC Electric Tariff, Attachment FF, § VIII.C.2.c.iv.

<sup>616</sup> First Compliance Order, 142 FERC ¶ 61,215 at P 206.

<sup>617</sup> MISO Answer at 22-23. We address in the next section how and to what extent MISO may consider the effect of the state regulatory process when evaluating transmission developer bids.

<sup>618</sup> *See infra* P 351 .

<sup>619</sup> MISO, FERC Electric Tariff, Attachment FF, §§ VIII.C.7-8.

regard to qualification criteria above, we find it inappropriate for MISO to assume that an incumbent transmission owner has certain capabilities for the purpose of the evaluation of a transmission project bid while nonincumbent transmission developers must submit information to demonstrate their capabilities. All transmission developers, whether incumbent or nonincumbent, must be subject to the same information requirements. Therefore, we direct MISO to submit, within 60 days of the date of issuance of this order, a further compliance filing that removes the provisions from its Tariff exempting incumbent transmission owners from the proposed information requirements.

**d. Evaluation Process for Transmission Proposals for Selection in the Regional Transmission Plan for Purposes of Cost Allocation**

326. Order No. 1000 required each public utility transmission provider to amend its tariff to describe a transparent and not unduly discriminatory process for evaluating whether to select a proposed transmission facility in the regional transmission plan for purposes of cost allocation.<sup>620</sup> The evaluation process must ensure transparency and provide the opportunity for stakeholder coordination.<sup>621</sup> In addition, the evaluation process must culminate in a determination that is sufficiently detailed for stakeholders to understand why a particular transmission project was selected or not selected in the regional transmission plan for purposes of cost allocation.<sup>622</sup>

**i. First Compliance Order**

327. Regarding MISO's proposal to evaluate New Transmission Proposals submitted by New Transmission Proposal Applicants in response to a Transmission Proposal Request, the Commission found that MISO's proposed developer selection process partially complied with the requirements of Order No. 1000.<sup>623</sup> The Commission stated that MISO did not distinguish between the criteria it would use to determine whether a transmission developer is qualified to submit a New Transmission Proposal and the

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<sup>620</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 328; Order No. 1000-A, 139 FERC ¶ 61,132 at P 452.

<sup>621</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 328; Order No. 1000-A, 139 FERC ¶ 61,132 at P 454.

<sup>622</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 328; Order No. 1000-A, 139 FERC ¶ 61,132 at P 267.

<sup>623</sup> First Compliance Order, 142 FERC ¶ 61,215 at P 334.

criteria MISO will use to evaluate the New Transmission Proposals submitted. Thus the Commission found that it was not clear how MISO would determine if a transmission developer is qualified to submit a New Transmission Proposal and how MISO would evaluate New Transmission Proposals that qualified transmission developers submitted. The Commission also found that MISO had not explained nor justified that its proposed evaluation process, which would weight project costs at or less than 30 percent, properly measured the relative efficiency and cost-effectiveness of a New Transmission Proposal.<sup>624</sup> The Commission concluded, therefore, it could not yet determine whether MISO's filing complied with the requirement to describe a transparent and not unduly discriminatory process for evaluating, in this case, New Transmission Proposals submitted in response to a Transmission Proposal Request.<sup>625</sup>

328. However, the Commission addressed certain aspects that it found sufficiently clear, including that: (1) it is appropriate for MISO to consider several factors in evaluating New Transmission Proposals submitted in response to a Transmission Proposal Request; (2) the proposed qualitative criteria to evaluate a New Transmission Proposal, including the project implementation capabilities and the operations, maintenance, repair and replacement capabilities criteria, may be better used as a separate assessment of determining whether a transmission developer is qualified to submit a New Transmission Proposal to develop a transmission project for selection in the regional transmission plan for purposes of cost allocation rather than a means to evaluate the bid submitted; and (3) MISO does not justify or explain why it assigned a significantly higher percentage to non-cost-based criteria and a much lower percentage to the cost-based criterion and how that assignment results in a not unduly discriminatory evaluation process.<sup>626</sup>

329. Thus, the First Compliance Order directed MISO to revise the Tariff to: (1) specify and distinguish between the qualification requirements a transmission developer must meet to submit a New Transmission Proposal in response to a Transmission Proposal Request and the evaluation requirements regarding the New Transmission Proposals submitted by qualified transmission developers; and (2) revise its evaluation process to reflect greater weighting of costs in evaluating New Transmission Proposals in order to better reflect the relative efficiency and cost-effectiveness of any proposed transmission solution, or explain and justify why its proposed weighting of costs in the

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<sup>624</sup> *Id.* P 335.

<sup>625</sup> *Id.* P 336.

<sup>626</sup> *Id.* PP 337-339.

evaluation process complies with the requirements of Order No. 1000. The order also directed MISO to clarify whether, with respect to the requirement to submit estimated annual revenue requirements for the first 40 years of a project's in-service life, MISO intended to require New Transmission Proposals to use annual revenue requirement estimates based on Attachments GG and MM of the Tariff, and, if so, to revise the Tariff accordingly.<sup>627</sup>

330. With respect to MISO's proposed state transmission developer selection process, the Commission found that this proposal did not comply with Order No. 1000 and directed MISO to eliminate provisions in its Tariff that allow a state to select the transmission developer of a transmission facility selected in a regional transmission plan for purposes of cost allocation. The Commission found that MISO must include a transmission developer selection process whereby the public utility transmission providers in the region ultimately decide which developer is eligible to use the regional cost allocation method for a transmission project selected in the regional transmission plan for purposes of cost allocation. The Commission agreed that, to the extent that state regulatory authorities want to participate, they are able to participate.<sup>628</sup> The Commission explained, however, that the public utility transmission providers in a transmission planning region must make the selection decision with respect to the transmission developer. The Commission further explained that it has the responsibility to ensure that the rates, terms, and conditions of service provided by public utility transmission providers are just and reasonable and not unduly discriminatory or preferential and that public utility transmission providers comply with its rules and regulations enacted to meet this responsibility.<sup>629</sup> Thus, the Commission stated, it is responsible for ensuring that public utility transmission providers in a region adopt transparent and not unduly discriminatory criteria for selecting a new transmission project in a regional transmission plan for purposes of cost allocation. The Commission stated that the role of state regulatory authorities must be to provide guidance and recommendations, including to consult, collaborate, inform, and even recommend a transmission developer that is eligible to use the regional cost allocation method for a transmission project selected in the regional transmission plan for purposes of cost

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<sup>627</sup> *Id.* PP 334-344.

<sup>628</sup> *Id.* P 354.

<sup>629</sup> *Id.* P 354.

allocation, but that the public utility transmission providers in a transmission planning region must make the selection decision with respect to the developer.<sup>630</sup>

**ii. Summary of Compliance Filings**

331. MISO states that, in order to clearly distinguish between qualification requirements a transmission developer must meet to submit a New Transmission Proposal and the evaluation criteria MISO will use to evaluate the New Transmission Proposals submitted by Qualified Transmission Developers, MISO has proposed several revisions to Attachment FF of the Tariff to ensure the evaluation requirements and criteria for proposals clearly apply only to New Transmission Proposals.<sup>631</sup> MISO states that these revisions are not intended to change the substance of the Tariff provisions related to evaluation of New Transmission Proposals, but rather to distinguish the process to evaluate applications to become a Qualified Transmission Developer from the process to evaluate New Transmission Proposals.<sup>632</sup>

332. With regard to the requirement to revise its evaluation process to either reflect greater weighting of costs in evaluating New Transmission Proposals or explain and justify why its proposed weighting of costs in the evaluation process complies with the requirements of Order No. 1000, MISO proposes to maintain its proposed weighting and provide justification.<sup>633</sup> Specifically, MISO states that the 30 percent weighting it originally proposed to apply in its evaluation process to the cost estimate and facility design criterion is just and reasonable, and, therefore, appropriate. According to MISO, the cost estimates supplied with a New Transmission Proposal are not firm and binding. MISO asserts that, unlike other industries, there is too much uncertainty and risk associated with the development of a new transmission facility to establish a fixed price in advance of regulatory permitting, right-of-way acquisition, final engineering and design, development, and construction. MISO claims that placing a disproportionate emphasis on cost estimates during the New Transmission Proposal evaluation process will result in an undue emphasis on the most inherently inaccurate aspect of the overall bid, which does nothing to ensure that more efficient and cost-effective solutions are chosen. MISO further claims that an overemphasis on the cost portion of a New

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<sup>630</sup> *Id.* PP 351-354.

<sup>631</sup> *See* MISO, FERC Electric Tariff, Attachment FF, § VIII.E.

<sup>632</sup> MISO Compliance Transmittal at 25.

<sup>633</sup> *See* MISO, FERC Electric Tariff, Attachment FF, § VIII.E.7.

Transmission Proposal could encourage parties to underestimate their bid costs or submit projects that are inferior from a design perspective.<sup>634</sup>

333. MISO explains that, because New Transmission Proposals do not contain binding bid prices, the purpose of submitting cost estimates is simply to allow MISO to consider various types of facility designs and the associated costs of such designs to select a proposal that provides the best trade-off between performance and costs. MISO states that weighting costs too high and focusing only on the cost level and not also on the facility design attributes and the rigor of the cost estimates provides perverse incentives to submit cost estimates well below the actual costs that will be incurred, leading to selection of a bid that does not represent the best overall proposal. MISO states that the development of transmission infrastructure must be focused on the following attributes: (1) the quality and rigor of the proposed facility design attributes compared to the level and rigor of the cost estimates (i.e., how much “bang for the buck” and how accurate is the assessment); (2) the ability of the entity to actually implement the project and meet the in-service date (i.e., will the project actually materialize and will that happen on or before the date required); and (3) the ability of the entity to operate and maintain the facilities reliably throughout their life (i.e., will the facilities actually deliver the promised benefits in a safe and reliable manner over the course of their life).<sup>635</sup> MISO states that, while project implementation and operations and maintenance capabilities are assessed in the qualification process, the level of capabilities regarding implementation, operation, and maintenance of a specific project is not binary and varies substantially. Thus, according to MISO, consideration of all of these capabilities when evaluating each New Transmission Proposal is vital to ensuring that the best overall proposal is selected. MISO asserts that its proposed weighting balances each of these important attributes roughly equally and, thus, is a just and reasonable approach to selecting the best overall transmission proposal given the level of uncertainty that exists at the time the transmission developers must be selected.<sup>636</sup>

334. MISO also proposes that for the project implementation and operations and maintenance capabilities criteria, an incumbent transmission owner will be assumed to fulfill these criteria for Open Transmission Projects that connect to the incumbent transmission owner’s system.<sup>637</sup>

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<sup>634</sup> MISO Compliance Transmittal at 25-26.

<sup>635</sup> *Id.* at 26.

<sup>636</sup> *Id.*

<sup>637</sup> MISO, FERC Electric Tariff, Attachment FF, § VIII.C.7-C.8

335. Also with respect to the evaluation process, MISO proposes to revise its Tariff to state that, when considering the cost and reasonably descriptive facility design quality of a New Transmission Proposal, MISO will evaluate, among other factors, the description of the capital resources available to fund transmission project costs as they arise.<sup>638</sup> In addition, MISO proposes to revise its Tariff to provide that when it considers project implementation capabilities and operations, maintenance, repair, and replacement capabilities in its evaluation process, it will evaluate existing or planned capabilities, competencies, and processes relative to the locations and jurisdictions where the transmission facility is to be located, as well as the strength of those capabilities demonstrated in the prequalification process to qualify the New Transmission Proposal Applicant as a Qualified Transmission Developer.<sup>639</sup>

336. MISO states that it has also made revisions to its Tariff to comply with the requirement to clarify its proposal regarding information related to revenue requirement estimates. MISO has revised its Tariff to provide that the annual revenue requirement estimates that must be included in a bid proposal must be made in accordance with Attachment MM of the Tariff for MVPs and Attachment GG of the Tariff for MEPs, including the supporting detail on the annual allocation factors for operations and maintenance, general and common depreciation expense, taxes other than income taxes, income taxes, and return used to estimate the annual revenue requirements.<sup>640</sup>

337. Finally, MISO states that, as required by the First Compliance Order, it has deleted former section VIII.B (State Selection of Qualified Transmission Developers) of Attachment FF in its entirety, which removes the language granting a state the right to select which Qualified Transmission Developer will construct a project located in part or in whole within its boundaries. MISO states that it has also deleted other Tariff references to allowing state parties to select the Selected Transmission Developers.<sup>641</sup>

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<sup>638</sup> *Id.* § VIII.E.3.c.

<sup>639</sup> *Id.* §§ VIII.E.4, VIII.E.5.

<sup>640</sup> MISO Compliance Transmittal at 18. *See also* MISO, FERC Electric Tariff, Attachment FF, § VIII.C.5.b.

<sup>641</sup> MISO Compliance Transmittal at 27. *See also* MISO, FERC Electric Tariff, Attachment FF, § VIII.C.13; MISO, FERC Electric Tariff, Module A, § 1.599a (Selected Transmission Developer) (1.0.0).

**iii. Protests/Comments**

338. ATC/Duke/Transource and LS Power contend that MISO failed to support its proposed 30 percent weighting of cost estimates. ATC/Duke/Transource claim that MISO's proposed evaluation criteria all but disregard costs at the transmission project evaluation stage of the transmission planning process, contrary to Order No. 1000's requirement that the evaluation process must properly measure the relative efficiency and cost-effectiveness of a proposed bid.<sup>642</sup> LS Power argues that MISO offers no explanation of how assigning project design and cost at 30 percent, while assigning project implementation, operation, maintenance and transmission planning participation at 70 percent, results in selection of the more efficient and cost-effective project.<sup>643</sup>

339. LS Power contends that, under MISO's evaluation proposal, (i) implementation, and (ii) operations and maintenance, account for 65 percent of the total transmission project evaluation. Thus, LS Power argues that incumbent transmission owners would automatically receive 100 percent of the 65 percent evaluation for these two categories. LS Power states the Commission should reject the inappropriate weight placed on these two categories.<sup>644</sup>

340. According to ATC/Duke/Transource, MISO's proposed evaluation process will not ensure that transmission developers' cost estimates are accurate and reasonable, because there is no incentive for a developer to spend significant time or resources to produce a thoughtful and accurate cost estimate. ATC/Duke/Transource argue that, to ensure the evaluation process properly measures the relative efficiency and cost-effectiveness of proposed bids, MISO should increase the weight for cost to 50 percent and reduce by 10 percent each the weights for project implementation capabilities and for operations and maintenance capabilities.<sup>645</sup> Similarly, LS Power argues that each of MISO's asserted concerns regarding costs estimates can be addressed by developing mechanisms to evaluate costs consistently, mitigate the potential to low-ball cost estimates, and share the risk of cost overruns. LS Power further contends that the Commission should direct MISO as to the evaluation criteria it must adopt. Specifically, LS Power suggests that the appropriate weighting of cost and project design is

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<sup>642</sup> ATC/Duke/Transource Protest at 20-21.

<sup>643</sup> LS Power Protest at 38-39.

<sup>644</sup> *Id.* at 37-38 (referencing MISO, FERC Electric Tariff, Attachment FF, § VIII.C.7-C.8).

<sup>645</sup> ATC/Duke/Transource Protest at 22.

75 percent, while project implementation capabilities and operations and maintenance should be accorded 12.5 percent each. LS Power also argues that project implementation or operations and maintenance capabilities should not be used as a mechanism to select a more expensive transmission project unless MISO can clearly articulate how the alleged deficiency in those categories results in the less expensive project no longer being the more efficient or cost-effective selection.<sup>646</sup>

341. ATC/Duke/Transource object to MISO's proposed Tariff changes where MISO inserted language stating that MISO will take into consideration the "locations and jurisdictions" where a transmission facility would be located.<sup>647</sup> ATC/Duke/Transource argue that these proposed revisions raise questions about how MISO will consider a state right of first refusal in terms of evaluating New Transmission Proposals and that MISO should be required to provide more details on its review process to ensure that a transmission developer is not rejected for an entire transmission project because a portion of the project could be located in a state with a right of first refusal.<sup>648</sup>

#### iv. Answer

342. In its answer, MISO reiterates that the proposal is a well-balanced approach that gives due consideration to the estimated cost of a transmission project, while also taking into account other important factors. MISO also states that the justness and reasonableness of a particular RTO's weighting of such estimates is not a matter of pinpoint precision, but rather involves a reasonable range of potentially appropriate weighting values, and further, that there can be several possible just and reasonable weightings of transmission project cost estimates. MISO maintains that, because cost estimates are not binding, there is no guarantee that selecting the lowest cost New Transmission Proposal will ultimately result in the lowest cost solution.<sup>649</sup>

343. MISO further argues that the cost estimate in a New Transmission Proposal is not the only factor that determines whether a transmission project is "more efficient or cost-effective" over its lifespan. According to MISO, other evaluation categories are directly related to determining whether a New Transmission Proposal is more efficient or cost-

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<sup>646</sup> LS Power Protest at 40.

<sup>647</sup> ATC/Duke/Transource Protest at 23 (citing MISO, FERC Electric Tariff, Attachment FF, § VIII.E.4-E.5).

<sup>648</sup> *Id.*

<sup>649</sup> MISO Answer at 3-4.

effective, as these factors have a direct bearing on the overall cost of a transmission project. MISO explains that a transmission developer's ability to implement and operate a transmission project in an efficient and reliable manner will translate to lower rates to consumers through reducing the likelihood of the need to replace parts or correct reliability issues over the life of the transmission project.<sup>650</sup>

344. MISO also states that the proposed weight for cost estimates is reasonable because such estimates are less variable under its competitive bidding framework than under a sponsorship approach. MISO explains that this is because, under its proposed inclusive evaluation process, the nature, scope, and potential cost of an Open Transmission Project is determined during the MTEP process before MISO opens an Open Transmission Project for competitive bidding. According to MISO, this means that it would already have a basic understanding of an Open Transmission Project's likely range of cost. MISO states that it initially determines the specific solutions to transmission issues during an MTEP cycle, including an estimated cost. MISO states that, following the MISO Board's approval of a transmission project, the transmission project's scope is fixed and does not vary in the competitive bidding process.<sup>651</sup>

345. In addition, MISO argues that the Commission should reject objections to the inclusion of the language "in the locations and jurisdictions where the New Transmission Facilities . . . are to be located," in the data submission categories for Project Implementation and Operations and Maintenance. MISO states that its footprint includes a significant portion of the United States, which will soon span from Montana and Michigan to Texas and Mississippi and that the geography, climate, administrative processes, and regulatory requirements vary significantly among these jurisdictions. MISO asserts that, for a specific Open Transmission Project, it is necessary for MISO to ensure New Transmission Proposal Applicants have the capabilities to implement transmission projects and operate and maintain transmission facilities in the specific state(s) where the Open Transmission Project and associated facilities are to be located. MISO argues that this requirement is not unduly discriminatory because it applies to all potential transmission developers. For instance, MISO states that a transmission developer, regardless of whether it is a current transmission owner or nonincumbent transmission developer, could demonstrate that it possesses the needed capabilities in the areas surrounding its own service territory or nearby states, but perhaps not in a state farther away. Similarly, MISO states that an entity that has historically operated in a geographic area with special characteristics may be better positioned to develop and

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<sup>650</sup> *Id.* at 5.

<sup>651</sup> *Id.* at 5-6.

operate transmission in an area with similar characteristics than an entity that has not developed and operated transmission in that type of area (e.g., development of submarine transmission in coastal areas to interconnect offshore generation). MISO notes that it would consider the feasibility of any applicant's plan to acquire the required capability should the applicant submit such information. MISO states that while the proposed Tariff language does not presuppose that any entity is unqualified to own and operate facilities in certain areas due to a lack of experience operating in that area, experience within a jurisdiction or state is valuable to inform MISO's evaluation of which developers may be able to construct, own, and operate a given Open Transmission Project in a more efficient or cost-effective manner than other developers.<sup>652</sup>

**v. Commission Determination**

346. We find that the provisions in MISO's compliance filing addressing the evaluation of proposed transmission facilities partially comply with the directives in the First Compliance Order and Order No. 1000. As a general matter, we find that it is just and reasonable for MISO to consider a range of factors other than costs when it evaluates bids from Qualified Transmission Developers. We further find that MISO has sufficiently demonstrated that the proposed weighting of its evaluation criteria is not unduly discriminatory and will result in a regional transmission planning process that selects more efficient or cost-effective transmission solutions, as required by Order No. 1000.

347. In its first Order No. 1000 compliance filing, MISO proposed a competitive bidding process that requires MISO to, collectively with stakeholders, identify transmission projects that are selected in the regional transmission plan for purposes of cost allocation prior to MISO selecting a transmission developer to build the transmission project. MISO's Transmission Planning Business Practices Manual states that prior to approval, transmission projects have been justified to be the preferred solution to an identified reliability, policy or other need, or to achieve an identified cost savings or other benefit and have been approved by the MISO Board. The identification of the preferred transmission solution (i.e., by listing the project in Appendix A of the MTEP) includes consideration of a variety of factors, including initial investment costs and performance against other economic metrics.<sup>653</sup> Moreover, MISO reviews cost estimates of identified

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<sup>652</sup> MISO Answer at 23-25.

<sup>653</sup> MISO Business Practices Manual for Transmission Planning at 17-18, available at <https://www.misoenergy.org/Library/BusinessPracticesManuals/Pages/BusinessPracticesManuals.aspx>.

potential transmission projects with stakeholders as part of the process to identify and select the preferred transmission solution to an identified need. This is consistent with the process described in Appendix B of the MISO Transmission Owners Agreement, which states that MISO planning staff “shall seek out opportunities to coordinate or consolidate, where possible, individually defined transmission projects into more comprehensive cost-effective developments subject to the limitations imposed by prior commitments and lead time constraints.”<sup>654</sup> We agree with MISO that the process identifying the Open Transmission Project to recommend to the MISO Board for approval results in MISO identifying the more efficient or cost-effective solution to an identified need prior to MISO soliciting New Transmission Proposals for the approved transmission project. As such, by the time MISO evaluates the New Transmission Proposals, MISO has already identified and the MISO Board has approved the transmission project while taking into account, among other things, the cost of proposed transmission solutions. Thus, MISO solicits New Transmission Proposals from transmission developers only after stakeholders have vetted, and the MISO Board has approved, the more efficient or cost-effective transmission project.

348. On balance, we find that MISO has shown that, while the costs transmission developers include in their bids may vary based on, for example, the type of equipment used to build the selected transmission facility, equal emphasis on factors other than those referring explicitly to transmission project costs will allow MISO to select the appropriate transmission developer for each transmission facility that has been found to be the more efficient or cost-effective solution to regional transmission needs. In Order No. 1000, the Commission stated that the criteria that public utility transmission providers use to evaluate and select among competing transmission solutions and resources must consider “the relative efficiency and cost-effectiveness of [any proposed transmission] solution.”<sup>655</sup> The same evaluation should occur when choosing a transmission developer to develop a specific transmission facility that MISO already selected in the regional transmission plan for purposes of cost allocation and we find that MISO’s proposal meets this requirement.

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<sup>654</sup> MISO FERC Electric Tariff, MISO Transmission Owner Agreement, App. B (Planning Framework) (0.0.0). Appendix B further states that “[t]his multi-party collaborative process is designed to ensure the development of the most efficient and cost-effective [MISO] Plan that will meet reliability needs and expand trading opportunities, better integrate the grid, and alleviate congestion, while giving consideration to the inputs from all stakeholders.”

<sup>655</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 331 n.307.

349. While the cost criterion itself is only given a 30 percent weight in MISO's evaluation, MISO's consideration of the criteria together will allow MISO to select the most efficient or cost-effective bid. As MISO has explained in its filing, its proposed evaluation criteria focus on the following important attributes: (1) the quality and rigor of the proposed facility design attributes compared to the level and rigor of the cost estimates; (2) the ability of the entity actually to implement the project and meet the in-service date; and (3) the ability of the entity to operate and maintain the facilities reliably throughout their life.<sup>656</sup> We agree with MISO that these other categories are directly related to determining whether a New Transmission Proposal is more efficient or cost-effective. Consideration of these factors will allow MISO to evaluate, for example, whether a transmission developer is likely to avoid major cost overruns during project implementation, or to efficiently maintain the project over its lifetime. We thus disagree with ATC/Duke/Transource and LS Power's claim that MISO has not supported the 30 percent weighting of cost estimates.

350. As discussed above in the Information Requirements section of this order,<sup>657</sup> LS Power has raised an important concern regarding MISO's proposal to automatically find that an incumbent transmission owner fulfills two of the evaluation criteria.<sup>658</sup> Under the proposal, it appears that an incumbent transmission owner would automatically receive the highest score for evaluation criteria that together are weighted as 70 percent of MISO's evaluation. We find that this proposed new Tariff language is inconsistent with the requirements of Order No. 1000 and not in compliance with the First Compliance Order. Accordingly, we direct MISO to submit, within 60 days of the date of issuance of this order, a further compliance filing to remove this language from the Tariff.

351. Finally, in response to ATC/Duke/Transource's objections to MISO's proposal to add language stating that MISO will take into consideration the "locations and

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<sup>656</sup> MISO Compliance Transmittal at 26.

<sup>657</sup> *See supra* P 325.

<sup>658</sup> The proposed language states that "[a]n incumbent Transmission Owner is assumed to fulfill the project implementation requirements for Open Transmission Projects that connect to the incumbent Transmission Owner's system" and "an incumbent Transmission Owner is assumed to fulfill the operations, maintenance, repair, and replacement requirements for Open Transmission Projects that connect to the incumbent Transmission Owner's system." MISO FERC Electric Tariff, Attachment FF, §§ VIII.C.7-C.8.

jurisdictions” where a transmission facility would be located,<sup>659</sup> we note that MISO explains that the proposed Tariff language does not presuppose that any transmission developer is unqualified to own and operate facilities in certain areas due to a lack of experience operating in that area and that MISO will not be using this criterion to exclude a New Transmission Proposal. Rather, MISO states that this criterion will allow MISO to consider a transmission developer’s experience within a jurisdiction or state and inform MISO’s evaluation of which developers may be able to construct, own, and operate a given Open Transmission Project in a more efficient or cost-effective manner. MISO also states that it would consider the feasibility of any transmission developer’s plan to acquire the required capability should the transmission developer submit such information. Thus, we find MISO’s proposed language to be an appropriate factor for consideration in its decision-making process and reject ATC/Duke/Transource’s protest.

e. **Reevaluation Process for Transmission Proposals for Selection in the Regional Transmission Plan for Purposes of Cost Allocation**

352. To ensure the incumbent transmission provider can meet its reliability needs or service obligations, Order No. 1000 required each public utility transmission provider to amend its tariff to describe the circumstances and procedures for reevaluating the regional transmission plan to determine if alternative transmission solutions must be evaluated as a result of delays in the development of a transmission facility selected in a regional transmission plan for purposes of cost allocation.<sup>660</sup> If an evaluation of alternatives is needed, the regional transmission planning process must allow the incumbent transmission provider to propose solutions that it would implement within its retail distribution service territory or footprint, and if that solution is a transmission facility, then the proposed transmission facility should be evaluated for possible selection in the regional transmission plan for purposes of cost allocation.<sup>661</sup>

i. **First Compliance Order**

353. In the First Compliance Order, the Commission found that MISO’s proposal regarding the reevaluation of proposed transmission projects partially complied with the requirements of Order No. 1000. The Commission stated that MISO’s proposal, which

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<sup>659</sup> See MISO, FERC Electric Tariff, Attachment FF, § VIII.E.4-E.5.

<sup>660</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at PP 263, 329; Order No. 1000-A, 139 FERC ¶ 61,132 at P 477.

<sup>661</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 329.

requires MISO to conduct a Variance Analysis if there is a delay of six months or more in the development of a transmission facility (based on project and developer status updates) and to conduct a full reevaluation, if indicated by the Variance Analysis, to determine if the delay poses risks of adverse impact on MISO's transmission system reliability (and what mitigation measures and plan should be implemented), was a reasonable approach to dealing with the reevaluation of proposed transmission projects.<sup>662</sup> However, the Commission stated that MISO's proposed Tariff language, which required the responsible transmission owner to report the status of all projects recommended for implementation in the MTEP (including schedule and estimated project cost changes) upon solicitation from MISO and "upon reaching pre-designated milestones in the project implementation process," contained insufficient explanation of "pre-designated milestones."<sup>663</sup> Accordingly, the Commission directed MISO to provide more detail about what these project milestones might consist of, how they will be established, and whether they are consistent with other references to milestones and timetables in the Tariff.<sup>664</sup> The Commission also found that, while the Tariff required MISO to report on progress of the projects recommended for implementation in the MTEP on a quarterly basis,<sup>665</sup> MISO should post all quarterly reports containing project and developer status updates and not only the most recent report.<sup>666</sup>

354. In addition, noting that MISO proposed to reevaluate projects based on cost increases in addition to schedule delays,<sup>667</sup> the Commission stated that Order No. 1000 does not require reevaluation of transmission projects based on cost requirements but allows a public utility transmission provider to include cost containment provisions in its

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<sup>662</sup> First Compliance Order, 142 FERC ¶ 61,215 at P 381 (citing MISO, FERC Electric Tariff, Attachment FF, §§ IX.A.2, IX.B.2 (8.0.0)).

<sup>663</sup> *Id.* P 382; *see also* MISO, FERC Electric Tariff, Attachment FF, § I.C.11 (8.0.0).

<sup>664</sup> First Compliance Order, 142 FERC ¶ 61,215 at P 382.

<sup>665</sup> MISO, FERC Electric Tariff, Attachment FF, § I.C.11 (8.0.0).

<sup>666</sup> First Compliance Order, 142 FERC ¶ 61,215 at P 382.

<sup>667</sup> MISO proposed that any project cost increase that reduces the benefit-cost ratio of an economically-driven Open Transmission Project to less than the required benefit-cost threshold ratio would trigger a Variance Analysis and potential reevaluation. MISO, FERC Electric Tariff, Attachment FF, § IX.A.1 (8.0.0).

compliance filing.<sup>668</sup> The Commission dismissed ATC/Duke/Transource's argument that MISO should evaluate the variance between the current actual cost estimate of a transmission project and the original cost estimate, in addition to the benefit-cost threshold, when reviewing a transmission project's status after it is awarded, stating that the purpose of MISO's Variance Analysis is to determine if delays in the development of a transmission facility selected in the regional transmission plan for purposes of cost allocation require reevaluation of alternative transmission solutions.<sup>669</sup>

355. Finally, the Commission declined the Organization of MISO States' request that transmission developers not be allowed to transfer the right and obligation to construct a project to an affiliate without a demonstration that: (1) ratepayers will be held harmless by the transfer, and (2) the transfer is in the public interest. The Commission also declined Organization of MISO States' request to restrict affiliates from submitting separate bids for the same transmission projects, with the exception of submitting one "fixed-cost bid" and one "non-fixed cost bid." The Commission instead accepted MISO's explanation that any attempt to limit the submission of proposals to one proposal per entity would require either defining entities so narrowly as to limit participation of any stakeholder in multiple proposals, or broadly enough to enable companies to form multiple limited liability corporations to submit multiple proposals.<sup>670</sup>

**ii. Requests for Rehearing or Clarification**

**(a) Summary of Requests for Rehearing or Clarification**

356. Indiana Commission and Organization of MISO States argue that the Commission erred by not requiring that the responsibilities and requirements that the Tariff imposes on a Selected Transmission Developer also apply to any successor entity to which the Selected Transmission Developer transfers its obligation to construct a transmission project. For instance, Indiana Commission and Organization of MISO States assert that nothing in the Transmission Owners Agreement or Tariff requires that all the responsibilities and requirements related to a nonincumbent Selected Transmission Developer also apply to that nonincumbent transmission developer's assignee, including an affiliate or subsidiary. According to Indiana Commission and Organization of MISO

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<sup>668</sup> First Compliance Order, 142 FERC ¶ 61,215 at P 383 (citing Order No. 1000-A, 139 FERC ¶ 61,132 at P 625).

<sup>669</sup> *Id.* P 386.

<sup>670</sup> *Id.* P 387.

States, it is in the public interest for all Selected Transmission Developers to comply with MISO's reporting requirements.<sup>671</sup> Therefore, Indiana Commission and Organization of MISO States request that the Commission grant rehearing and require MISO to file additional tariff language clearly stating that any entity, including affiliates and subsidiaries, to which the right to develop a transmission project is transferred has the same responsibilities and must meet the same requirements as the transmission developer that was originally selected to develop the project.<sup>672</sup>

**(b) Commission Determination**

357. We grant Indiana Commission's and Organization of MISO States' requests for rehearing. We agree with Indiana Commission and Organization of MISO States that the Commission should have directed MISO in the First Compliance Order to revise its OATT so that the requirements that the Tariff imposes on a Selected Transmission Developer also apply to any successor entity to which the Selected Transmission Developer transfers its obligation to construct a transmission facility. MISO's Tariff provides that a delegation or assignment of transmission project responsibilities to another entity, including an affiliate or partner, is a material deviation from a Selected Transmission Developer's qualifications and thus triggers a reevaluation to ensure that the new Selected Transmission Developer is qualified to construct, implement, operate, maintain, and/or restore the Open Transmission Project (and noting that qualification requires the developer to make a number of commitments such as a commitment to sign the Transmission Owners Agreement after construction of the project).<sup>673</sup> However, there is no Tariff provision that clarifies that any entity that receives the transferred right

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<sup>671</sup> Indiana Commission Rehearing Request at 12; Organization of MISO States Rehearing Request at 9-10. Organization of MISO States and Indiana Commission assert that the Transmission Owners Agreement already provides that the responsibilities of a MISO transmission owner related to the development of a transmission project apply to a MISO transmission owner's assignee. Indiana Commission Rehearing Request at 12-13; Organization of MISO States Rehearing Request at 9.

<sup>672</sup> Indiana Commission Rehearing Request at 14; Organization of MISO States Rehearing Request at 12. Organization of MISO States states that the responsibilities include: (1) completing the required Project Status Report; (2) reporting changes in the Status of Developer Qualifications; and (3) submitting any necessary Variance Analysis. Organization of MISO States Rehearing Request at 11.

<sup>673</sup> MISO, FERC Electric Tariff, Attachment FF, §§ IX.A.3, IX.B.3; *see also* MISO, FERC Electric Tariff, Attachment FF, § VIII.B.3.b; *supra* P 247.

to develop an Open Transmission Project has the same responsibilities and must meet the same requirements as the transmission developer that was originally selected to develop the Open Transmission Project. We therefore direct MISO to submit, within 60 days of the date of issuance of this order, a further compliance filing that includes this Tariff language.

**iii. Compliance**

**(a) Summary of Compliance Filings**

358. MISO states that, as directed by the First Compliance Order, it has included additional detail about the pre-designated project milestones, which it states it developed through the stakeholder process.<sup>674</sup> MISO proposes Tariff language stating that the pre-designated milestones in the implementation process of a typical MTEP development process are: (i) Milestone 1: Final Sub-Regional Planning Meeting/Out of Cycle Request Submittal; (ii) Milestone 2a: Pre-project approval; (iii) Milestone 2b: Developer selection (which only applies to Open Transmission Projects); (iv) Milestone 3: Long lead materials; (v) Milestone 4: Pre-construction; and (vi) Milestone 5: Facility completion. MISO proposes to include further details about the requirements and timelines for data submittal, review, and comment at each of these milestone points in the Transmission Planning Business Practices Manual.<sup>675</sup> MISO also states that it will post all quarterly reports for an approved project on MISO's website until the project is in-service.<sup>676</sup>

359. MISO also clarifies that it will post all quarterly reports for an approved transmission project on MISO's website until the project is in-service, as opposed to including only the most recent quarterly report.<sup>677</sup>

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<sup>674</sup> MISO Compliance Transmittal at 27.

<sup>675</sup> MISO, FERC Electric Tariff, Attachment FF, § I.C.11.a. *See also* MISO Compliance Transmittal at 27 (citing section 4.2.3.1 of the Transmission Planning Business Practices Manual, *available at*: <https://www.misoenergy.org/Library/BusinessPracticesManuals/Pages/BusinessPracticesManuals.aspx>).

<sup>676</sup> MISO Compliance Transmittal at 28.

<sup>677</sup> *Id.*

(b) **Protests/Comments**

360. ATC/Duke/Transource argue that the Commission should require MISO to monitor a transmission project's status using the project's ongoing actual cost rather than the ongoing benefit-cost ratio of a project. ATC/Duke/Transource claim that such monitoring will ensure that transmission developers provide legitimate cost estimates as part of their transmission project bids and will prevent cost estimates from increasing substantially during the development of a project without resulting in a benefit-cost ratio for the project that falls below the benefit-cost threshold ratio required for the applicable cost allocation method. ATC/Duke/Transource state that, under MISO's current proposal, it is possible that a transmission project's costs could increase much higher than estimated without triggering reevaluation, potentially resulting in unjust and unreasonable rates.<sup>678</sup>

(c) **Commission Determination**

361. We find that provisions in MISO's compliance filing addressing the reevaluation of the regional transmission plan partially comply with the directives in the First Compliance Order and Order No. 1000. MISO has revised its Tariff to include the "pre-designated milestones" that Selected Transmission Developers must follow to submit status reports. In addition, MISO has revised the Tariff to refer to its Transmission Planning Business Practices Manual for further details about requirements and timelines related to each of these pre-designated milestones.<sup>679</sup> However, MISO does not establish in the Tariff a requirement that MISO post all quarterly status reports, which the Commission required in the First Compliance Filing. Accordingly, we direct MISO to submit, within 60 days of the date of issuance of this order, a further compliance filing that includes a Tariff requirement for MISO to post all quarterly status reports and not just the most recent report.

362. We will not require, as ATC/Duke/Transource's request, that MISO monitor a transmission project's status using the transmission project's ongoing actual cost rather than the ongoing benefit-cost ratio of a transmission project. We addressed ATC/Duke/Transource's request previously in the First Compliance Order. The Commission stated that MISO is not required, but is permitted, under Order No. 1000, to

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<sup>678</sup> ATC/Duke/Transource Protest at 22.

<sup>679</sup> Although MISO states in its transmittal letter that it has included this additional detail in new section 4.2.3.1 of its Transmission Planning Business Practices Manual and that it is currently available on MISO's web site, it does not appear that MISO has yet posted this new version of the Transmission Planning Business Practices Manual.

include cost containment provisions in its compliance filing.<sup>680</sup> MISO has chosen to reevaluate transmission projects based on cost increases, in addition to schedule delays and changes in a Selected Transmission Developer's qualifications. However, the purpose of the reevaluation requirements is to determine if delays in the development of a transmission facility selected in the regional transmission plan for purposes of cost allocation require reevaluation of alternative transmission solutions.<sup>681</sup> Since ATC/Duke/Transource's request is not necessary for MISO to comply with Order No. 1000's reevaluation requirements, we dismiss it.

f. **Cost Allocation for Transmission Projects Selected in the Regional Transmission Plan for Purposes of Cost Allocation**

363. Order No. 1000 required each public utility transmission provider to participate in a regional transmission planning process that provides nonincumbent transmission developers and incumbent transmission developers the same eligibility to use a regional cost allocation method or methods for any transmission facility selected in the regional transmission plan for purposes of cost allocation.<sup>682</sup> Order No. 1000 also required that the regional transmission planning process have a fair and not unduly discriminatory mechanism to grant to an incumbent transmission provider or nonincumbent transmission developer the right to use the regional cost allocation method for transmission facilities selected in the regional transmission plan for purposes of cost allocation.<sup>683</sup>

i. **Competitive Bidding Process**

(a) **First Compliance Order**

364. In the First Compliance Order, the Commission determined that MISO's proposal to use a competitive bidding process for selection of Selected Transmission Developers and to allocate the cost of a transmission facility through a regional cost allocation method or methods complied with the requirements of Order No. 1000 and allowed incumbent transmission developers and nonincumbent transmission developers to

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<sup>680</sup> First Compliance Order, 142 FERC ¶ 61,215 at P 383 (citing Order No. 1000-A, 139 FERC ¶ 61,132 at P 625).

<sup>681</sup> *Id.* P 386; Order No. 1000-A, 139 FERC ¶ 61,132 at P 477.

<sup>682</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 332.

<sup>683</sup> *Id.* P 336.

participate comparably for transmission developer selection.<sup>684</sup> However, the Commission found that MISO's proposed Tariff language was not clear as to whether all bids may be rejected and under what circumstances that action may be taken.<sup>685</sup> Therefore, the Commission directed MISO to file a further compliance filing with Tariff language to clarify whether and under what circumstances all bids may be rejected.<sup>686</sup>

**(b) Summary of Compliance Filings**

365. MISO proposes Tariff revisions to clarify the circumstances under which it can reject all bids from qualified transmission developers.<sup>687</sup> Under its proposal, MISO will retain the authority to reject proposals if they do not meet the Tariff's requirements for the project classification in question, including, but not limited to, the requirements with respect to the benefit-cost ratio. MISO further states that it will also be able to reject all bids when the results of its evaluation indicate that a proposal would not sufficiently address the Transmission Issue(s) that the Transmission Proposal Request was intended to address. MISO states, however, that to the extent it receives one or more bids that fully comply with the Tariff's project classification requirements and adequately address the relevant issues, it must select one such bid.<sup>688</sup> If MISO does not select any of the bids from among those it receives, then it will assign the Open Transmission Project to the applicable incumbent transmission owner(s).<sup>689</sup>

**(c) Commission Determination**

366. We find that the provisions in MISO's compliance filing addressing its competitive bidding process comply with the directives in the First Compliance Order and Order No. 1000. MISO has clarified the circumstances under which it can reject all bids. Specifically, MISO may reject all bids it receives and assign the Open Transmission Project to the applicable incumbent transmission owner if none of the bids meet the Tariff's requirements for the transmission project classification in question or

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<sup>684</sup> First Compliance Order, 142 FERC ¶ 61,215 at PP 397-399.

<sup>685</sup> *Id.* P 399.

<sup>686</sup> *Id.*

<sup>687</sup> See MISO, FERC Electric Tariff, Attachment FF, § VIII.E.9.

<sup>688</sup> MISO Compliance Transmittal at 28.

<sup>689</sup> MISO, FERC Electric Tariff, Attachment FF, § VIII.E.9.

do not sufficiently address the Transmission Issue(s) that the Transmission Proposal Request was intended to address. We find that MISO's proposal is reasonable and complies with the requirements of Order No. 1000.

**ii. Construction Work in Progress (CWIP)**

**(a) First Compliance Order**

367. In the First Compliance Order, the Commission found that Attachment FF provides that when a nonincumbent transmission developer becomes a Selected Transmission Developer, the nonincumbent transmission developer becomes eligible to sign the Transmission Owners Agreement and agrees to turn over the functional control of the facilities to MISO once the New Transmission Facilities become energized. The Commission stated that, at that point, an entity becomes a transmission owner and is afforded the right to cost recovery. Although Non-owner Members are ineligible to recover costs until such time as they are eligible to sign the Transmission Owners Agreement, the Commission determined that this would not prevent a nonincumbent transmission developer from participating in the MISO transmission planning process or becoming a Selected Transmission Developer and using the regional cost allocation method for Open Transmission Projects. The Commission also stated that, regardless, cost recovery issues are outside the scope of Order No. 1000. The Commission therefore rejected requests to require MISO to revise the Transmission Owners Agreement to allow transmission developers to become eligible to sign the Transmission Owners Agreement prior to them owning transmission facilities within the MISO footprint.<sup>690</sup>

**(b) Summary of Requests for Rehearing or Clarification**

368. ATC/Duke/Transource and LS Power both argue that the Commission erred in its determination concerning the eligibility of nonincumbent transmission developers to recover transmission development costs in rates prior to the completion of the applicable transmission facilities.<sup>691</sup> They state that to recover costs under the MISO Tariff, a nonincumbent transmission developer must sign the Transmission Owners Agreement. However, they assert that there is no mechanism in the Tariff for a nonincumbent transmission developer to collect revenues during construction of those facilities under

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<sup>690</sup> First Compliance Order, 142 FERC ¶ 61,215 at P 408.

<sup>691</sup> ATC/Duke/Transource, Request for Rehearing, Docket No. ER13-187-002, at 9-10 (filed April 22, 2013) (ATC/Duke/Transource Rehearing Request); LS Power Compliance Filing Rehearing Request at 6-7.

Commission-approved rate treatments, such as CWIP, because a nonincumbent transmission developer is precluded from signing the Transmission Owners Agreement until after the transmission facilities that it is developing have been constructed.<sup>692</sup> As a result, ATC/Duke/Transource and LS Power argue, the treatment of nonincumbent transmission developers as compared to incumbent transmission owners is unduly discriminatory.<sup>693</sup>

369. Specifically, LS Power contends that a nonincumbent transmission developer should be permitted to use the regional cost allocation method on the same terms as an incumbent transmission owner, i.e., once selected as a transmission developer for an Open Transmission Project.<sup>694</sup> LS Power disputes the Commission's characterization in the First Compliance Order of a nonincumbent transmission developer's ineligibility to recover costs until it signs the Transmission Owners Agreement as a cost recovery issue, arguing instead that it is an issue of discriminatory access to use the regional cost allocation method. According to LS Power, while an incumbent transmission owner that is the Selected Transmission Developer of an Open Transmission Project has immediate access to use the regional cost allocation method, a nonincumbent transmission developer would not have such access until after the project is constructed and turned over to MISO.<sup>695</sup>

370. ATC/Duke/Transource argue that, contrary to the Commission's finding in the First Compliance Order, a nonincumbent transmission developer's ineligibility to recover costs until it signs the Transmission Owners Agreement is not simply an issue of participation in the transmission planning process but, instead, amounts to discriminatory treatment with respect to the competitive bidding process. Specifically, ATC/Duke/Transource argue that because MISO's compliance filing does not allow incumbent transmission developers and nonincumbent transmission developers to participate in the competitive bidding process comparably, MISO does not comply with Order No. 1000's requirements that: (1) transmission planning regions must establish a "transparent and not unduly discriminatory process for evaluating whether to select a proposed transmission facility in the regional transmission plan for purposes of cost

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<sup>692</sup> LS Power Compliance Filing Rehearing Request at 6-7 (citing Attachment FF, § VIII.D.4.1 (8.0.0)); ATC/Duke/Transource Rehearing Request at 12-13.

<sup>693</sup> ATC/Duke/Transource Rehearing Request at 9-10; LS Power Compliance Filing Rehearing Request at 7.

<sup>694</sup> LS Power Compliance Filing Rehearing Request at 6.

<sup>695</sup> *Id.* at 6-7.

allocation”;<sup>696</sup> and (2) each region’s transmission planning process must provide a nonincumbent transmission developer an opportunity comparable to that of an incumbent transmission developer to allocate the cost of a transmission facility through a regional cost allocation method or methods.<sup>697</sup>

371. As evidence, ATC/Duke/Transource argue incumbent transmission owners are able to use Commission-approved rate treatments,<sup>698</sup> resulting in lower costs and risks, and therefore will be able to offer lower bids. Meanwhile, ATC/Duke/Transource contend that a nonincumbent transmission developer would not be able to offer a lower bid because it cannot use Commission-approved rate treatments, even if the Commission has already approved the use of such rate treatments in a FPA section 219<sup>699</sup> incentive rate filing. ATC/Duke/Transource argue that this gives incumbent transmission owners a competitive advantage.<sup>700</sup> ATC/Duke/Transource further claim that, because a nonincumbent transmission developer is ineligible to use Commission-approved rate treatments until it owns transmission facilities subject to MISO’s control, the Commission’s efforts in approving such rate treatments are meaningless.<sup>701</sup>

372. ATC/Duke/Transource and LS Power state that MISO attempts to justify the discriminatory treatment of nonincumbent transmission developers by arguing that it is

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<sup>696</sup> ATC/Duke/Transource Rehearing Request at 12 (citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 328).

<sup>697</sup> *Id.* (citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 332; *NorthWestern Corporation*, 143 FERC ¶ 61,056 (2013)).

<sup>698</sup> ATC/Duke/Transource state that the ability to use Commission-approved rate treatments, such as CWIP, increases cash flow and reduces the financial risk associated with transmission construction, thus reducing the cost of debt. *Id.* at 11, 13-14 (citing, *Promoting Transmission Investment Through Pricing Reform*, Policy Statement, 141 FERC ¶ 61,129, at P 12 (2012)).

<sup>699</sup> 16 U.S.C. § 824s (2012).

<sup>700</sup> ATC/Duke/Transource state that even without rate incentives under FPA section 219, 16 U.S.C. § 824s (20012), an incumbent transmission owner will still have a competitive advantage in being able to avail itself of a potential 50 percent recovery of CWIP under the Commission’s regulations. *See* 18 C.F.R. § 35.25 (2013). ATC/Duke/Transource Rehearing Request at 14 n.41.

<sup>701</sup> *Id.* at 11.

appropriate to only allow cost recovery for signatories of the Transmission Owners Agreement due to the obligations that agreement enforces. However, LS Power states that MISO offers no explanation of why it is inappropriate to allow nonincumbent transmission developers selected to develop an Open Transmission Project to sign the Transmission Owners Agreement or why MISO cannot develop a comparable agreement with comparable obligations.<sup>702</sup> LS Power argues that the Transmission Owners Agreement should not control whether the rights of nonincumbent transmission developers and incumbent transmission owners are equal, but rather that the Tariff should provide the comparable treatment. ATC/Duke/Transource argue that the Commission does not have to order MISO to make changes to the Transmission Owners Agreement to allow nonincumbent transmission developers to recover CWIP, but could instead direct MISO to revise its Tariff.<sup>703</sup> LS Power further states that, to the extent that the Commission accepted MISO's reliance on the Transmission Owners Agreement to determine access to certain cost recovery methods, the Commission erred in relying on the Transmission Owners Agreement rather than the Tariff to establish generally applicable provisions. LS Power states that either the Transmission Owners Agreement must be made available for signature at the time that a transmission developer is selected for an Open Transmission Project, or it should not be part of the Order No. 1000 compliant process.<sup>704</sup>

373. ATC/Duke/Transource and LS Power argue that the First Compliance Order is inconsistent with the PJM First Compliance Order, which found to be just and reasonable, in concept, the PJM Transmission Owners' new definition of transmission owner that would enable a selected nonincumbent transmission developer to recover CWIP.<sup>705</sup> They note that the PJM First Compliance Order required PJM to file a further compliance filing to provide a cost-recovery framework for nonincumbent transmission developers similar to the framework available to incumbent transmission owners. ATC/Duke/Transource argue that SPP has also made allowance for nonincumbent transmission developers to use rate treatments prior to having transmission facilities in

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<sup>702</sup> LS Power Compliance Filing Rehearing Request at 8 n.23.

<sup>703</sup> ATC/Duke/Transource Rehearing Request at 14-15.

<sup>704</sup> LS Power Compliance Filing Rehearing Request at 7-9.

<sup>705</sup> *Id.* at 8 (citing PJM First Compliance Order, 142 FERC ¶ 61,214); ATC/Duke/Transource Rehearing Request at 15-16.

service.<sup>706</sup> ATC/Duke/Transource and LS Power argue that the Commission should order MISO to make similar changes to MISO's Tariff to permit incumbent transmission owners and nonincumbent transmission developers that are selected to develop an Open Transmission Project to recover their costs through the Tariff to prevent unfair discrimination and ensure consistency in policy implementation among regions.<sup>707</sup>

(c) **Commission Determination**

374. We deny ATC/Duke/Transource's and LS Power's requests for rehearing. While Order No. 1000 requires that a nonincumbent transmission developer have the same eligibility as an incumbent transmission developer to use a regional cost allocation method, the Commission clarified that nonincumbent transmission developers must have an opportunity comparable to that of an incumbent transmission developer to allocate the cost of a transmission facility selected in a regional transmission plan for purposes of cost allocation through a regional cost allocation method.<sup>708</sup> The Commission found in the First Compliance Order that MISO's proposed competitive bidding process complied with this requirement and allowed incumbent and nonincumbent transmission developers to participate comparably.<sup>709</sup> We acknowledge that the timing of when an incumbent transmission owner and a nonincumbent transmission developer may collect revenues under Commission-approved rate treatments such as CWIP may be different. However, it is unclear at this time whether that difference results in discriminatory treatment such that incumbent and nonincumbent transmission developers do not have a comparable opportunity to use the regional cost allocation method.

375. Similarly, we are also not persuaded by ATC/Duke/Transource's argument that the issue of a nonincumbent transmission developer's ineligibility to recover costs until it signs the Transmission Owners Agreement amounts to discriminatory treatment with respect to the competitive bidding process because incumbent transmission developers will be able to offer lower cost bids since they are able to use Commission-approved rate

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<sup>706</sup> ATC/Duke/Transource Rehearing Request at 17 (citing SPP, Transmittal Letter, Docket Nos. ER13-366-000 and ER13-367-000 (filed Nov. 13, 2012)).

<sup>707</sup> *Id.* (noting that Commission has previously recognized the importance of consistency between the RTO/ISO regions) (additional citations omitted); LS Power Compliance Filing Rehearing Request at 8-9 (citing PJM First Compliance Order, 142 FERC ¶ 61,214 at PP 330, 333).

<sup>708</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 332.

<sup>709</sup> First Compliance Order, 142 FERC ¶ 61,215 at P 397.

treatments that increase cash flow, reduce the financial risk, and reduce the cost of debt. A record has not been developed in this proceeding to demonstrate that incumbent transmission owners are or will be able to offer lower cost bids as a result of potentially being able to recover CWIP costs. We therefore dismiss as unsupported based on this record petitioners' argument that this cost recovery issue allows MISO to discriminate against nonincumbent transmission developers when evaluating New Transmission Proposal Applicants.

376. We find without merit LS Power's arguments that the Transmission Owners Agreement should not control whether the rights of nonincumbent transmission developers and incumbent transmission owners are equal, but rather that the Tariff should provide the comparable treatment, and that the Commission erred to the extent it accepted MISO's reliance on the Transmission Owners Agreement to determine access to certain cost recovery methods because it should have relied on the Tariff. In the First Compliance Order, the Commission stated:

We find that Attachment FF provides that when a nonincumbent becomes a Selected Transmission Developer, the nonincumbent becomes eligible to sign the Transmission Owners Agreement and to turn over the functional control of the facilities to MISO once the New Transmission Facilities become energized. At that point, an entity become a Transmission Owner and is afforded the right to cost recovery. Although Non-owner Members are ineligible to recover costs (i.e., CWIP) until such time as they are eligible to sign the Transmission Owners Agreement, we do not find this prevents a nonincumbent from participating in the MISO planning process or becoming a Selected Transmission Developer and using the regional cost allocation method for Open Transmission Projects.<sup>[710]</sup>

377. Thus, the First Compliance Order found that MISO's proposed competitive bidding process, as established in the Tariff, would allow incumbent and nonincumbent transmission developers to participate comparably and have the same eligibility to access the regional cost allocation method, and petitioners have not convinced us otherwise. We continue to decline to require MISO to revise the Transmission Owners Agreement to change "Owner" in order to allow transmission developers prior to owning transmission

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<sup>710</sup> *Id.* P 408 (additional citation omitted).

facilities within the MISO footprint to become eligible to sign the Transmission Owners Agreement.

378. We disagree with arguments that the First Compliance Order is inconsistent with the PJM First Compliance Order and SPP's compliance filing. The fact that PJM and SPP included, as part of their Order No. 1000 compliance filings, allowances for nonincumbent transmission developers to use rate treatments prior to having transmission facilities in service does not mean we must direct MISO to include similar treatment in its Tariff. Order No. 1000 states that while the Commission would not address cost recovery in the proceeding, it noted that cost recovery could be considered as part of a transmission planning region's stakeholder process in developing a regional cost allocation method or methods to comply with Order No. 1000. Thus, the Commission stated that to the extent that cost recovery provisions are considered in connection with a cost allocation method or methods for a regional or interregional transmission facility, public utility transmission providers could include cost recovery provisions in their compliance filings; but, they were under no such obligation to do so.<sup>711</sup> We dismiss petitioners' arguments accordingly.

### 3. Cost Allocation

379. Order No. 1000 required each public utility transmission provider to have in its tariff a method, or set of methods, for allocating the costs of any new transmission facility selected in the regional transmission plan for purposes of cost allocation.<sup>712</sup> Each public utility transmission provider must demonstrate that its cost allocation method satisfies six regional cost allocation principles.<sup>713</sup> In addition, while Order No. 1000 permitted participant funding, participant funding cannot be the regional cost allocation method.<sup>714</sup>

380. Regional Cost Allocation Principle 1 requires that the cost of transmission facilities be allocated to those within the transmission planning region that benefit from those facilities in a manner that is at least roughly commensurate with estimated benefits. The cost allocation methods must clearly and definitively specify identifiable benefits

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<sup>711</sup> See Order No. 1000-A, 139 FERC ¶ 61,132 at P 616.

<sup>712</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at PP 558, 690.

<sup>713</sup> *Id.* P 603.

<sup>714</sup> *Id.* P 723.

and the class of beneficiaries, and the transmission facility costs allocated must be roughly commensurate with that benefit.<sup>715</sup>

381. Regional Cost Allocation Principle 2 requires that those that receive no benefit from transmission facilities, either at present or in a likely future scenario, not be involuntarily allocated any of the costs of those transmission facilities.<sup>716</sup>

382. Regional Cost Allocation Principle 3 specifies that, if a benefit to cost threshold is used to determine which transmission facilities have sufficient net benefits to be selected in a regional transmission plan for the purpose of cost allocation, the threshold must not be so high that transmission facilities with significant positive net benefits are excluded from cost allocation. Such a threshold may not include a ratio of benefits to costs that exceeds 1.25 unless the transmission planning region or public utility transmission provider justifies, and the Commission approves, a higher ratio.<sup>717</sup>

383. Regional Cost Allocation Principle 4 specifies that the regional cost allocation methods must allocate costs solely within that transmission planning region unless another entity outside the region or another transmission planning region voluntarily agrees to assume a portion of those costs. In addition, each regional transmission planning process must identify consequences for other transmission planning regions, such as upgrades that may be required in another region and, if the original region agrees to bear costs associated with such upgrades, then the original region's cost allocation method or methods must include provisions for allocating the costs of the upgrades among the beneficiaries in the original region.<sup>718</sup>

384. Regional Cost Allocation Principle 5 specifies that the cost allocation method and data requirements for determining benefits and identifying beneficiaries for a transmission facility must be transparent with adequate documentation to allow a stakeholder to determine how they were applied to a proposed transmission facility.<sup>719</sup>

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<sup>715</sup> *Id.* PP 625, 678.

<sup>716</sup> *Id.* P 637.

<sup>717</sup> *Id.* P 646.

<sup>718</sup> *Id.* P 657.

<sup>719</sup> *Id.* P 668.

385. Regional Cost Allocation Principle 6 specifies that a transmission planning region may choose to use a different cost allocation method for different types of transmission facilities in the regional transmission plan, but there can be only one cost allocation method for each type of transmission facility.<sup>720</sup> If a transmission planning region chooses to use a different cost allocation method for different types of transmission facilities, each cost allocation method must be determined in advance for each type of facility.<sup>721</sup> A regional cost allocation method may include voting requirements for identified beneficiaries to vote on proposed transmission facilities.<sup>722</sup>

**i. First Compliance Order**

386. In the First Compliance Order, the Commission found that MISO had demonstrated that its regional cost allocation methods for MEPs and MVPs, which the Commission has previously accepted, partially complied with the six regional cost allocation principles required in Order No. 1000.<sup>723</sup> Specifically, the Commission found that the regional cost allocation methods for MEPs and MVPs: (1) allocate costs in a manner that is at least roughly commensurate with estimated benefits; (2) do not involuntarily allocate costs to those who receive no benefits; (3) include clearly defined benefit to cost threshold ratios that do not exceed 1.25; (4) allocate costs solely within the affected transmission planning region; (5) provide for methods for determining the benefits and beneficiaries that are transparent with adequate documentation to allow a stakeholder to determine how they were applied to a proposed transmission facility; and (6) represent different cost allocation methods for different types of facilities that are set out clearly and explained in detail.<sup>724</sup>

387. The Commission found that MISO's regional cost allocation methods for MEPs and MVPs comply with Regional Cost Allocation Principle 1. With respect to MVPs, the Commission found persuasive MISO's explanation that its Tariff requires the consideration, on a portfolio basis, of the regional benefits of MVPs and that, because the benefits of MVPs are spread broadly across the MISO footprint, 100 percent of their costs are allocated regionally. In addition, the Commission noted that the Commission

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<sup>720</sup> *Id.* PP 685-686.

<sup>721</sup> *Id.* P 560.

<sup>722</sup> *Id.* P 689.

<sup>723</sup> First Compliance Order, 142 FERC ¶ 61,215 at P 434.

<sup>724</sup> *Id.*

similarly found, in accepting MISO's proposal to allocate 100 percent of MVP costs regionally, that the costs of MVPs are allocated "on a basis that is 'roughly commensurate' with the benefits of [MVP] projects[.]"<sup>725</sup> The Commission stated that in making this finding in the MVP Order that costs of MVPs are allocated at least roughly commensurate with the benefits MVPs provide to the MISO region, the Commission relied on four principle aspects. First, the Commission found that the initial screen determining whether each project meets one of three criteria ensures that each project benefits the MISO region.<sup>726</sup> Second, the Commission found that the portfolio approach helps to ensure that the benefits, as well as the costs, of MVPs are spread broadly across the MISO region.<sup>727</sup> Third, the Commission found that stakeholder review of cost-benefit calculations allows stakeholders to challenge studies quantifying the costs and benefits of MVPs.<sup>728</sup> Finally, the Commission noted that the MVP proposal was generally supported by state authorities and other MISO stakeholders.<sup>729</sup> Therefore, the Commission found upon review of MISO's existing MVP cost allocation method in the context of Order

No. 1000 that, for the reasons the Commission outlined in the MVP Order, MISO's regional cost allocation method for MVPs allocates costs in a manner that is at least roughly commensurate with the benefits that they provide.<sup>730</sup>

388. With respect to MEPs, the Commission stated that the Commission found, in accepting MISO's revised MEP cost allocation procedures, that by allocating 20 percent of MEP costs regionally, while amending the procedures so that the remaining 80 percent is allocated based on the adjusted production costs savings across MISO's local resource zones, that the costs of MEPs are allocated based on a just and reasonable "calculation of the benefits of MEPs [to] ensure that costs are allocated to those who benefit[.]"<sup>731</sup> The

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<sup>725</sup> *Id.* P 436 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 133 FERC ¶ 61,221, at P 200 (2010) (MVP Order), *order on reh'g*, 137 FERC ¶ 61,074 (2011)).

<sup>726</sup> *Id.* (citing MVP Order, 133 FERC ¶ 61,221 at P 201).

<sup>727</sup> *Id.* (citing MVP Order, 133 FERC ¶ 61,221 at P 202).

<sup>728</sup> *Id.* (citing MVP Order, 133 FERC ¶ 61,221 at P 203).

<sup>729</sup> *Id.* (citing MVP Order, 133 FERC ¶ 61,221 at P 204).

<sup>730</sup> *Id.*

<sup>731</sup> *Id.* P 437 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 139 FERC ¶ 61,261, at P 45 (2012)).

Commission found upon review of the MEP cost allocation method in the context of Order No. 1000 that, for the reasons outlined in the MEP Order, MISO's regional cost allocation method for MEPs allocate the costs of such projects in a manner that is at least roughly commensurate with the benefits they provide in that the costs associated with regional benefits are allocated regionally, while the costs associated with each MISO local resource zone's adjusted production costs savings are allocated based on the distribution of those benefits among the zones.<sup>732</sup>

389. The Commission similarly determined that MISO's regional cost allocation methods for MEPs and MVPs comply with Regional Cost Allocation Principle 2, in the context of Order No. 1000, because MISO allocates costs associated with MVPs and MEPs in a manner at least roughly commensurate with estimated benefits and, thus, does not allocate costs to those that receive no benefit from transmission facilities.<sup>733</sup> Specifically, the Commission found that the MVP usage charge properly allocates costs based on usage over time and, therefore, allocates costs to load in a manner that reflects changes in MVP beneficiaries over time.<sup>734</sup> With regard to MEPs, the Commission similarly found that the granularity of the benefits calculation, i.e., 80 percent allocated to local resource zones, which are further allocated to each pricing zone within each local resource zone on a load ratio share-basis, ensures that the costs are allocated to those that benefit.<sup>735</sup> The Commission also found that MISO complies with Regional Cost Allocation Principle 3 because MISO's proposed benefit-cost threshold ratio does not exceed 1.25 to 1.<sup>736</sup>

390. The Commission also determined that MISO partially complies with Regional Cost Allocation Principle 4. The Commission found that that MISO's regional cost allocation methods for MEPs and MVPs comply with the Regional Cost Allocation Principle 4 requirement that the allocation method for the cost of a transmission facility selected in a regional transmission plan for purposes of cost allocation must allocate costs solely within that transmission planning region unless another entity outside the region or another transmission planning region voluntarily agrees to assume a portion of those

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<sup>732</sup> *Id.*

<sup>733</sup> *Id.* P 438.

<sup>734</sup> *Id.*

<sup>735</sup> *Id.*

<sup>736</sup> *Id.* P 439.

costs.<sup>737</sup> The Commission determined, however, that MISO does not comply with the Regional Cost Allocation Principle 4 requirement that the regional transmission planning process identify the consequences of a transmission facility selected in the regional transmission plan for purposes of cost allocation for other transmission planning regions, such as upgrades that may be required in another region.<sup>738</sup> The Commission therefore directed MISO to file a further compliance filing revising its Tariff to provide for identification of the consequences of a transmission facility selected in the regional transmission plan for purposes of cost allocation. The Commission further required MISO to address whether the MISO region has agreed to bear the costs associated with any required upgrades in another transmission planning region and, if so, how such costs will be allocated within the MISO transmission planning region.<sup>739</sup>

391. The Commission found that MISO complies with the requirement of Regional Cost Allocation Principle 5 that the regional cost allocation methods be transparent. The Commission found persuasive MISO's explanation that the allocation and benefit determination methods for transmission projects are specified in its Tariff and supplemented by the Business Practices Manual for Transmission Planning, the regional cost allocation methods are applied consistent with Order No. 890 with numerous opportunities for stakeholder participation, and MISO's analyses of projected benefits are documented through studies and are published in each year's MTEP report, which is posted on MISO's website.<sup>740</sup> The Commission also found that MISO's regional cost allocation methods comply with Regional Cost Allocation Principle 6. The Commission stated that MISO has chosen to use a different cost allocation method for different types of transmission facilities in the regional transmission plan. The Commission also found that MISO has not designated a type of transmission facility that has no regional cost allocation method applied to it.<sup>741</sup>

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<sup>737</sup> *Id.* P 440.

<sup>738</sup> *Id.* P 441.

<sup>739</sup> *Id.*

<sup>740</sup> *Id.* P 442.

<sup>741</sup> *Id.* P 443.

**ii. Requests for Rehearing or Clarification****(a) Summary of Requests for Rehearing or Clarification**

392. Illinois Commission states that the postage stamp component of the MVP and MEP cost allocation methods does not specifically identify benefits or beneficiaries, nor does it demonstrate that the distribution of benefits is commensurate with the distribution of costs. Specifically, Illinois Commission asserts that MISO fails to identify benefits or beneficiaries associated with the 20 percent postage stamp cost allocation for MEPs and has not demonstrated that such benefits are distributed to beneficiaries evenly (*pro rata* based on load) across the MISO footprint. Similarly, Illinois Commission asserts that MISO has not demonstrated the benefits of MVPs or shown that those benefits are distributed evenly across the MISO footprint on a megawatt-hour basis.<sup>742</sup>

393. Illinois Commission argues that a stakeholder cannot determine how the postage stamp cost allocation method and data requirements determine benefits and identify beneficiaries. Instead, Illinois Commission argues, the postage stamp component is based on assumptions regarding system-wide benefits and the distribution of beneficiaries and is in violation of the Regional Cost Allocation Principle 5 requirement that cost allocation methods be transparent with adequate documentation to allow a stakeholder to determine how the cost allocation method was applied to a proposed transmission facility.<sup>743</sup>

394. Illinois Commission claims that because MISO has not “determined” the benefits associated with the postage stamp components of its regional cost allocation methods and has not “identified” the specific benefits or the beneficiaries, as required by Regional Cost Allocation Principle 5, MISO cannot demonstrate that costs are only allocated regionally to those that benefit, as required by Regional Cost Allocation Principle 2. Thus, Illinois Commission seeks rehearing of the Commission’s finding that MISO’s proposed cost allocation method satisfies both Regional Cost Allocation Principles 2 and 5.<sup>744</sup>

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<sup>742</sup> Illinois Commission Rehearing Request at 8-9.

<sup>743</sup> *Id.* at 9.

<sup>744</sup> *Id.* at 9-10.

(b) **Commission Determination**

395. We deny Illinois Commission’s request for rehearing. Illinois Commission claims that because MISO has not “determined” the benefits associated with its postage stamp components of MVPs and MEPs and has not “identified” the specific benefits or the beneficiaries, as required by Regional Cost Allocation Principle 5,<sup>745</sup> MISO cannot demonstrate that costs are only allocated regionally to those that benefit, as required by Regional Cost Allocation Principle 2.<sup>746</sup> We affirm the findings in the First Compliance Order that the postage stamp components of MISO’s MVP and MEP cost allocation methods comply with Order No. 1000 Regional Cost Allocation Principles 2 and 5. Further, since the issuance of the First Compliance Order, the U.S. Court of Appeals for the Seventh Circuit (Seventh Circuit) issued an opinion affirming MISO’s 100 percent postage stamp cost allocation method for MVPs.<sup>747</sup> The Seventh Circuit affirmed, in all but one respect,<sup>748</sup> the Commission’s order approving MISO’s MVP cost allocation method.<sup>749</sup> We find that the Seventh Circuit’s decision provides additional support that MISO’s cost allocation methods comply with Regional Cost Allocation Method Principles 2 and 5.

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<sup>745</sup> The cost allocation method and data requirements for determining benefits and identifying beneficiaries for a transmission facility must be transparent with adequate documentation to allow a stakeholder to determine how they were applied to a proposed transmission facility. Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 586 (cross-referenced at 136 FERC ¶ 61,051 at P 586).

<sup>746</sup> Those that receive no benefit from transmission facilities, either at present or in a likely future scenario, must not be involuntarily allocated the costs of those facilities. *Id.*

<sup>747</sup> *Ill. Commerce Comm’n v. FERC*, 721 F.3d 764 (7th Cir. 2013), *cert. denied sub nom. Schuette v. FERC*, 82 U.S.L.W. 3240 (U.S. Feb. 24, 2014) (No. 13-443), and *Hoosier Rural Energy Coop. Inc. v. FERC*, 82 U.S.L.W. 3240 (U.S. Feb. 24, 2014) (No. 13-445) (*Ill. Commerce Comm’n*).

<sup>748</sup> The court vacated and remanded back to the Commission the Commission’s prohibition on MISO from “charging anything for exports of energy to PJM enabled by the multi-value projects while permitting [MISO] to charge for exports on energy to all other RTOs.” *Id.* at 780.

<sup>749</sup> *Midwest Indep. Transmission Sys. Operator, Inc.*, 133 FERC ¶ 61,221 (2010) (MVP Order), *order on reh’g*, 137 FERC ¶ 61,074 (2011).

396. With respect to Regional Cost Allocation Principle 5, we find Illinois Commission's argument that the regional cost allocation methods for MVPs and MEPs is not transparent and therefore does not comply with Regional Cost Allocation Principle 5 is without merit. We continue to find that MISO complies with Regional Cost Allocation Principle 5 because the cost allocation and benefit determination methods for MVPs and MEPs are: (1) specified in MISO's Tariff and supplemented by the Transmission Planning Business Practices Manual; (2) the cost allocation methods are applied with numerous opportunities for stakeholder participation; and (3) MISO's analysis of projected benefits are documented through studies and are published in MISO's annual MTEP report. Importantly, we find that stakeholders have opportunities to challenge MISO's cost allocation determination through formal dispute resolution processes under the MISO Tariff. Thus, consistent with the Seventh Circuit's finding, we find that the burden is on stakeholders to counter MISO's analysis by showing their own "evidence of imbalance of costs and benefits."<sup>750</sup>

397. With respect to Regional Cost Allocation Principle 2, we also do not find Illinois Commission's rehearing request persuasive. We continue to find that MISO's regional cost allocation methods for MVPs and MEPs comply with Regional Cost Allocation Principle 2 because they allocate costs associated with MVPs and MEPs in a manner at least roughly commensurate with estimated benefits, and thus do not allocate costs to those that receive no benefit.<sup>751</sup> Specifically, we continue to find that the MVP usage charge properly allocates costs based on usage over time and, therefore, allocates costs to load in a manner that reflects changes in MVP beneficiaries over time.<sup>752</sup> With regard to MEPs, we continue to find that the granularity of the benefits calculation, i.e., 80 percent allocated to local resource zones, which are further allocated to each pricing zone within each local resource zone on a load ratio share-basis, ensures that the costs are allocated to those that benefit.<sup>753</sup>

398. Our findings above, that MVPs comply with Regional Cost Allocation Principle 2, are also supported by the Seventh Circuit's decision. The Seventh Circuit noted that to qualify as an MVP, a transmission project must: (1) have a minimum expected cost of \$20 million; (2) consist of high-voltage transmission lines; and (3) either help MISO

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<sup>750</sup> *Ill. Commerce Comm'n v. FERC*, 721 F.3d at 775.

<sup>751</sup> First Compliance Order, 142 FERC ¶ 61,215 at P 438.

<sup>752</sup> *Id.*

<sup>753</sup> *Id.*

members meet state renewable energy requirements, fix reliability problems, or provide economic benefits in multiple pricing zones. While the Seventh Circuit further stated that “[n]one of these eligibility criteria ensures that every utility in MISO’s vast region will benefit from every MVP project, let alone in exact proportion to its share of the MVP tariff,”<sup>754</sup> it also pointed out that under the eligibility criteria, every MVP will be large, consist of high-voltage transmission facilities (enabling power to be transmitted efficiently across pricing zones), and provide one or more of several benefits (i.e., helping utilities satisfy renewable energy requirements, improving reliability, and facilitating power flow to currently underserved areas). The court acknowledged that calculating cost savings associated with these benefits, such as from reduced line losses, reduced reserve margin losses, having access to cheaper wind power from the West, and improved grid reliability, faced “limitations on calculability that the uncertainty of the future imposes.”<sup>755</sup> However, the Seventh Circuit stressed that such benefits were real, substantial, and would benefit utilities and consumers in all of MISO’s pricing zones.<sup>756</sup>

399. The Seventh Circuit also found that it is not possible “to allocate these cost savings with any precision across MISO members.”<sup>757</sup> Citing its earlier finding that the Commission can approve a proposal even if the Commission “cannot quantify the benefits” to a particular utility so long as it has “an articulable and plausible reason to believe that the benefits are at least roughly commensurate” with that utility’s share of total electricity sales, the Seventh Circuit found that it will have to suffice that MISO’s and the Commission’s “crude” attempt to match the costs and benefits may be all that is possible.<sup>758</sup> Hence, in qualifying as an MVP, a transmission project demonstrates benefits that are, according to the Seventh Circuit, experienced in all of MISO’s pricing zones.

400. While the Seventh Circuit’s decision addressed only the regional cost allocation method for MVPs, we also find that the Seventh Circuits decision supports the finding in the First Compliance Order that the regional cost allocation method for MEPs complies with Order No. 1000’s Regional Cost Allocation Principle 2. Similar to the eligibility

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<sup>754</sup> *Ill. Commerce Comm’n v. FERC*, 721 F.3d at 774.

<sup>755</sup> *Id.* at 774.

<sup>756</sup> *Id.* at 775.

<sup>757</sup> *Id.* at 774.

<sup>758</sup> *Id.* (citing *Ill. Commerce Comm’n v. FERC*, 576 F.3d 470, 477 (7<sup>th</sup> Cir. 2009)).

criteria that a transmission project must meet to qualify as an MVP, to qualify as an MEP a transmission project must, among other requirements: (1) cost \$5 million or more; (2) involve transmission facilities with voltages of 345 kV or higher that constitute more than 50 percent of the combined project cost; and (3) be found to have regional benefits pursuant to a cost-benefit analysis.<sup>759</sup> In performing that cost-benefit analysis, MISO will use multiple future scenarios and multi-year analysis including sensitivity analyses guided by input from the Planning Advisory Committee to evaluate the anticipated benefits, measured as adjusted production cost savings, of a proposed MEP.<sup>760</sup> MISO will then compare the sum of a proposed transmission project's benefits for each local resource zone to its costs and, if the project has a benefit-cost ratio of 1.25 or greater, will include it in the MTEP as an MEP.<sup>761</sup>

401. As discussed above, the Seventh Circuit found that under the eligibility criteria for qualifying as an MVP, every MVP will be large, consist of high-voltage transmission facilities (enabling power to be transmitted efficiently across pricing zones), and will provide one or more of several benefits (i.e., helping utilities satisfy renewable energy requirements, improving reliability, and facilitating power flow to currently underserved areas), and thus provides benefits that are, according to the Seventh Circuit, experienced in all of MISO's pricing zones. Likewise, to qualify as an MEP a transmission project must be large (i.e., cost \$5 million or more), consist of high-voltage transmission facilities (i.e., involve transmission facilities with voltages of 345 kV or higher that constitute more than 50 percent of the combined project cost), and be found to have regional benefits pursuant to a cost-benefit analysis (i.e., have a benefit-cost ratio of 1.25 or greater). Thus, to justify the allocation of 20 percent of the costs of MEPs on a postage stamp basis, we find that because a transmission project must be large and consist of high-voltage transmission facilities to qualify as an MEP, MEPs provide some of the same regional benefits as MVPs (i.e., enabling power to be transmitted efficiently across pricing zones), which are benefits that the Seventh Circuit has found are

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<sup>759</sup> MISO FERC Electric Tariff, Attachment FF, § II.B. An MEP may include lower voltage transmission facilities that operate at or above 100 kV so long as those facilities: (1) collectively constitute less than 50 percent of the combined project cost; and (2) are necessary for higher voltage transmission facilities that operate at or above 345 kV to deliver sufficient regional benefits to satisfy the benefit-cost ratio or are otherwise needed to relieve applicable reliability criteria violations that are projected to occur as a direct result of the higher voltage transmission facilities. *Id.*

<sup>760</sup> *Id.* §§ II.B.1, II.B.1.a.

<sup>761</sup> *Id.* §§ II.B.1.c, II.B.1.e.

experienced in all MISO pricing zones. Therefore, we deny rehearing that MISO's cost allocation methods do not comply with Regional Cost Allocation Principle 2.

**iii. Compliance**

**(a) Summary of Compliance Filings**

402. MISO proposes to revise its Tariff to state that, as part of the evaluation of any proposed MEPs or MVPs, MISO will determine whether the proposed project causes any violations of NERC Reliability Standards on the transmission system(s) of the adjacent neighboring transmission planning region(s).<sup>762</sup> Under this proposal, if MISO's evaluation identifies any such violations, it will contact and coordinate with the other potentially affected adjacent neighboring transmission planning region(s) on any further evaluation.<sup>763</sup> MISO states that it has currently not agreed, as a general rule, to bear the costs associated with any upgrades needed in another transmission planning region in connection with transmission projects approved in the MTEP. MISO states, however, that to the extent MISO has an agreement with another transmission planning region regarding funding of upgrades required in one transmission planning region necessitated by transmission projects approved in the other transmission planning region, MISO will follow such agreements, which in some instances may require payment for upgrades in neighboring transmission planning regions.<sup>764</sup>

403. MISO states that it will generally continue to recognize that the constructing transmission owner in a neighboring transmission planning region has cost responsibility for network upgrades resulting from transmission projects approved in the MTEP. MISO states, however, that when reliability upgrades are required on a neighboring system in another transmission planning region, MISO will work with the constructing transmission owner on a case-by-case basis to determine, by mutual agreement, whether all or a portion of the network upgrade should be paid for by the neighboring MISO transmission owner. MISO clarifies that any costs incurred by a MISO transmission owner as the result of such an agreement will be ineligible for regional cost allocation within MISO unless the funded transmission project qualifies as a MVP or MEP.<sup>765</sup>

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<sup>762</sup> *Id.* § II.D.

<sup>763</sup> *Id.*

<sup>764</sup> MISO Compliance Transmittal at 29.

<sup>765</sup> *Id.*

**(b) Commission Determination**

404. We find that the provisions in MISO's compliance filing addressing MISO's proposed regional cost allocation method comply with the directives in the First Compliance Order because MISO has revised its Tariff to provide for identification of the consequences of a transmission facility selected in the regional transmission plan for purposes of cost allocation on another transmission planning region, thus complying with Regional Cost Allocation Principle 4. Furthermore, MISO has addressed whether, and under what circumstances, the MISO region will bear the costs associated with any required upgrades in another transmission planning region.

**V. Entergy and Cleco**

**A. First Compliance Order**

405. In the First Compliance Order, the Commission conditionally accepted Entergy's and Cleco's proposal to comply with Order No. 1000 by participating in the MISO regional transmission planning process starting on June 1, 2013, subject to the outcome of the proceedings on MISO's proposed modifications to its Tariff that are needed to effectuate the transition to transmission planning by MISO of the Entergy and Cleco transmission systems.<sup>766</sup> The Commission stated that it could not determine whether

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<sup>766</sup> First Compliance Order, 142 FERC ¶ 61,215 at PP 458-459. In its first compliance filing, MISO identified nine Tariff revisions as necessary to effectuate the transition to MISO planning for the Entergy and Cleco transmission facilities, but stated that it would submit them at a later date. Specifically, MISO listed changes to: (1) Attachment FF, section IA.2.c (to add a new sub-region to the list of sub-regional planning meetings); (2) Attachment FF-1 (planned projects excluded from regional cost allocation); (3) Attachment FF-3 (Planning Sub-Regions Map); (4) Attachment FF-4 (listing of Transmission Owners integrating local planning process); (5) Module A (Common Tariff Provisions; possible addition of Cleco to definition of Second Planning Area); (6) Attachments VV and WW (Local Resource Zone maps); (7) Attachment O (formula rates in transmission pricing zones); (8) Schedules 7, 8, 9, and 26 (covering point-to-point and network transmission service and network upgrade charges); and (9) Attachment P (list of grandfathered agreements). MISO submitted and the Commission has accepted most of these revisions. MISO determined and the Commission agreed that the revision to Module A was not required. *See Midwest Indep. Transmission Sys. Operator, Inc.*, 143 FERC ¶ 61,193 (2013). On June 20, 2013, the Commission issued an order conditionally accepting and suspending certain proposed tariff revisions, including those to Attachment O, and establishing hearing and settlement

(continued...)

Entergy would comply with Order No. 1000 upon joining MISO since MISO, Entergy and Cleco had not provided the necessary details of how Entergy and Cleco would participate in the MTEP process and MISO had not proposed Tariff revisions affecting the integrations. Although MISO asserted that it intended to submit the Tariff revisions necessary to integrate Entergy and Cleco into its region, including modifications to MTEP, 60 days prior to the effective date of the proposed modifications, the Commission stated that it was not able to review such modifications prior to issuing the First Compliance Order.<sup>767</sup>

406. In the First Compliance Order, the Commission found that Entergy's proposal to continue its current transmission planning cycle during the period leading up to and overlapping with its participation in MTEP 2014 by completing its 2014-2018 Construction Plan partially complied with Order No. 1000.<sup>768</sup> The Commission determined that the transmission planning process for the Entergy 2014-2018 Construction Plan had been underway since October 2012 and, therefore, allowing Entergy to complete this transmission planning cycle did not conflict with the requirements of Order No. 1000.<sup>769</sup> However, the Commission directed MISO to provide further explanation about its proposal to include all transmission facilities in Entergy's 2014-2018 Construction Plan as "previously approved projects" under Appendix A of the MTEP.<sup>770</sup>

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judge procedures. *See ITC Holdings Corp.*, 143 FERC ¶ 61,257 (2013); *order on reh'g*, 146 FERC ¶ 61,111 (2014).

<sup>767</sup> First Compliance Order, 142 FERC ¶ 61,215 at P 460.

<sup>768</sup> *Id.* P 472.

<sup>769</sup> *Id.* P 474.

<sup>770</sup> The Commission noted that MISO had filed a new Module B-1 to its Tariff in a separate proceeding, and that a provision at Module B-1, Attachment 5, section 4.5 of the Tariff stated that "[p]rojects in the Construction Plan will be included in the MTEP Appendix A as 'previously approved projects,' but the cost allocation provisions in Attachment FF of the Tariff shall not be applicable to such projects." In an order issued on June 20, 2013, the Commission accepted Module B-1 but conditioned its acceptance on the outcome of MISO's Order No. 1000 compliance proceeding. *Id.* P 458 & n.849 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 143 FERC ¶ 61,258 at P 30 (2013) (Module B-1 Order)).

407. Specifically, the Commission stated that it understood MISO's proposal to mean that any transmission project included in MTEP Appendix A before June 1, 2013 (including those in the Entergy 2014-2018 Construction Plan) will not be subject to the requirements of Order No. 1000. However, the Commission found it was not clear how MISO would consider transmission projects that have been previously approved in the Entergy transmission planning process. The Commission was concerned that exempting from the requirements of Order No. 1000 all facilities identified in the Entergy 2014-2018 Construction Plan may conflict with the requirements of Order No. 1000 that apply to the evaluation or reevaluation of any transmission facility that occurs after the effective date of the public utility's Order No. 1000 compliance filing.<sup>771</sup> The Commission therefore directed MISO to submit a further compliance filing providing further explanation of: (1) its proposal to include all transmission facilities in Entergy's 2014-2018 Construction Plan as "previously approved projects" under Appendix A of the MTEP; (2) what evaluation (or reevaluation) it will perform on the previously approved projects or transmission facilities identified in the Entergy 2014-2018 Construction Plan; and (3) what regional cost allocation method will apply to the transmission facilities MISO evaluates (or reevaluates).<sup>772</sup>

#### **B. Summary of Compliance Filings**

408. MISO states that the Entergy 2014-2018 Construction Plan represents the transmission planning efforts of Entergy and MISO, in its role as the Independent Coordinator of Transmission for Entergy, during the 2013 transmission planning cycle. MISO states that, similar to the MTEP, the Entergy Construction Plan evaluates transmission needs over a long-term time horizon and includes transmission projects that will need to begin construction between 2014 and 2018. MISO states that, in general, those transmission projects that are expected to begin construction prior to the end of 2014, and thus prior to MTEP approval by the MISO Board, will be identified in a separate filing to amend Attachment FF-1 of its Tariff.<sup>773</sup> MISO states that the analysis for those transmission projects is considered complete and no further evaluation or reevaluation will be performed on them. MISO further states that those transmission projects in the Entergy 2014-2018 Construction Plan that are not included in the to-be-amended Attachment FF-1 will be further evaluated as a part of the normal MTEP

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<sup>771</sup> *Id.* P 458.

<sup>772</sup> *Id.* P 459. *See also id.* P 474.

<sup>773</sup> MISO, FERC Electric Tariff, Attachment FF-1 (List of Planned Projects to be Excluded from Cost Allocation) (1.0.0).

transmission planning process beginning with the MTEP 2014 transmission planning cycle. MISO states that those transmission projects that are evaluated as part of MTEP 2014 and beyond will be eligible for any applicable regional cost allocation method detailed in Attachment FF and Attachment FF-6 of MISO's Tariff.<sup>774</sup>

### **C. Protests/Comments**

409. LS Power argues that MISO's compliance filing is at odds with the simultaneous compliance filing that MISO made in Docket No. ER12-2682-001 to comply with the Module B-1 Order. LS Power argues that Attachment 5 of Module B-1, which contains the Transmission Planning Process, seems to have provisions that are inconsistent with the explanation that MISO provided in its response to the First Compliance Order. Specifically, LS Power states that the Module B-1 language suggests that all transmission projects in the Entergy 2014-2018 Construction Plan are to be included in Attachment FF-1 as previously approved projects and not subject to cost allocation, but that in its response to the First Compliance Order, MISO states that only the transmission projects beginning construction by the end of 2014 are to be included in the Attachment FF-1 list. LS Power argues that the Commission should require modifications to Module B-1 to make it consistent with MISO's response to the First Compliance Order.

410. LS Power argues that the Commission should also require MISO to provide additional detail on the regional cost allocation method applicable to the integrated Entergy region. LS Power states that MISO did not specifically describe MISO's regional cost allocation approach to the former Entergy territory. LS Power states that the Commission should provide confirmation that each former Entergy Operating Company remains a separate retail distribution service territory or footprint for purposes of Order No. 1000 regional cost allocation.<sup>775</sup>

### **D. Answer**

411. MISO states that before Entergy's integration into MISO in December 2013, MISO will file an amendment to Attachment FF-1 that will identify the projects that MISO will not evaluate through the MTEP process and that will thus not be eligible for regional cost allocation under MISO's Tariff, nor subject to the transmission planning provisions of Order No. 1000. MISO states that these projects to be included in the amendment to Attachment FF-1 were developed under the transmission planning provisions of the Entergy Tariff and will consist of approved projects whose funding

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<sup>774</sup> MISO Compliance Transmittal at 29-30.

<sup>775</sup> LS Power Protest at 43.

mechanism has also been approved, regardless of the expected start date of their construction, and other approved projects whose construction is scheduled to begin before the end of 2014. MISO states that because these projects were not approved by MISO they will be included in MISO's base planning models but not in Appendix A to the MTEP. However, projects not deemed previously approved will be subject to MISO's evaluation under its Order No. 1000-compliant MTEP process and costs will be allocated in accordance with their approved project classification under MISO's Tariff.<sup>776</sup>

#### **E. Commission Determination**

412. We find that MISO's compliance filing complies with the directives in the First Compliance Order addressing Entergy's Order No. 1000 compliance filing. MISO has clarified that it is not proposing to exempt from the requirements of Order No. 1000 *all* transmission projects identified in the Entergy 2014-2018 Construction Plan. Rather, MISO explains that only those transmission projects in the Entergy 2014-2018 Construction Plan that are expected to begin construction prior to the end of 2014 and for which analysis is considered complete will not be subject to Order No. 1000. MISO states that those transmission projects in the Entergy 2014-2018 Construction Plan that are not included in the to-be-amended Attachment FF-1 will be further evaluated as a part of the normal MTEP transmission planning process beginning with the MTEP 2014 transmission planning cycle. Additionally, MISO submitted, in a separate docket, the revisions to Attachment FF-1, which, consistent with these statements, lists only transmission projects from the Entergy 2014-2018 Construction Plan for which analysis is complete and does not include (and thus does not exempt from Order No. 1000) transmission projects from the Entergy 2014-2018 Construction Plan that MISO will reevaluate.<sup>777</sup>

413. We dismiss LS Power's argument that the Commission should require modifications to Module B-1 so that it will be consistent with MISO's answer in to the First Compliance Order. On December 19, 2013, in Docket Nos. ER12-2682-000, ER12-2682-001, and ER12-2682-002, MISO filed a motion to withdraw Module B-1 and terminate the Module B-1 proceedings. The Commission granted MISO's Motion to Withdraw Filings and Terminate Proceedings in Docket Nos. ER12-2682-000, ER12-

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<sup>776</sup> MISO Answer at 44-45.

<sup>777</sup> On December 18, 2013, MISO submitted the revisions to Attachment FF-1 in Docket No. ER14-681-000. The filing included a new Attachment FF-1A. The Commission accepted the filing by delegated letter order. *Midcontinent Indep. Sys. Operator, Inc.*, Docket No. ER14-681-000 (Jan. 10, 2014) (delegated letter order).

2682-001, and ER12-2682-002 in an order issued on February 20, 2014.<sup>778</sup> Thus, we find that LS Power's concerns regarding inconsistencies between Module B-1 and MISO's compliance with Order No. 1000 are now moot.

414. Finally, we do not grant LS Power's request to find that each Entergy Operating Company remains a separate retail distribution service territory or footprint for purposes of Order No. 1000 regional cost allocation. In Order No. 1000-A, the Commission stated that, in the case of an RTO or ISO whose footprint covers the entire region, local transmission facilities are defined by reference to the retail distribution service territories or footprints of its underlying transmission owning members.<sup>779</sup> In addition, Order No. 1000 defines a local transmission facility as a transmission facility located solely within a public utility transmission provider's retail distribution service territory or footprint that is not selected in the regional transmission plan for purposes of cost allocation.<sup>780</sup> In the case of Entergy, the combined retail distribution service territories of the Entergy Operating Companies together constitute a single footprint for purposes of defining local transmission facilities pursuant to Order No. 1000. Thus, a transmission facility located entirely within the combined Entergy transmission system footprint or within one or more of the Entergy Operating Companies' individual retail distribution service territories and that is not selected in the regional transmission plan for purposes of cost allocation will be a "local transmission facility" as defined by Order No. 1000.<sup>781</sup> However, we note that a transmission facility located entirely within the retail distribution service territory of one or more of the Entergy Operating Companies or

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<sup>778</sup> See *ITC Holdings Corp.*, 146 FERC ¶ 61,111, at P 18 (2014).

<sup>779</sup> Order No. 1000-A, 139 FERC ¶ 61,132 at P 429.

<sup>780</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 63.

<sup>781</sup> The Commission made a similar finding in *Duke Energy Carolinas LLC*, 145 FERC ¶ 61,252, at PP 49-51 (2013). In that order, the Commission found that the Duke Energy Carolinas LLC's (Duke) and Carolina Power and Light Company's (Progress) (together, Duke-Progress) retail distribution service territories taken together constitute a single footprint for purposes of defining local transmission facilities pursuant to Order No. 1000. Thus, a transmission facility located entirely within the combined Duke-Progress transmission system footprint or within either Duke's retail distribution service territory or Progress' retail distribution service territory and that is not selected in the regional transmission plan for purposes of cost allocation will be a "local transmission facility" as defined by Order No. 1000.

within the combined Entergy Operating Companies footprint may still be eligible for potential selection in the regional transmission plan for purposes of cost allocation.

## **VI. Baseline Reliability Project Filing**

### **A. First Compliance Order**

415. In the First Compliance Order, the Commission accepted, subject to a compliance filing, MISO's proposal pursuant to FPA section 205, to assign all Baseline Reliability Project costs to the pricing zone in which the Baseline Reliability Project is located, finding it to be just and reasonable and not unduly discriminatory or preferential. The Commission found that MISO had shown that the benefits of a Baseline Reliability Project are realized primarily in the pricing zone in which the project is located and that MISO's proposal "assigns the costs of Baseline Reliability Projects in a manner that is roughly commensurate with the benefits that these projects provide."<sup>782</sup>

416. The Commission found that MISO's previous cost allocation method for Baseline Reliability Projects (i.e., 20 percent postage stamp cost allocation) was unnecessary to comply with the cost allocation requirements of Order No. 1000.<sup>783</sup> The Commission accepted MISO's proposed MEP and MVP cost allocation methods as in compliance with the requirement to have in place a method, or set of methods, for allocating costs of new transmission facilities selected in the regional transmission plan for purposes of cost allocation that satisfies the six regional cost allocation principles described in Order No. 1000.<sup>784</sup> The Commission found that MISO's Baseline Reliability Project Filing proposal to eliminate regional cost sharing for Baseline Reliability Projects was not inconsistent with the Order No. 1000 statement that a region may not designate a type of transmission facility that has no regional cost allocation method applied to it since transmission projects with reliability benefits selected in the regional transmission plan for purposes of cost allocation would be covered by MVPs.<sup>785</sup> The Commission also found persuasive MISO's contention that, going forward, its MEP and MVP project categories would displace Baseline Reliability Projects when more efficient or cost-effective regional solutions (i.e., MEPs or MVPs) were available to meet multiple transmission needs. However, the Commission required MISO to submit an informational filing following the completion of MTEP 2015 that would outline the

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<sup>782</sup> First Compliance Order, 142 FERC ¶ 61,215 at PP 518, 520.

<sup>783</sup> *Id.* P 519.

<sup>784</sup> *Id.*

<sup>785</sup> *Id.* (citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 690).

number of MVPs, MEPs, and Baseline Reliability Projects approved during the MTEP 2014 and MTEP 2015 cycles and would include an analysis of Baseline Reliability Projects approved during the MTEP 2014 and MTEP 2015 cycles.<sup>786</sup>

417. In response to protests, the Commission noted that MISO is not required to show as part of its FPA section 205 proceeding that MISO's current cost allocation method for Baseline Reliability Projects is unjust, unreasonable, or unduly discriminatory but rather that MISO must demonstrate that its proposed cost allocation method will result in just and reasonable rates. The Commission also disagreed with arguments that, because a portion of the costs of some Baseline Reliability Projects are currently allocated to pricing zones other than the pricing zone in which the project is located, that some Baseline Reliability Projects provide benefits outside of the pricing zone in which they are located and thus costs are not allocated roughly commensurate with benefits under MISO's proposal. The Commission stated that MISO had presented convincing support for its claim that the pricing zone in which a Baseline Reliability Project is located receives most of the benefits provided by that project and, therefore, assigning all of the associated costs to that pricing zone results in an allocation of costs that is roughly commensurate to the distribution of the project's benefits.<sup>787</sup>

418. The Commission noted that MISO's proposal would allow transmission owners to retain a federal right of first refusal for a Baseline Reliability Project located within its retail distribution service territory or footprint.<sup>788</sup> However, the Commission stated that, given that MISO has demonstrated that Baseline Reliability Projects primarily benefit the pricing zone in which they are located, the result of MISO's proposal to allocate the costs of these facilities at least roughly commensurate with benefits did not violate the requirements of Order No. 1000.

419. In addition, the Commission noted that Order No. 1000 does not require removal of a federal right of first refusal for any transmission facility located in more than one transmission provider's retail distribution service territory or footprint unless that transmission facility is also selected in the regional transmission plan for purposes of cost allocation.<sup>789</sup> The Commission also disagreed with comments that restricting a Baseline

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<sup>786</sup> *Id.*

<sup>787</sup> *Id.* P 522 (additional citations omitted).

<sup>788</sup> *Id.* P 524 (citing Order No. 1000-A, 139 FERC ¶ 61,132 at P 423).

<sup>789</sup> *Id.* P 525 (citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 313; Order No. 1000-A, 139 FERC ¶ 61,132 at P 415).

Reliability Project to a single transmission provider's retail distribution territory may cause MISO to divide projects or select a combination of projects that are not more efficient or cost-effective.<sup>790</sup>

420. The Commission directed MISO to submit a further compliance filing within 120 days of issuance of the First Compliance Order. In response to this directive, MISO separately submitted proposed tariff revisions in advance of the 120-day compliance deadline, requesting that the Commission address the Baseline Reliability Project Filing compliance requirement separately from, and ahead of, the First Compliance Order's other requirements. According to MISO, it filed this compliance filing separately in order to ensure that there was no confusion as to what provisions were in effect when the Baseline Reliability Project changes approved by the First Compliance Order went into effect on June 1, 2013. On August 2, 2013, the Commission accepted, as in compliance with the First Compliance Order, MISO's proposed tariff revisions, subject to a further compliance order.<sup>791</sup> On August 14, 2013, MISO submitted a further compliance filing, which the Commission accepted on September 6, 2013.<sup>792</sup>

**B. Requests for Rehearing or Clarification**

421. AWEA/WOW and LS Power assert that allowing MISO to shift all Baseline Reliability Project costs to the pricing zone in which the project is located enabled MISO to eliminate the only regional cost allocation method in MISO for transmission projects that exclusively address reliability needs.<sup>793</sup> According to AWEA/WOW and LS Power, to qualify as an MVP, a transmission facility must address reliability concerns *and* another need, such as public policy mandates or economic benefits.<sup>794</sup> Both petitioners therefore assert that the Commission's finding in the First Compliance Order contradicts

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<sup>790</sup> *Id.*

<sup>791</sup> *Midcontinent Indep. Sys. Operator, Inc.*, 144 FERC ¶ 61,096 (2013).

<sup>792</sup> *Midcontinent Indep. Sys. Operator, Inc.*, Docket No. ER13-186-003 (Sept. 6, 2013) (delegated letter order).

<sup>793</sup> AWEA/WOW, Request for Clarification and Rehearing, Docket No. ER13-186-001, at 2 (filed April 22, 2013) (AWEA/WOW Rehearing Request); LS Power, Request for Rehearing, Docket No. ER13-186-001, at 3-4 (filed Apr. 22, 2013) (LS Power Baseline Reliability Project Filing Rehearing Request).

<sup>794</sup> AWEA/WOW Rehearing Request at 3 (referencing MISO, FERC Electric Tariff, Attachment FF at § II.C.2.a, II.C.2.c); LS Power Baseline Reliability Project Filing Rehearing Request at 4.

Order No. 1000's prohibition on excluding a single type of transmission facility from regional cost allocation, because a transmission project that provides only reliability benefits does not qualify for regional cost allocation as an MVP.<sup>795</sup>

422. According to LS Power, until MISO adopts, through the stakeholder process, a new regional cost allocation method for transmission facilities whose need is driven exclusively by reliability concerns, Order No. 1000 mandates that the existing regional cost allocation method for Baseline Reliability Projects must remain in place.<sup>796</sup> LS Power further asserts that allocating the costs of a Baseline Reliability Project to the pricing zone in which it is located forces zonal ratepayers to pay all of the costs of a transmission facility that benefits other zones solely to protect the incumbent transmission owner from competition. LS Power states that Order No. 1000 established that, if a transmission project, even if exclusively reliability driven, is in more than one retail distribution service territory, it should not retain a right of first refusal because “[f]ederal rules should not prevent consumers from being able to benefit from the full range of advantages that competition can provide, which the preservation of barriers to entry does not allow.”<sup>797</sup> In addition, AWEA/WOW and LS Power state that transmission projects that exclusively address reliability needs will not be eligible for selection in the regional transmission plan for purposes of cost allocation because there is no regional cost allocation method that would apply to such projects.<sup>798</sup> Thus, LS Power argues that the Commission must reverse its First Compliance Order as it relates to Baseline Reliability Projects.<sup>799</sup>

423. AWEA/WOW and LS Power disagree with MISO's assertion that *all* Baseline Reliability Projects are local such that their costs could be allocated solely to a single

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<sup>795</sup> AWEA/WOW Rehearing Request at 3 (citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 690); LS Power Baseline Reliability Project Filing Rehearing Request at 4-5 (citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 690).

<sup>796</sup> LS Power Baseline Reliability Project Filing Rehearing Request at 5.

<sup>797</sup> *Id.* at 5-6 (citing Order No. 1000-A, 139 FERC ¶ 61,132 at P 82).

<sup>798</sup> AWEA/WOW Rehearing Request at 4; LS Power Baseline Reliability Project Filing Rehearing Request at 8.

<sup>799</sup> LS Power Baseline Reliability Project Filing Rehearing Request at 5-6.

pricing zone.<sup>800</sup> Specifically, AWEA/WOW and LS Power assert that Baseline Reliability Projects are not by definition restricted to transmission facilities located within a single pricing zone.<sup>801</sup> Thus, LS Power argues, there is a clear conflict that must be resolved between the definition of local transmission projects under Order No. 1000 and Baseline Reliability Projects, which are not necessarily located exclusively in a single pricing zone.<sup>802</sup> LS Power argues that, until the definition of Baseline Reliability Projects is changed to restrict those projects to a single pricing zone, Baseline Reliability Projects must have a component that allocates costs to more than a single pricing zone, i.e., regionally.<sup>803</sup> LS Power also contends that the Commission should require that MISO maintain a regional cost allocation method for Baseline Reliability Projects that are located in more than one pricing zone.<sup>804</sup> AWEA/WOW, on the other hand, state that the definition of, and cost allocation for, Baseline Reliability Projects should be modified to apply only to transmission facilities located in a single pricing zone.<sup>805</sup>

424. AEP, AWEA/WOW, and LS Power argue that MISO failed to establish that allocating all of the costs of Baseline Reliability Projects to a single pricing zone is just and reasonable in all instances. According to LS Power, the Commission improperly relied on the statistics that MISO offered. AWEA/WOW and LS Power state that the Commission should be concerned about the 20 percent of projects that had more than 25 percent of their costs allocated to a pricing zone other than the one in which they are

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<sup>800</sup> AWEA/WOW Rehearing Request at 3 (citing First Compliance Order, 142 FERC ¶ 61,215 at P 485); LS Power Baseline Reliability Project Filing Rehearing Request at 6 (citing First Compliance Order, 142 FERC ¶ 61,215 at P 485).

<sup>801</sup> AWEA/WOW Rehearing Request at 3; LS Power Baseline Reliability Project Filing Rehearing Request at 7.

<sup>802</sup> LS Power Baseline Reliability Project Filing Rehearing Request at 7.

<sup>803</sup> AWEA/WOW Rehearing Request at 4; LS Power Baseline Reliability Project Filing Rehearing Request at 8.

<sup>804</sup> LS Power Baseline Reliability Project Filing Rehearing Request at 9. LS Power further states that any regional cost allocation method for transmission projects located in more than one retail distribution service territory should be considered a regional cost allocation method under Order No. 1000; otherwise, LS Power claims, transmission providers will adopt alternative cost allocation methods to circumvent Order No. 1000 and retain a federal right of first refusal. *Id.*

<sup>805</sup> AWEA/WOW Rehearing Request at 4.

located.<sup>806</sup> LS Power argue that Baseline Reliability Projects constitute a significant portion of the transmission projects in MISO, noting that, as referenced in the MISO 2012 MTEP report, there are 31 Baseline Reliability Projects recommended for approval totaling \$468 million. LS Power states that seven of those Baseline Reliability Projects cost \$386 million and are subject to regional cost sharing under the cost allocation method in place prior to the First Compliance Order.<sup>807</sup> LS Power asserts that, under the new cost allocation method, all \$386 million of those costs would be allocated to the pricing zones in which the seven projects are located, with no competition and no evidence that those pricing zones receive all the benefits.<sup>808</sup>

425. AEP similarly states that the 2009 and 2011 MTEP reports demonstrate that Baseline Reliability Projects represent significant capital investments in MISO, and that a large percentage of approved Baseline Reliability Projects have costs allocated to more than one MISO pricing zone. Specifically, AEP states that, in the 2011 MTEP, the costs of four of the twelve approved Baseline Reliability Projects, representing \$68 million out of a total \$253 million, were allocated to more than one MISO transmission pricing zone and that, since 2009, MISO has approved eleven Baseline Reliability Projects greater than \$20 million and three Baseline Reliability Projects greater than \$50 million. Thus, AEP asserts that, in only two MISO MTEP transmission planning cycles, Baseline Reliability Projects represent more than three quarters of a billion dollars in total capital cost. According to AEP, because Baseline Reliability Projects have historically represented such a large capital investment, the Commission must not allow MISO and the MISO transmission owners to circumvent more efficient or cost-effective transmission solutions by favoring Baseline Reliability Projects developed by incumbent transmission owners.<sup>809</sup>

426. According to AWEA/WOW and LS Power, MISO failed to conclusively establish its predictions regarding the future transmission projects to be constructed in MISO.

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<sup>806</sup> *Id.* at 4-5; LS Power Baseline Reliability Project Filing Rehearing Request at 10-11.

<sup>807</sup> LS Power Baseline Reliability Project Filing Rehearing Request at 11 (citing MISO Transmission Expansion Plan 2012 Report at 5, 16, 19 *available at* <https://www.midwestiso.org/Library/Repository/Study/MTEP/MTEP12/MTEP12%20Report.pdf>).

<sup>808</sup> *Id.*

<sup>809</sup> AEP, Request for Clarification or Rehearing, Docket Nos. ER13-186-001 and ER13-187-002, at 4-5 (filed April 22, 2013) (AEP Rehearing Request).

They therefore argue that the Commission erred when it found persuasive MISO's contention that, going forward, the MEP and MVP project categories will displace Baseline Reliability Projects when more efficient or cost-effective regional solutions (i.e., MEPs or MVPs) are available to meet multiple transmission needs.<sup>810</sup> AWEA/WOW and LS Power assert that, in fact, in MISO's most recent MTEP, no MVPs were approved, and only one MEP, valued at only \$14.5 million, was approved.<sup>811</sup> AWEA/WOW and LS Power further assert that MISO failed to establish that allocating all costs of all Baseline Reliability Projects to the zone in which the project is located is always appropriate.<sup>812</sup> Therefore, according to AWEA/WOW and LS Power, the Commission's acceptance of MISO's unsupported assertions is arbitrary and capricious and must be reversed.<sup>813</sup>

427. LS Power also argues that, because MISO failed to establish that its proposal was just and reasonable, the Commission erred by not addressing the alternative proposal of the Joint State Commissions (i.e., the Public Service Commission of Wisconsin, the Michigan Public Service Commission, and the Missouri Public Service Commission), as filed in their protest of MISO's proposed Baseline Reliability Project changes.<sup>814</sup> Specifically, LS Power notes that the Joint State Commissions advocated an "interim" hybrid approach in their protest. LS Power asserts that the Commission should have addressed whether this approach was just and reasonable.<sup>815</sup>

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<sup>810</sup> AWEA/WOW Rehearing Request at 5 (citing First Compliance Order, 142 FERC ¶ 61,215 at P 519); LS Power Baseline Reliability Project Filing Rehearing Request at 11 (citing First Compliance Order 142 FERC ¶ 61,215 at P 519).

<sup>811</sup> AWEA/WOW Rehearing Request at 5; LS Power Baseline Reliability Project Filing Rehearing Request at 11-12.

<sup>812</sup> AWEA/WOW Rehearing Request at 5; LS Power Baseline Reliability Project Filing Rehearing Request at 12.

<sup>813</sup> AWEA/WOW Rehearing Request at 3; LS Power Baseline Reliability Project Filing Rehearing Request at 12.

<sup>814</sup> LS Power Baseline Reliability Project Filing Rehearing Request at 13 (referencing Joint State Commissions, Protest, Docket Nos. ER13-186-000, ER13-187-000, and ER13-187-001 (filed Dec. 10, 2012)).

<sup>815</sup> *Id.*

428. To the extent that the Commission does not reverse approval of the new cost allocation method for Baseline Reliability Projects, LS Power requests rehearing on the timing and nature of the informational filing the Commission required MISO to make following the completion of MTEP 2015.<sup>816</sup> To ensure that stakeholders have sufficient information during the transmission planning process, LS Power requests that the Commission require MISO to provide the relevant information during the MTEP transmission planning process when it recommends a transmission project, including MTEP13 and MTEP14. LS Power asserts that the Commission should require MISO to perform and post such analysis for each Baseline Reliability Project and to identify specifically what MVP or MEP projects it evaluated to determine that the Baseline Reliability Project was the more efficient solution to an identified need.<sup>817</sup>

429. Likewise, AEP states that the Commission should provide more specific guidance on what types of data and information MISO is required to collect, analyze, and provide as part of the informational filing. AEP asks that, at a minimum, the Commission require MISO to include: (1) a description of the Line Outage Distribution Factor (LODF) methodology that MISO currently uses for the non-regional portion of the Baseline Reliability Project and how a similar analysis needs to be done either through LODF or distribution factor analysis for each Baseline Reliability Project selected in the MTEP highlighting the reduction of loading on various transmission facilities within MISO by transmission pricing zone; (2) a market efficiency analysis for each Baseline Reliability Project selected in the MTEP showing load cost savings for the benefiting zones within MISO and the production cost savings for the entire MISO footprint; and (3) an identification by zone of transmission constraints eliminated or addressed by each Baseline Reliability Project. According to AEP, such information would allow the Commission to ensure that Baseline Reliability Projects are local in nature and are not benefiting multiple pricing zones.<sup>818</sup>

430. AEP further asserts that the Commission should direct MISO to implement measures to avoid automatically classifying projects as Baseline Reliability Projects without providing stakeholders an opportunity to identify more cost-effective solutions.<sup>819</sup> For example, AEP states that expected generation retirements are often communicated to MISO off-cycle and will need to be studied on a shorter time frame

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<sup>816</sup> *Id.* (citing First Compliance Order 142 FERC ¶ 61,215 at P 519).

<sup>817</sup> *Id.*

<sup>818</sup> AEP Rehearing Request at 6.

<sup>819</sup> *Id.* at 7.

than MISO's structured MTEP transmission planning cycle to evaluate the reliability impacts and identify any necessary transmission upgrades to mitigate those impacts. AEP asserts that the Commission should clarify that the reliability projects that result from such accelerated study are not automatically classified as Baseline Reliability Projects simply because MISO is not able to coordinate its study and response within the MVP and MEP transmission planning cycles. AEP states that, alternatively, the Commission could direct MISO to perform a reevaluation of Baseline Reliability Projects to determine if they can be qualified as MEPs or MVPs during the MISO MTEP transmission planning cycles.<sup>820</sup>

431. AEP asserts that the Commission should also clarify that once it receives MISO's informational report, it will analyze the data and revisit its determination not to eliminate the right of first refusal for Baseline Reliability Projects if that information shows that Baseline Reliability Projects provide demonstrable benefits in transmission pricing zones outside the zone in which the project is located or if the Commission determines that the MISO is inappropriately relying on the development of Baseline Reliability Projects to the exclusion of MVPs and MEPs. Otherwise, AEP states, the informational filing may be seen as merely an administrative duty, particularly given that the Commission has instructed that it will not accept comments or issue orders on the informational filing.<sup>821</sup> AEP asserts that the Commission did not provide much direction regarding how it would confirm that the number and scale of Baseline Reliability Projects in MISO would be small enough to warrant an exception to its federal right of first refusal elimination directive.<sup>822</sup> AEP asserts that the Commission must ensure that transmission projects that most efficiently address multiple transmission needs are in fact selected in MISO's regional transmission plan.<sup>823</sup>

432. To the extent that the Commission does not provide the clarification and guidance requested above or otherwise institute a mechanism to revisit its acceptance of MISO's proposed cost allocation for Baseline Reliability Projects in the event that Baseline Reliability Projects provide demonstrable benefits in transmission pricing zones outside the zone in which the project is located or Baseline Reliability Projects are being developed notwithstanding more efficient MVP and MEP alternatives, AEP respectfully requests rehearing of the Commission's decision not to notice the informational filing,

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<sup>820</sup> *Id.*

<sup>821</sup> *Id.* at 7-8.

<sup>822</sup> *Id.* at 4.

<sup>823</sup> *Id.* at 5.

accept comments, or issue orders on the informational filing.<sup>824</sup> AEP contends that the First Compliance Order does not provide the assurances necessary to address any unintended consequences regarding the role of Baseline Reliability Projects in MISO's transmission planning process. Specifically, AEP states unless the Commission notices and accepts comments on the informational filing, and, if necessary, issues orders with respect to that filing, there is no mechanism for verifying whether Baseline Reliability Projects primarily benefit the pricing zone in which the project is located and whether MEPs and MVPs will displace Baseline Reliability Projects.<sup>825</sup>

433. ATC/Duke/Transource states that MISO appropriately proposed to limit the applicability of the right of first refusal provision to facilities that are not Open Transmission Projects. However, ATC/Duke/Transource argues that the Commission erred by not requiring MISO to change the existing language in Appendix B, section VI of the Transmission Owners Agreement that states that ownership and responsibility to construct certain transmission facilities that retain a federal right of first refusal belong equally to each transmission owner to whose system such transmission facilities connect.<sup>826</sup> ATC/Duke/Transource argues that this existing language effectively permits certain transmission facilities to retain a federal right of first refusal *and* receive regional cost allocation, contrary to the requirements of Order No. 1000.<sup>827</sup> Accordingly, ATC/Duke/Transource requests rehearing of the Commission's finding in the First Compliance Order that ATC/Duke/Transource's request to change Appendix B, section VI of the Transmission Owners Agreement so that the transmission projects in question are shared "proportionally" rather than shared "equally" is beyond the scope of the compliance filing.<sup>828</sup>

434. ATC/Duke/Transource states that, under the current Transmission Owners Agreement, if a transmission project, other than an Open Transmission Project, connects between two transmission owners' systems, that transmission project "belongs equally" to each interconnected transmission owner, unless the owners otherwise agree.<sup>829</sup>

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<sup>824</sup> *Id.* at 8.

<sup>825</sup> *Id.* at 9-11.

<sup>826</sup> ATC/Duke/Transource Rehearing Request at 5. Transource is not joining in the request for rehearing with respect to this issue. *Id.* at 5 n.18.

<sup>827</sup> *Id.* at 8.

<sup>828</sup> *Id.* (citing First Compliance Order, 142 FERC ¶ 61,215 at P 201).

<sup>829</sup> *Id.* (citing Transmission Owners Agreement, Appendix B, § VI).

ATC/Duke/Transource argues that this means that the costs of a transmission project that connects two transmission owners' systems must be shared equally (i.e., half to each interconnected transmission owner) regardless of the amount of the project that is located within each transmission owner's footprint. ATC/Duke/Transource asserts that a transmission owner should not automatically be granted a 50 percent ownership share of a project if, for example, only 5 percent of the project will be located in its pricing zone. According to ATC/Duke/Transource, the customers of this transmission owner would then be forced to bear the costs of 45 percent of the project that is outside of their transmission owner's footprint.<sup>830</sup> ATC/Duke/Transource argues, therefore, that Appendix B, section VI of the Transmission Owners Agreement must be revised so that the costs of a transmission facility that retains a federal right of first refusal (i.e., a transmission facility that is not an Open Transmission Project) are not allocated regionally.<sup>831</sup>

435. To prevent the unintended regional cost sharing that ATC/Duke/Transource asserts could result from equal ownership of a local transmission project that connects two transmission owners' systems, ATC/Duke/Transource states that, consistent with the intent of Order No. 1000, the Commission should grant rehearing and, as ATC/Duke/Transource originally proposed, direct MISO to revise Appendix B, section VI of the Transmission Owners Agreement as follows:

Ownership and the responsibilities to construct facilities which are connected between two (2) or more Owners' facilities belong ~~equally~~ proportionately to each Owner based on the portion of the facilities located in each Owners' pricing zone, unless such Owners otherwise agree, and the responsibility for maintaining such facilities belongs ~~equally~~ proportionately to the Owners of the facilities unless otherwise agreed by such Owners.<sup>832</sup>

**C. Commission Determination**

436. We deny the requests for rehearing. We affirm our finding in the First Compliance Order that MISO's proposal pursuant to FPA section 205, to assign all Baseline Reliability Project costs to the pricing zone in which the Baseline Reliability

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<sup>830</sup> *Id.* at 8-9.

<sup>831</sup> *Id.*

<sup>832</sup> *Id.* at 9.

Project is located, is just and reasonable and not unduly discriminatory or preferential. As the Commission stated in the First Compliance Order, MISO has shown that the benefits of a Baseline Reliability Project are realized primarily in the pricing zone in which the project is located and that MISO's proposal "assigns the costs of Baseline Reliability Projects in a manner that is roughly commensurate with the benefits that these projects provide."<sup>833</sup>

437. We disagree with petitioners that assert that the Commission's finding in the First Compliance Order contradicts Order No. 1000's prohibition on excluding a single type of transmission facility from regional cost allocation. The Commission found in the First Compliance Order that MISO's proposal to eliminate regional cost sharing for Baseline Reliability Projects is not inconsistent with the Order No. 1000 statement that a region may not designate a type of transmission facility that has no regional cost allocation method applied to it, since transmission projects with reliability benefits selected in the regional transmission plan for purposes of cost allocation are covered by MVPs,<sup>834</sup> and we affirm that finding here.

438. We also disagree with LS Power's contention that Order No. 1000 established that, if a transmission project, even if exclusively reliability driven, is in more than one retail distribution service territory, it should not retain a right of first refusal. Order No. 1000 defines a "local transmission facility" as a transmission facility located solely within a public utility transmission provider's retail distribution service territory or footprint that is not selected in a regional transmission plan for purposes of cost allocation.<sup>835</sup> The Commission did not require removal of a federal right of first refusal for local transmission facilities.<sup>836</sup> The Commission also stated that Order No. 1000 does not prevent an incumbent transmission provider from meeting its reliability needs or service obligations by choosing to build new transmission facilities that are located solely within its retail distribution service territory or footprint and that are not selected in a regional transmission plan for purposes of cost allocation.<sup>837</sup> In addition, in Order No. 1000-A, the Commission clarified that Order No. 1000 does not require elimination of a

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<sup>833</sup> First Compliance Order, 142 FERC ¶ 61,215 at PP 518, 520.

<sup>834</sup> *Id.* P 519 (citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 690).

<sup>835</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 63.

<sup>836</sup> *Id.* PP 258, 318.

<sup>837</sup> *Id.* PP 262, 329. *See also* Order No. 1000-A, 139 FERC ¶ 61,132 at PP 366, 379, 425, 428.

federal right of first refusal for a new transmission facility if the regional cost allocation method results in 100 percent of the transmission facility's cost being allocated to the public utility transmission provider in whose retail distribution service territory or footprint the facility is to be located. Accordingly, the Commission also clarified that the term "selected in a regional transmission plan for purposes of cost allocation" excludes a new transmission facility if the costs of that facility are borne entirely by the public utility transmission provider in whose retail distribution service territory or footprint that new transmission facility is to be located.<sup>838</sup>

439. Under MISO's Commission-approved Baseline Reliability Project Filing, a transmission owner will be responsible for the costs of the portion of the Baseline Reliability Project physically located in its pricing zone. Because Baseline Reliability Projects are local transmission projects that are not selected in the regional transmission plan for purposes of cost allocation, MISO's proposal is consistent with Order Nos. 1000 and 1000-A. Thus, we find that MISO may maintain a federal right of first refusal for Baseline Reliability Projects.

440. We therefore disagree with LS Power that the Commission should require that MISO maintain a regional cost allocation method for Baseline Reliability Projects that are located in more than one pricing zone and AWEA/WOW that the definition of, and cost allocation for, Baseline Reliability Projects should be modified to apply only to transmission facilities located in a single pricing zone. However, MISO must make clear, consistent with the First Compliance Order and the discussion above, that for Baseline Reliability Projects located in more than one pricing zone, a transmission owner's cost responsibility is limited to the portion of the Baseline Reliability Project that is physically located in that transmission owner's pricing zone. Currently, MISO's Tariff states only that "[c]osts of Baseline Reliability Projects shall be recovered pursuant to Attachment O of this Tariff by the Transmission Owner(s) and/or ITC(s) developing such projects, subject to the requirements of the [Transmission Owners] Agreement."<sup>839</sup> To eliminate any uncertainty about MISO's proposal regarding Baseline Reliability Projects, we direct MISO to revise its Tariff to make clear that a transmission owner is responsible for all the costs of a Baseline Reliability Project (or portion of a Baseline Reliability Project) that is physically located in that transmission owner's pricing zone. This direction is consistent with MISO's description of its proposal and what the Commission accepted in the First Compliance Order. For example, in the transmittal letter of its FPA section 205 filing, MISO explained that it was proposing to modify the cost allocation method for Baseline

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<sup>838</sup> Order No. 1000-A, 139 FERC ¶ 61,132 at P 423.

<sup>839</sup> MISO, FERC Electric Tariff, Attachment FF, § III.A.2.c.

Reliability Projects to allocate 100 percent of the costs of each Baseline Reliability Project to the pricing zone in which it is located.<sup>840</sup> In accepting MISO's proposal in the First Compliance Order, the Commission stated that assigning all of the costs of a Baseline Reliability Project to the pricing zone in which the project is located allocates costs roughly commensurate with the benefits that the project is expected to provide.<sup>841</sup> Accordingly, in response to LS Power's request that MISO maintain a regional cost allocation method for Baseline Reliability Projects that are located in more than one pricing zone, we deny this request for rehearing but direct MISO to submit, within 60 days of the date of issuance of this order, a further compliance filing that revises its Tariff to make clear that a transmission owner is responsible for all the costs for the portion of a Baseline Reliability Project that is physically located in that transmission owner's pricing zone.

441. With respect to ATC/Duke/Transource's argument that the Commission erred by not requiring MISO to change the existing language in Appendix B, section VI of the Transmission Owners Agreement, we deny this request for rehearing. ATC/Duke/Transource's proposed change to the Transmission Owners Agreement would apply to transmission facilities beyond just Baseline Reliability Projects. Because MISO's filing here deals only with Baseline Reliability Projects, ATC/Duke/Transource's request is beyond the scope of this proceeding. However, to eliminate any uncertainty regarding MISO's proposal, we find that MISO must revise the existing language in the Transmission Owners Agreement to make clear that it does not apply to Baseline Reliability Projects. Specifically, consistent with our directive above for MISO to revise its Tariff to make clear that a transmission owner is responsible for all the costs related to the portion of a Baseline Reliability Project that is physically located in that transmission owner's pricing zone, we direct MISO to submit, within 60 days of the date of the issuance of this order, a further compliance filing that revises Appendix B, section VI of the Transmission Owners Agreement to state that this provision does not apply to Baseline Reliability Projects.

442. With respect to AEP's argument that the Commission must not allow MISO and the MISO transmission owners to circumvent more efficient or cost-effective transmission solutions by favoring Baseline Reliability Projects developed by incumbent transmission owners, as determined in the First Compliance Order, we continue to find persuasive MISO's contention that, going forward, its MEP and MVP project categories

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<sup>840</sup> MISO, Transmittal Letter, Docket No. ER13-186-000, at 5 (filed Oct. 25, 2012).

<sup>841</sup> First Compliance Order, 142 FERC ¶ 61,215 at P 520.

will displace Baseline Reliability Projects when more efficient or cost-effective regional transmission solutions (i.e., MEPs or MVPs) are available to meet multiple transmission needs.<sup>842</sup> With regard to arguments that the Commission erred when it found MISO's contention persuasive, we note that MISO's Tariff makes clear that "[a]ny transmission project that qualifies as a Multi-Value Project shall be classified as a MVP irrespective of whether such project is also a Baseline Reliability Project and/or Market Efficiency Project."<sup>843</sup>

443. With respect to LS Power's argument that the Commission erred by not addressing the alternative proposal of the Joint State Commissions, as the Commission stated in the First Compliance Order, we do not require MISO to revise its proposed cost allocation method for Baseline Reliability Projects in response to any of the alternative cost allocation methods proposed by protestors because we have found MISO's proposal to be just and reasonable.<sup>844</sup> As the Commission has previously stated, "[a] proposal need not be perfect, or the most desirable way of doing things, it need only be just and reasonable."<sup>845</sup>

444. We further decline to grant LS Power's and AEP's request for rehearing on the timing and nature of the informational filing the Commission required MISO to make following the completion of MTEP 2015, as we find unconvincing arguments that more specific guidance is needed.

The Commission orders:

(A) The requests for rehearing and clarification are hereby denied, in part, and granted, in part, as discussed in the body of this order.

(B) MISO's compliance filing is hereby accepted, effective June 1, 2013, subject to a further compliance filing, as discussed in the body of this order.

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<sup>842</sup> *Id.* P 521.

<sup>843</sup> MISO, FERC Electric Tariff, Attachment FF, § II.C.4.

<sup>844</sup> First Compliance Order, 142 FERC ¶ 61,215 at P 522.

<sup>845</sup> *Entergy Servs., Inc.*, 116 FERC ¶ 61,275, at P 32 (2006); *see also Cal. Indep. Sys. Operator Corp.*, 106 FERC ¶ 63,026, at P 57 (2004).

(C) MISO is hereby directed to submit a further compliance filing, within 60 days of the date of issuance of this order, as discussed in the body of this order.

(D) MidAmerican's and American Transmission's respective compliance filings are hereby accepted, effective October 11, 2012, respectively.

By the Commission. Commissioner Norris is dissenting in part and concurring in part with a separate statement attached.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

**Appendix A: Abbreviated Names of Commenters and Petitioners**

<b>Abbreviation</b>	<b>Commenter/Petitioner Names</b>
AEP	American Electric Power Service Corporation
Arkansas Commission ATC/Duke/Transource	Arkansas Public Service Commission American Transmission Company LLC, by its corporate manager, ATC Management Inc.; Duke-American Transmission Company, LLC; Duke Energy Transmission Holding Company, LLC; and American Electric Power Service Corporation, on behalf of Transource Energy, LLC
AWEA/WOW	American Wind Energy Association and Wind on the Wires
Illinois Commerce Commission	Illinois Commission
Indiana Commission	Indiana Utility Regulatory Commission
LS Power	LS Power Transmission, LLC and LSP Transmission Holdings, LLC
Midwest TDUs	Great Lakes Utilities; Indiana Municipal Power Agency; Madison Gas and Electric Company; Midwest Municipal Transmission Group; Missouri Joint Municipal Electric Utility Commission; Missouri River Energy Services; and WPPI Energy
MISO Transmission Owners	Ameren Services Company; City Water, Light & Power (Springfield, IL); Dairyland Power Cooperative; Great River Energy; Hoosier Energy Rural Electric Cooperative, Inc.; Indianapolis Power & Light Company; MidAmerican Energy Company; Minnesota Power; Montana-Dakota Utilities Co.; Northern Indiana Public Service Company; Northern States Power Company (MN); Northern States Power Company (WI); Northwestern Wisconsin Electric Company; Otter Tail Power Company; Southern Illinois Power

<b>Abbreviation</b>	<b>Commenter/Petitioner Names</b>
NARUC	Cooperative; Southern Indiana Gas & Electric Company; and Southern Minnesota Municipal Power Agency
	National Association of Regulatory Utility Commissioners
Organization of MISO States	Organization of MISO States

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Midwest Independent Transmission System Operator, Inc. and the MISO Transmission Owners	Docket Nos. ER13-187-002 ER13-187-003 ER13-187-004
Midwest Independent Transmission System Operator, Inc. and the MISO Transmission Owners	ER13-186-001
MidAmerican Energy Company and Midwest Independent Transmission System Operator, Inc.	ER13-89-001 ER13-89-002
American Transmission Company LLC and Midwest Independent Transmission System Operator, Inc.	ER13-101-002 ER13-101-003
Cleco Power LLC	ER13-84-001
Entergy Arkansas, Inc.	ER13-95-001

(Issued May 15, 2014)

NORRIS, Commissioner, *dissenting in part and concurring in part*:

I dissent from today's order because it represents a step backward from the Commission's efforts under Order No. 1000 to increase competition for transmission development. In my view, establishing reforms for the regional transmission planning process to ensure that non-incumbent transmission developers can participate on a level playing field with incumbent transmission owners was essential in order to promote increased competition. Today's order approves practices within the MISO transmission planning process that unreasonably tilt the playing field in favor of incumbents, thereby undermining the ability to identify the more efficient or cost-effective transmission solutions. In short, the non-incumbent measures approved today fail to promote the development of more efficient or cost-effective transmission facilities in a manner that ensures just and reasonable rates.

I believe that the non-incumbent reforms adopted in Order No. 1000 held the promise of providing real benefits to consumers by increasing competition for transmission development. In the first round of Order No. 1000 compliance filings, the Commission made significant progress with respect to these objectives. Unfortunately today's order, together with the PJM and

South Carolina Order No. 1000 compliance orders that the Commission is issuing concurrently, reverse course, undo a good deal of the progress that has been made thus far, and serve to unreasonably protect incumbent transmission owners.

While there are many examples of innovative incumbent transmission developers, others may lack innovation and may be more interested in preserving the status quo to insulate themselves from competition. Today's order protects incumbents rather than promotes competition. This concerns me because no single entity, whether incumbent or non-incumbent, has a lock on ideas for better transmission and non-transmission alternatives. Clearly, incumbents already are well-positioned through their knowledge of the system, including issues related to reliability and congestion. Today's order gives incumbents a further advantage over non-incumbents by limiting non-incumbents' participation in the planning process. Moreover, if incumbents are unable to come up with a better solution for transmission needs, I am concerned that the reason could be a lack of innovation or a conflict of interest. Through today's order, we are allowing consumers to bear the burden of these potential shortcomings.

Specifically, today's order: 1) grants rehearing to allow MISO's regional transmission planning process to effectively exclude non-incumbents from participating due to a consideration of state law; 2) approves an unnecessarily complicated definition of upgrades that could effectively restrict the ability of non-incumbents from competing for a subset of proposed transmission projects; and 3) approves evaluation criteria that undervalues project costs. When considering the barriers created by these three aspects of MISO's proposal, today's order has taken a significant step backward with respect to the policy goals of Order No. 1000. These measures essentially serve only to protect the interests of the traditional incumbent transmission developers, by limiting opportunities for non-incumbents to compete in the regional planning process for projects that meet regional transmission needs.

### **State Laws**

My greatest concern is the effective exclusion of non-incumbents from the regional transmission planning process due to consideration of state law. I cannot support the unjustified departure from Order No. 1000 that allows the MISO regional transmission planning process to automatically exclude non-incumbents from being designated to develop a transmission project due to consideration of state law. In short, this change in policy will effectively exclude non-incumbents from participating more broadly in the planning process. Such a change in policy is not justified by the record in this case, is entirely inconsistent with the express language of Order No. 1000, and undermines the policy goals of Order No. 1000.

I believe the Commission correctly determined in the first MISO compliance order that state law cannot be used to effectively exclude non-incumbents from participating in the planning process.<sup>1</sup> From a policy perspective, providing an open and fair opportunity for all stakeholders, including non-incumbents, to participate fully in the regional transmission planning process will ensure that the planning process provides complete transparency regarding all reasonable alternatives that would be available to meet identified transmission needs.

Ensuring wider participation in the regional transmission planning process increases competition, which in turn would result in a regional transmission plan that identifies more efficient or cost-effective transmission solutions. Indeed, Order No. 1000-A states that a goal of its reforms is to provide more information and options for stakeholders and state regulators to consider, in order to ensure that they are able to make the best decision regarding how to meet their transmission needs.<sup>2</sup> A key objective of the regional transmission planning process under Order No. 1000 is to produce a transmission plan that includes more efficient or cost-effective transmission projects so that the region's transmission providers, in consultation with stakeholders and the relevant regulatory authorities, can decide whether to move forward and realize the benefits from such transmission projects. Yet, this order proposes to restrict the set of transmission proposals that could be submitted by non-incumbents and considered in the planning process at the outset, based on the potential for conflicts with state or local laws.

Today's order justifies exclusion of non-incumbents as a threshold matter because of the assertion that inefficiencies in process could result. We should not use claims of inefficiency of process as justification for introducing measures in the regional transmission planning process that will reduce competition by limiting the subset of transmission proposals that can be considered. I am more concerned that we promote a transmission planning process that results in transmission solutions that increase competition, and provide real consumer benefits by lowering costs. Limiting the set of projects and developers that can even be considered in the planning process is inconsistent with that goal and results in unjust and unreasonable rates. Concerns about an inefficient planning process can, and should be, mitigated by the fact that transmission developers who submit bids will fully fund the competitive bidding process and will not submit bids for projects that are unlikely to succeed.<sup>3</sup>

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<sup>1</sup> *Midwest Indep. Transmission Sys. Operator, Inc.*, 142 FERC ¶ 61,215, at P 206 (2013).

<sup>2</sup> Order No. 1000-A, 139 FERC ¶ 61,132, at P 190 (2012).

<sup>3</sup> Transmission developers must provide a \$100,000 deposit when submitting a bid. *Midwest Indep. Transmission Sys. Operator, Inc.*, 147 FERC ¶ 61,127, at P 320 (2014).

MISO's effective exclusion of non-incumbents based on a consideration of state law is also wholly inconsistent with the express language of the final rule. In Order No. 1000-A, the Commission stated

[I]t would be an impermissible barrier to entry to require, as part of the qualification criteria, that a transmission developer demonstrate that it either has, or can obtain, state approvals necessary ... to be eligible to propose a transmission facility.<sup>4</sup>

Yet, that in effect is what MISO has proposed to do. I simply cannot reconcile this language with the approach MISO has taken here. Moreover, Order No. 1000-A also contemplates a process in which a transmission project that is selected for cost allocation must set forth a timeline under which it will achieve the necessary state approvals for constructing a project, and allows for a re-evaluation process if a developer is unable to meet its proposed timeline. The order justified this approach by finding that it increases the number of projects evaluated and selected to meet regional needs, and provides non-incumbents the opportunity to propose a transmission facility while it seeks to comply with state laws or regulations. This discussion would be meaningless if the Commission had intended to effectively exclude non-incumbents from participating in the regional transmission planning process based on a consideration of state law.<sup>5</sup>

## Upgrades

MISO has proposed extensive language in its tariff describing transmission projects that would be considered upgrades to existing transmission facilities and therefore not eligible to non-incumbent transmission developers. As Illinois Commerce Commission notes, the proposed

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<sup>4</sup> Order No. 1000-A, 139 FERC ¶ 61,132, at P 441 (2012).

<sup>5</sup> Numerous parties point to language from the final rule that nothing in Order No. 1000 "is intended to preempt or otherwise conflict with state authority over siting, permitting, and construction of transmission facilities ... ." Order No. 1000-A, 139 FERC ¶ 61,132 at P 186. In my view, allowing non-incumbents to participate in the regional transmission planning process without consideration of potential state law restrictions does not infringe upon the state's authority over siting, permitting and construction of transmission facilities. Rather, this language simply acknowledges state jurisdiction over siting, permitting, and construction of transmission facilities. Using this language to exclude non-incumbents denies states and other stakeholders the opportunity to have all essential information regarding the more efficient or cost-effective transmission facilities.

tariff language contains eleven subsections, some with multiple entries, to define an upgrade.<sup>6</sup> While this proposal is justified by MISO as intended to increase transparency, I believe that it does more harm than good. Characterizing new transmission investment as an upgrade will, of course, preclude non-incumbents from competing for a large subset of transmission projects in the future, as such projects can be reserved for the incumbents. Incumbent transmission providers will certainly attempt to utilize these complex rules to preclude non-incumbents to the greatest extent possible from the opportunity to compete for transmission projects.

I acknowledge that Order No. 1000 allowed for significant flexibility with respect to the definition of upgrades, and acknowledge the unique role of incumbents in upgrading its own facilities. But, I believe that MISO's proposal introduces too much complexity and uncertainty, and will leave non-incumbents at a competitive disadvantage. Moreover, I do not believe that MISO has justified this expansive definition of upgrades and how it furthers the goals of Order No. 1000.

### **Evaluation of Project Costs**

MISO has also proposed evaluation criteria for consideration of transmission proposals that weigh project design *and* cost at only 30 percent of the total evaluation criteria. Placing such a small amount of weight on project costs, in essence only a portion of the 30 percent not allotted to project design, is wholly inconsistent with the goal of establishing transmission planning processes that result in more efficient or cost-effective transmission solutions to benefit consumers. I also fail to see why the majority of the weighted criteria in the evaluation process (65 percent for experience with project implementation and with operations and maintenance) should go to aspects that have already been evaluated at the stage in the process in which transmission developers are deemed qualified. Moreover, incumbents within a region will inherently be advantaged by this weighting of criteria, given the fact that they already own and operate transmission facilities. Tellingly, MISO had proposed that incumbents automatically receive full credit for experience with project implementation and with operations and maintenance. MISO's weighting of criteria does not allow non-incumbents to participate on a level playing field.

Indeed, the original MISO compliance order rejected this same weighting proposal as unsupported, and I do not believe that the MISO proposal has met its burden to persuade the Commission to find otherwise. MISO argues that cost estimates in the transmission development process are inherently inaccurate and placing too much an emphasis on cost could incent low-ball bids. These concerns could be addressed by developing mechanisms to evaluate costs

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<sup>6</sup> Illinois Commerce Commission August 21, 2013 Comments at 7-9.

consistently and mitigate the risk of low-ball estimates. I cannot reconcile the ultimate goal in Order No. 1000 of more efficient or cost-effective transmission with MISO's plan for evaluating transmission proposals that weighs project costs at less than 30 percent of the overall evaluation process. I believe that much greater weight should be placed on project costs in order to identify transmission and non-transmission solutions that capture the most benefits for consumers.

\* \*

The non-incumbent reforms within Order No. 1000 were part of an overall package of reforms within the final rule that set our country on a path for increased and robust transmission development, based on an open and competitive process that would result in more efficient or cost-effective transmission solutions. Unfortunately, today's order strays far from Order No. 1000's original path that would have allowed non-incumbents to actively participate and compete in the transmission planning process, and instead has followed a divergent path that I cannot support.<sup>7</sup>

For these reasons, I respectfully dissent in part and concur in part.

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John R. Norris, Commissioner

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<sup>7</sup> I support the determination that the right of first refusal provision in the MISO Transmission Owners Agreement is not entitled to *Mobile-Sierra* presumption. But, as a policy matter, it is my view that the Commission should not conduct a discretionary analysis to determine whether to grant *Mobile-Sierra* protection. Therefore, I concur, in part, in this order.