

150 FERC ¶ 61,037  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Midwest Independent Transmission System Operator, Inc. and the MISO Transmission Owners	Docket Nos.	ER13-187-006 ER13-187-007 ER13-187-008 ER13-187-009
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Midwest Independent Transmission System Operator, Inc. and the MISO Transmission Owners	Docket No.	ER13-186-004
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MidAmerican Energy Company and Midwest Independent Transmission System Operator, Inc.	Docket No.	ER13-89-003
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Cleco Power LLC	Docket No.	ER13-84-002
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Entergy Arkansas, Inc.	Docket No.	ER13-95-002
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ORDER ON REHEARING AND COMPLIANCE FILINGS

(Issued January 22, 2015)

1. On May 15, 2014, the Commission issued an order<sup>1</sup> that conditionally accepted in part and rejected in part Midcontinent Independent System Operator, Inc.'s (MISO)<sup>2</sup> second filing to comply with the local and regional transmission planning and cost

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<sup>1</sup> *Midwest Indep. Transmission Sys. Operator, Inc.*, 147 FERC ¶ 61,127 (2014) (Second Compliance Order).

<sup>2</sup> Effective April 26, 2013, MISO changed its name from "Midwest Independent Transmission System Operator, Inc." to "Midcontinent Independent System Operator, Inc."

allocation requirements of Order No. 1000<sup>3</sup> and the Commission's First Compliance Order.<sup>4</sup> The Commission accepted MISO's second compliance filing, effective June 1, 2013, subject to a further compliance filing by MISO to be submitted within 60 days of the date of issuance of the Second Compliance Order.<sup>5</sup>

2. On June 13, 2014, LS Power Transmission, LLC and LSP Transmission Holding, LLC (together, LS Power) and the Illinois Commission (Illinois Commission) submitted timely requests for rehearing of the Second Compliance Order.

3. On June 4, 2014, in Docket No. ER13-187-006, MISO submitted revisions to Attachment FF of the MISO Open Access Transmission Energy and Operating Reserve Markets Tariff (Tariff)<sup>6</sup> to comply with the Second Compliance Order. MISO states that the June 4, 2014 compliance filing addresses only the Commission's directives to include Tariff provisions that require incumbent transmission owners to participate in the transmission developer prequalification process and to remove Tariff language that automatically found that incumbent transmission owners satisfied certain requirements. MISO requests that the revisions submitted on June 4, 2014 be made effective as of June 1, 2013, the effective date approved in the First Compliance Order.<sup>7</sup>

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<sup>3</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 and clarification*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012), *aff'd sub nom. S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014).

<sup>4</sup> *Midwest Indep. Transmission Sys. Operator, Inc.*, 142 FERC ¶ 61,215 (2013) (First Compliance Order).

<sup>5</sup> Second Compliance Order, 147 FERC ¶ 61,127 at PP 4, 26.

<sup>6</sup> MISO, FERC Electric Tariff, Attachment FF (Transmission Expansion Planning Protocol) (34.0.0).

<sup>7</sup> MISO Filing Parties June 4, 2014 Compliance Filing Transmittal, Docket No. ER13-187-006, at 1, 6. *See also* First Compliance Order, 142 FERC ¶ 61,215 at P 28.

4. On July 14, 2014, MISO and the MISO Transmission Owners<sup>8</sup> (together, MISO Filing Parties) submitted revisions to the Tariff<sup>9</sup> and Agreement of Transmission Facilities Owners to Organize the Midwest Independent Transmission System Operator, Inc., A Delaware Non-Stock Corporation (Transmission Owners Agreement)<sup>10</sup> to comply with the Second Compliance Order.<sup>11</sup> MISO Filing Parties state that the July 14, 2014 compliance filing addresses the remaining directives of the Second Compliance Order that were not addressed in the June 4, 2014 compliance filing and request that those

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<sup>8</sup> MISO Transmission Owners consist of Ameren Services Company, as agent for Union Electric Company, Ameren Illinois Company, and Ameren Transmission Company of Illinois; City Water, Light & Power (Springfield, Illinois); 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>9</sup> MISO, FERC Electric Tariff, Attachment FF (Transmission Expansion Planning Protocol) (35.0.0); MISO, FERC Electric Tariff, Module A, (Common Tariff Provisions, General Provisions, Definitions – N (32.0.0), Definitions – O (33.0.0), Definitions – T (33.0.0)), submitted in Docket No. ER13-187-008.

<sup>10</sup> MISO, FERC Electric Tariff, MISO Rate Schedules, MISO Transmission Owner Agreement, App. B (Planning Framework) (31.0.0); App. F (Bylaws) (36.0.0), submitted in Docket No. ER13-187-009.

<sup>11</sup> MISO explains that due to eTariff filing constraints, it was not able to submit the revisions to the Tariff and the Transmission Owners Agreement in the same filing. It therefore made the July 14, 2014 filing in two parts. *See* MISO Filing Parties July 14, 2014 Compliance Filing Transmittal, Docket No. ER13-187-009, at 1. Unless otherwise noted, citations to MISO's Attachment FF in this order will refer to version 35.0.0, submitted in Docket No. ER13-187-008.

revisions become effective on June 1, 2013, the effective date of MISO's previously-accepted Tariff revisions.<sup>12</sup>

5. As discussed below, we accept MISO's compliance filing, subject to a further compliance filing within 30 days of the date of issuance of this order. Specifically, we direct MISO to (1) remove the proposed provision that specifies that a proposed transmission project consisting of both new transmission line sections and upgrades to existing transmission line sections will be considered an upgrade for the purpose of retaining a federal right of first refusal, unless more than 50 percent of the total transmission project cost is for the new transmission line sections and each new transmission line section is at least five miles in length, (2) remove the proposed new information requirement that a qualified transmission developer indicate how it will comply with the legal requirements of the state or locality where it plans to construct the transmission project, and (3) remove the requirement that, in order to become a qualified transmission developer, an applicant must demonstrate it has or can obtain sufficient capabilities and competencies regarding (i) regulatory permitting, including obtaining a certificate of public convenience and necessity (or equivalent) and other required permits from applicable regulatory authorities and (ii) right-of-way and land acquisition including condemnation; and (4) remove the requirement that a business plan include a plan for: (i) regulatory permitting; and (ii) obtaining public utility status and/or condemnation authority in applicable jurisdictions. We also deny requests for rehearing.

## **I. Background**

6. 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>13</sup> to require that each public utility

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<sup>12</sup> MISO Filing Parties July 14, 2014 Compliance Filing Transmittal, Docket No. ER13-187-008, at 1-2. MISO Filing Parties state that MISO inadvertently omitted several revisions in the Tariff sheets submitted in MISO's June 4, 2014 compliance filing, and MISO Filing Parties state that they have incorporated these revisions into the tariff sheets submitted in the July 14, 2014 compliance filing. *Id.* at 20-21.

<sup>13</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

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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.

7. 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.

## **II. Notice of Filings and Responsive Pleadings**

8. Notice of MISO's June 4, 2014 compliance filing was published in the *Federal Register*, 79 Fed. Reg. 33,744 (2014), with interventions and protests due on or before July 7, 2014. On July 14, 2014, MISO Transmission Owners filed comments in support of MISO's compliance filing.

9. Notices of MISO Filing Parties' July 14, 2014 filing were published in the *Federal Register*, 79 Fed. Reg. 42,782 (2014) and 79 Fed. Reg. 42,784 (2014), with interventions and protests due on or before August 4, 2014. On August 4, 2014, LS Power and ATC/Duke/Transource<sup>14</sup> filed timely protests and comments to MISO Filing Parties' July 14, 2014 compliance filing. On August 25, 2014, MISO Filing Parties jointly filed an answer in response to the protests and comments. On September 9, 2014, ATC/Duke/Transource filed an answer in response to MISO Filing Parties' answer.

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(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).

<sup>14</sup> ATC/Duke/Transource consists of 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.

### III. Discussion

#### A. Procedural Matters

10. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2014), prohibits an answer to a protest or an answer unless otherwise ordered by the decisional authority. We accept MISO Filing Parties' answer and ATC/Duke/Transource's answer because they have provided information that assisted us in our decision-making process.

#### B. Substantive Matters

11. As discussed below, we deny the requests for rehearing. We also find that MISO's June 4, 2014 and July 14, 2014 compliance filings partially comply with the directives of the Second Compliance Order. We thus accept, subject to conditions, MISO's proposed revisions to the Tariff and the Transmission Owners Agreement, and direct MISO to submit, within 30 days of the date of issuance of this order, a further compliance filing, as discussed below.

##### 1. References to State or Local Rights of First Refusal

###### a. Second Compliance Order

12. In the Second Compliance Order, the Commission granted rehearing and reversed its earlier finding that MISO's proposal to designate a transmission project to the incumbent transmission owner when required by state law, regulation, or administrative agency did not comply with Order No. 1000. The Commission found, upon further consideration, that the provision MISO proposed 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.<sup>15</sup> That provision states:

**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

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<sup>15</sup> Second Compliance Order, 147 FERC ¶ 61,127 at P 147.

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>16</sup>

13. The Commission continued to require the elimination of federal rights of first refusal from Commission-jurisdictional tariffs or agreements. Here, however, the Commission found that it was addressing the question of whether it should appropriately prohibit MISO from recognizing state or local laws or 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. The Commission concluded that, on balance, it should not prohibit MISO from recognizing state or local laws or regulations as a threshold issue, and that regardless of whether state or local laws are expressly referenced in the MISO Tariff, some state laws or regulations might prohibit a nonincumbent transmission developer from developing a particular transmission project in that state.<sup>17</sup>

14. The Commission found that requiring MISO to remove the provision from its tariff would result in a regional transmission planning process that does not efficiently account for the existence of state or local laws or regulations that impact the siting, permitting, and construction of transmission facilities, and 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. The Commission found that requiring such consideration would create unnecessary inefficiencies and delays.<sup>18</sup> Therefore, it granted rehearing and found that MISO may retain the provision that recognizes state or local laws or regulations as a threshold matter in the regional transmission planning process.<sup>19</sup>

15. The Commission denied Illinois Commission's request for rehearing of the finding that transmission projects subject to state rights of first refusal may still be eligible for regional cost allocation. It stated that, while Order No. 1000 addressed disincentives created by *federal* rights of first refusal that may deter nonincumbent transmission developers, it recognized that the Order No. 1000 reforms did not address all possible

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<sup>16</sup> MISO, FERC Electric Tariff, Attachment FF, § VIII.A.

<sup>17</sup> Second Compliance Order, 147 FERC ¶ 61,127 at P 149.

<sup>18</sup> *Id.* P 150.

<sup>19</sup> *Id.*

disincentives to competition to develop transmission projects selected in the regional transmission plan for purposes of cost allocation, and that there may be restrictions on the construction of transmission facilities by nonincumbent transmission providers under state or local laws or regulations.<sup>20</sup>

16. The Commission further noted that its decision to focus on federal (not state) right of first refusal provisions in Commission-jurisdictional tariffs was “designed to ensure that its nonincumbent transmission developer reforms do not result in the regulation of matters reserved to the states.”<sup>21</sup> Finally, the Commission pointed out that, even if a transmission project was subject to a state right of first refusal, the regional transmission planning process still results in the selection of transmission projects that are more efficient or cost-effective than would have been developed but for such processes.<sup>22</sup>

**b. Requests for Rehearing**

17. Illinois Commission and LS Power request rehearing of the Commission’s decision to allow MISO to retain the provision that requires it to designate a transmission project 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 laws and regulations, which 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>23</sup> Illinois Commission asserts that, contrary to the Commission’s finding in the Second Compliance Order, the First Compliance Order did not pre-empt state laws or prohibit MISO from recognizing state or local laws or regulations; rather, the Commission simply provided a process for MISO to exercise authority under its OATT and for states to exercise authority under state laws.<sup>24</sup>

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<sup>20</sup> *Id.* P 155 n.285 (citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 287).

<sup>21</sup> *Id.* P 156.

<sup>22</sup> *Id.* P 157.

<sup>23</sup> LS Power Request for Rehearing at 5, 30-42; Illinois Commission Request for Rehearing at 4-18; *see* Second Compliance Order, 147 FERC ¶ 61,127 at P 147; MISO, FERC Electric Tariff, Attachment FF, § VIII.A.

<sup>24</sup> Illinois Commission Request for Rehearing at 10-11, 10 n.27 (citing First Compliance Order, 142 FERC ¶ 61,215 at PP 134-136, and asserting that the

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18. LS Power argues that, by recognizing state and local laws and regulations as a threshold issue, the Second Compliance Order abdicates the Commission's statutory responsibility to determine what transmission solution and transmission developer is eligible for regional cost allocation and to ensure that the rates for that transmission project are just and reasonable and allows states to dictate to the Commission which transmission developers are eligible for regional cost allocation. LS Power contends that MISO's proposal would use those laws to exclude solutions from the competitive process, further preventing the Commission from determining the more efficient or cost-effective transmission developer and, therefore, the just and reasonable rate for the transmission project regardless of who builds the project.<sup>25</sup> LS Power also argues that, although the Commission would retain the obligation to review any rate request prior to project operation, without the results of the competitive process, the Commission will not be in a position to determine if the rates are just and reasonable.<sup>26</sup>

19. LS Power argues that the Second Compliance Order shifts interpretation of state and local laws to MISO and the Commission and allows MISO to either (1) refuse to competitively bid transmission projects in the first instance, or (2) refuse selection of the more efficient or cost-effective transmission developer after competitive solicitation. LS

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Commission simply required that transmission projects proceed through the competitive selection process, even in cases where the project is subject to a state right of first refusal). In addition, Illinois Commission notes certain legal and policy arguments provided by Commissioner Norris, and states that it agrees with and echoes these arguments. Illinois Commission Request for Rehearing at 16-17 (citing Second Compliance Order, 147 FERC ¶ 61,127 (Norris, Comm'r, Dissenting, at 1-3)). Commissioner Norris noted that from a policy perspective, providing an open and fair opportunity for all stakeholders to participate fully in the regional transmission planning process will ensure that the planning process provides transparency regarding all reasonable alternatives to meet identified transmission needs, and that without such an opportunity, MISO cannot identify the more efficient or cost-effective transmission solutions, the results being a failure to ensure just and reasonable rates (citing Second Compliance Order, 147 FERC ¶ 61,127 (Norris, Comm'r, Dissenting)). Commissioner Norris additionally noted that incumbent transmission developers may lack innovation or be more interested in preserving the status quo and insulating themselves from competition than nonincumbents (citing Second Compliance Order, 147 FERC ¶ 61,127 (Norris, Comm'r, Dissenting)).

<sup>25</sup> LS Power Request for Rehearing at 31.

<sup>26</sup> *Id.*

Power asserts that MISO's proposal places MISO and the Commission as the arbiters of state or local law and thus allows MISO to create federal rights of first refusal out of state laws.<sup>27</sup>

20. LS Power argues that the Commission's reliance on MISO's argument that inefficiencies will occur if MISO is required to ignore state and local right of first refusal laws is unsupported because MISO makes no reference to an actual state law that establishes the "impossibility" of a nonincumbent transmission developer ever building a transmission project in a particular state such that completing the competitive process is inefficient. LS Power contends that MISO's argument is based on the unsupported assumption that nonincumbent transmission developers will nonetheless bid even if they have no legal possibility of ever building a transmission project. LS Power states that, if there are in fact states where there is no legal possibility for it to ever build a transmission project, it is not going to bid on that transmission project.<sup>28</sup> LS Power points to right of first refusal laws in North Dakota, South Dakota, Minnesota, and Indiana, which it argues do not necessarily make it impossible for a nonincumbent transmission developer to ever build a transmission project within those states.<sup>29</sup>

21. LS Power argues that it is not inefficient to open up for competitive bidding all transmission projects selected in the regional transmission plan for purposes of cost allocation, including those with potential state or local rights of first refusal. LS Power explains that if an incumbent transmission owner believes that there is no legal possibility for a nonincumbent transmission developer to build, it need not bid because it is unlikely that anyone will bid, and the transmission project will be assigned to the incumbent transmission owner. Furthermore, LS Power states that if the incumbent transmission owner bids and no others do, there is no need for evaluation and thus no inefficiency, other than the time for the bid submission. Finally, LS Power argues that, if a nonincumbent transmission developer bids, it may have a different interpretation of the law than the incumbent transmission owner, and MISO will have to evaluate the bids to determine the more efficient or cost-effective transmission developer, leaving for the state the determination of state law.<sup>30</sup>

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<sup>27</sup> *Id.* at 33.

<sup>28</sup> *Id.* at 40.

<sup>29</sup> *Id.* at 36-39.

<sup>30</sup> *Id.* at 40-41.

22. LS Power argues that the Commission should strike the MISO tariff language that reads, “Applicable Laws and Regulations include, but are not limited to, those . . . governing the use of existing developed and undeveloped right of way held by an incumbent utility.”<sup>31</sup> LS Power asserts that neither MISO nor the Commission is in a position to determine the application of state laws or regulations regarding property rights, and certainly not as a threshold issue. LS Power contends that MISO has not established how it would implement this provision in a non-discriminatory manner in the transmission planning and selection process. LS Power argues that the siting of transmission, whether on such right of way or elsewhere, is a matter reserved to the states and not one that is normally decided in the transmission planning process.<sup>32</sup>

23. Illinois Commission requests rehearing of the Commission’s decision to allow transmission projects selected in the regional transmission plan for purposes of cost allocation to be eligible for regional cost allocation, even if assigned to an incumbent transmission owner pursuant to state law, without requiring adjustments to the regional cost allocation method.<sup>33</sup> Illinois Commission adds that a regional transmission planning process is not a substitute for having and applying an effective competitive selection process.<sup>34</sup> Illinois Commission argues that such a competitive selection process is necessary to ensure the transmission rates for such projects will be just and reasonable,<sup>35</sup> otherwise, states with right of first refusal laws may shift the costs that may result from having a right of first refusal for incumbent transmission developers to ratepayers in other states.<sup>36</sup> LS Power notes that it does not seek rehearing on this issue, but agrees with Illinois Commission that the reasoning underlying Order No. 1000’s requirement that public utility transmission providers eliminate federal rights of first refusal from Commission-jurisdictional tariffs and agreements also applies to state right of first refusal laws.<sup>37</sup> However, LS Power requests that the Commission strike from the

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<sup>31</sup> MISO, FERC Electric Tariff, Attachment FF, § VIII.A.

<sup>32</sup> LS Power Request for Rehearing at 41-42.

<sup>33</sup> Illinois Commission Request for Rehearing at 4-5.

<sup>34</sup> *Id.* at 22.

<sup>35</sup> *Id.* at 19.

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

<sup>37</sup> LS Power Request for Rehearing at 42-43; *see* Illinois Commission Request for Rehearing at 20.

Second Compliance Order the finding 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 purposes,” arguing that there is no factual support in the record for this conclusion.<sup>38</sup> Illinois Commission argues that, rather than allow MISO to retain the provision, the Commission could have addressed arguments regarding inefficiency, delay, and reliability by providing MISO with guidance and direction on what to do when a transmission project or developer selected by MISO is prohibited from constructing the transmission project under state law.<sup>39</sup>

**c. Commission Determination**

24. On rehearing, petitioners argue that the Commission erred in allowing MISO to retain the provision that requires MISO to comply with any applicable laws and regulations granting a right of first refusal to a transmission owner and requiring that that transmission owner be assigned any transmission project within the scope, and in accordance with the terms, of any applicable laws and regulations, which 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>40</sup> Further, Illinois Commission requests rehearing of the Commission’s decision to allow transmission projects selected in the regional transmission plan for purposes of cost allocation that are assigned to an incumbent transmission owner pursuant to state law to be eligible for regional cost allocation, without requiring adjustments to the regional cost allocation method. For the reasons discussed below, we deny petitioners’ requests for rehearing.

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<sup>38</sup> LS Power Request for Rehearing at 43 (referring to Second Compliance Order, 147 FERC ¶ 61,127 at P 157).

<sup>39</sup> Illinois Commission Request for Rehearing at 15-16. Additionally, the Illinois Commission argues that, to avoid potential cost inefficiency in the process, the Commission need only clarify that developers that voluntarily choose to participate in the competitive selection process, including incumbent transmission owners, must bear some reasonable portion of MISO’s costs of operating that process. If no nonincumbents choose to participate, MISO may select the incumbent, provided that the incumbent meets all qualification standards. *Id.*

<sup>40</sup> LS Power Request for Rehearing at 5, 30-42; Illinois Commission Request for Rehearing at 4-18; *see* Second Compliance Order, 147 FERC ¶ 61,127 at P 147.

25. In denying rehearing, we confirm the Commission's finding in the Second Compliance Order that it is appropriate for MISO to recognize state or local laws or regulations as a threshold matter in the regional transmission planning process.<sup>41</sup> As the Commission stated in the Second Compliance Order and we reiterate here, Order No. 1000's focus is on federal right of first refusal provisions in Commission-jurisdictional tariffs, and 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>42</sup> In the Second Compliance Order, the Commission found that the provision requiring MISO to designate an incumbent transmission owner to build a transmission project within the scope, and in accordance with the terms, of any applicable laws and regulations, which 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 rights of way held by an incumbent utility "merely acknowledges state and local laws and regulations and does not create a federal right of first refusal."<sup>43</sup> The Commission explained that "[n]othing has changed the Commission's view that Order No. 1000's requirement to remove federal rights of first refusal is in the public interest" and stated that it continues "to require the elimination of federal rights of first refusal from Commission-jurisdictional tariffs or agreements."<sup>44</sup> Nevertheless, the Commission explained, Order No. 1000 was not intended to "limit, preempt, or otherwise affect state or local laws or regulations with respect to construction of transmission facilities."<sup>45</sup> Therefore, Order No. 1000 "does not

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<sup>41</sup> Second Compliance Order, 147 FERC ¶ 61,127 at P 149.

<sup>42</sup> *Id.* P 156; *see* Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at PP 253, 377 & n.231.

<sup>43</sup> Second Compliance Order, 147 FERC ¶ 61,127 at P 147; *see* MISO, FERC Electric Tariff, Attachment FF, § VIII.A.

<sup>44</sup> Second Compliance Order, 147 FERC ¶ 61,127 at PP 148-149.

<sup>45</sup> *Id.* PP 149, 227; *see also* Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 253 n.231, 319 (finding that "[n]othing 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. . . ." and ". . . our reforms are not intended to alter an incumbent transmission provider's use

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require removal of references to such state or local laws or regulations from Commission-approved tariffs or agreements.”<sup>46</sup>

26. We disagree with LS Power and Illinois Commission that the Commission erred by basing its decision in the Second Compliance Order primarily on the fact that it found compelling the arguments about 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.<sup>47</sup> While the Commission considered these arguments persuasive, the rationale for its decision in the Second Compliance Order was its finding that MISO’s proposed provision was not a federal right of first refusal and that, 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.<sup>48</sup> The Commission explained that it would not 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, as Order No. 1000 was not intended to limit, preempt, or otherwise affect state or local laws or regulations with respect to construction of transmission facilities.<sup>49</sup> We therefore find that it is unnecessary to clarify what actions MISO and transmission developers should take to address concerns related to inefficiencies and delays that could occur if MISO were required to remove its proposed provision, such as specifying a process for selecting a replacement transmission developer or transmission project in circumstances where state law requires a different outcome.

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and control of its existing rights-of-way. . . . The retention, modification, or transfer of rights-of-way remain subject to relevant law or regulation granting the rights-of-way.”).

<sup>46</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at PP 253 & n.231, 319; *see also* Order No. 1000-A, 139 FERC ¶ 61,132 at P 427.

<sup>47</sup> LS Power Request for Rehearing at 28-29; Illinois Commission Request for Rehearing at 9.

<sup>48</sup> Second Compliance Order, 147 FERC ¶ 61,127 at P 149 (citing Order No. 1000-A, 139 FERC ¶ 61,132 at P 381).

<sup>49</sup> *Id.*

27. In Order No. 1000, the Commission found that removing federal rights of first refusal from Commission-jurisdictional tariffs and agreements would provide nonincumbent transmission providers with the opportunity to propose and construct transmission projects, consistent with state and local laws and regulations.<sup>50</sup> In this way, the Commission struck an important balance between removing barriers to participation by potential transmission providers in the regional transmission planning process and ensuring the nonincumbent transmission developer reforms do not result in the regulation of matters reserved to the states.<sup>51</sup> In the Second Compliance Order, the Commission explained that its “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 states.”<sup>52</sup>

28. The Commission found that, in evaluating MISO’s tariff provision, 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.<sup>53</sup> The Commission was called on to consider whether the provision creates a federal right of first refusal or merely references existing state or local laws or regulations with respect to construction, siting, or permitting of transmission facilities, in determining whether MISO must eliminate the provision from its Commission-jurisdictional tariffs and agreements. The Commission carefully considered petitioners’ arguments in determining whether it is appropriate 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.<sup>54</sup> The Commission found that MISO “may retain

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<sup>50</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 259.

<sup>51</sup> Second Compliance Order, 147 FERC ¶ 61,127 at P 150; *see* Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at PP 43-47, 107.

<sup>52</sup> *See* Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at PP 43-47, 107.

<sup>53</sup> Second Compliance Order, 147 FERC ¶ 61,127 at P 149.

<sup>54</sup> *Id.* P 150. We note that MISO has previously stated that, in situations where an Open Transmission Project crosses between a state that has a state right of first refusal and one that does not, the portion of the Open Transmission Project that is in the state without a right of first refusal would go through MISO's competitive bidding process. *See, e.g.,* MISO and MISO Transmission Owners January 18, 2013 Answer

[the] proposed . . . provision” because “it is appropriate for MISO to recognize state or local laws and regulations as a threshold matter [in the regional transmission planning process.”<sup>55</sup>

29. The requests for rehearing, by contrast, seek to expand the reach of Order No. 1000’s reforms, by prohibiting MISO from recognizing state or local laws or 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. Order No. 1000 defines the phrase “federal right of first refusal” to refer to rights of first refusal that are created by provisions in Commission-jurisdictional tariffs or agreements.<sup>56</sup> In particular, Order No. 1000 explained that a federal right of first refusal in a region’s Commission-jurisdictional tariffs or agreements would operate, at the federal level, to “prevent [nonincumbent] entities from constructing and owning new transmission facilities located in that region.”<sup>57</sup> In contrast, state and local laws and regulations providing an incumbent transmission owner with a right of first refusal to develop a transmission project located within the state are created at the state and local level.<sup>58</sup> Petitioners have not demonstrated how MISO’s provision goes beyond what the Commission found as permissible references to state and local laws and regulations.

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in Docket No. ER13-187-000 at 18 and MISO’s October 15, 2013 Answer in Docket No. ER13-187-003 at 10-11.

<sup>55</sup> *Id.*

<sup>56</sup> Order No. 1000-A, 139 FERC ¶ 61,132 at P 415.

<sup>57</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 261.

<sup>58</sup> *See* Second Compliance Order, 147 FERC ¶ 61,127 at P 149 (“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.”); Order No. 1000-A, 139 FERC ¶ 61,132 at P 381 (A right of first refusal “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.’”).

30. We disagree with LS Power that the Second Compliance Order “abdicates” the Commission’s statutory responsibility to determine what transmission solution and transmission developer is eligible for regional cost allocation and to ensure that the rates for that transmission project are just and reasonable and allows states to dictate to the Commission which transmission developers are eligible for regional cost allocation.<sup>59</sup> As noted above, a right of first refusal “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.”<sup>60</sup> 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>61</sup> With respect to LS Power’s argument that the Commission will not be in a position to determine if the rates are in fact just and reasonable, we reiterate that Order No. 1000 “ensure[s] that the Commission’s transmission planning and cost allocation requirements are *adequate* to support more efficient and cost-effective investment decisions moving forward.”<sup>62</sup>

31. Regarding LS Power’s argument that MISO’s proposal places MISO and the Commission as the arbiters of state or local law, we acknowledge that while MISO will be responsible for the final planning decisions, we expect the states will provide input regarding their state or local laws or regulations. As the Commission stated in Order No. 1000-A, “our expectation is that state regulators should play a strong role and that public utility transmission providers will consult closely with state regulators to ensure that their respective transmission planning processes are consistent with state requirements.”<sup>63</sup> Similarly, we deny LS Power’s request to require MISO to strike the tariff language that reads, “Applicable Laws and Regulations include, but are not limited to, those . . . governing the use of existing developed and undeveloped right of way held by an incumbent utility.”<sup>64</sup> We anticipate that MISO will work closely with the states throughout the transmission planning process and that MISO’s procedures will provide

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<sup>59</sup> LS Power Request for Rehearing at 31.

<sup>60</sup> Order No. 1000-A, 139 FERC ¶ 61,132 at P 381.

<sup>61</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 287; Order No. 1000-A, 139 FERC ¶ 61,132 at P 381.

<sup>62</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 44 (emphasis added).

<sup>63</sup> Order No. 1000-A, 139 FERC ¶ 61,132 at P 338.

<sup>64</sup> MISO, FERC Electric Tariff, Attachment FF, § VIII.A.

transparency regarding any state or local laws or regulations it uses in its decision-making process.

32. Finally, we deny Illinois Commission's request for rehearing concerning regional cost allocation for transmission projects selected in the regional transmission plan for purposes of cost allocation that also are subject to a state right of first refusal. 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.<sup>65</sup> For example, 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>66</sup> 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.<sup>67</sup> We continue to "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."<sup>68</sup> Thus, we deny Illinois Commission's request for rehearing.

33. Similarly, we disagree with LS Power that the Commission should strike, as unsupported, its finding 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 purposes of transmission projects that are more efficient or cost-effective than would have been developed but for such purposes."<sup>69</sup> In Order No. 1000, the

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<sup>65</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 287.

<sup>66</sup> *Id.*

<sup>67</sup> Second Compliance Order, 147 FERC ¶ 61,127 at P 157.

<sup>68</sup> *Id.*

<sup>69</sup> Compare LS Power Request for Rehearing and Clarification at 43 (asserting that insufficient record exists to support the Commission's finding), *and* Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 53 (concluding that the reforms adopted in Order No. 1000 are "justified sufficiently by the 'theoretical threat' identified"), *and* Order No. 1000-A, 139 FERC ¶ 61,132 at P 71 (noting that "the substantial evidence standard . . . only requires evidence that a 'reasonable mind might accept' as 'adequate to support a

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Commission determined that by ensuring a robust process is in place to identify and consider regional transmission solutions to regional transmission needs, public utility transmission providers will have processes available to identify more efficient or cost-effective solutions than may have been the case without Order No. 1000's reforms.<sup>70</sup> The Commission's finding in Order No. 1000 was based on its careful consideration of the record and the arguments presented in favor of and against the reforms.<sup>71</sup> Based on this review, the Commission exercised its independent judgment and expertise in this area. We reiterate that, 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 and did not address all disincentives to competition in the regional transmission planning process.<sup>72</sup>

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

a. **Second Compliance Order**

34. In the Second Compliance Order, the Commission found that MISO had failed to sufficiently justify its proposal that a transmission project with less than 20 contiguous miles of new transmission line sections would qualify as an upgrade and be excluded

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conclusion” and “[i]n the context of rulemakings that involve legislative facts and generic factual predictions, the relevant criterion is whether the agency has provided a reasonable explanation of the problem presented and its solution to it”) (citing *Dickenson v. Zurko*, 527 U.S. 150, 155 (1999) and *Federal Communications Commission v. Nat'l Citizens Comm. for Broadcasting*, 436 U.S. 755, 814 (1978)).

<sup>70</sup> Second Compliance Order, 147 FERC ¶ 61,127 at P 147; Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 315; Order No. 1000-A, 139 FERC ¶ 61,132 at P 179.

<sup>71</sup> See Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at PP 42-62, 78-84; Order No. 1000-A, 139 FERC ¶ 61,132 at P 57 (“The Commission justified the need for the reforms in Order No. 1000 based on [a theoretical] threat created by the inadequacy of existing transmission planning and cost allocation requirements to meet the anticipated challenges facing the industry, a threat whose existence was illustrated by actual problems that the Commission noted in the order, but that are not necessary to justify its response to the threat.”) (citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 53).

<sup>72</sup> Second Compliance Order, 147 FERC ¶ 61,127 at PP 155-156.

from the competitive bidding process and thus directed MISO to remove the 20 contiguous mile threshold.<sup>73</sup>

35. The Commission stated, however, that it is 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. The Commission stated that, 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. The Commission explained that, 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. The Commission stated that 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. The Commission found that MISO could also propose a method or combinations of methods such as: (i) limiting the definition of upgrades; (ii) reducing the length of contiguous segments; and/or (iii) limiting the number of contiguous segments.<sup>74</sup>

**b. Compliance Filing**

36. MISO Filing Parties propose to replace the 20 contiguous mile threshold with one based on a combined mileage threshold and a minimum cost percentage threshold. Specifically, MISO Filing Parties propose that a proposed transmission project consisting of both new transmission line sections and upgrades to existing transmission line sections will be considered an upgrade for the purpose of retaining a right of first refusal, unless: (1) more than 50 percent of the total transmission project cost is for the new transmission line sections; and (2) each new transmission line section is at least five miles in length.<sup>75</sup> MISO Filing Parties further state that transmission projects with new transmission line facilities that exceed these thresholds will be split, with the new transmission line section

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<sup>73</sup> *Id.* P 182.

<sup>74</sup> *Id.* P 183.

<sup>75</sup> MISO, FERC Electric Tariff, Attachment FF, § VIII.A.2.1.1.

being treated as one or more transmission projects selected in the regional transmission plan for purposes of cost allocation and the upgrade portion(s) assigned to the owner(s) of the existing transmission facilities.<sup>76</sup>

37. MISO Filing Parties state that their proposal is just and reasonable and consistent with Order No. 1000 and the Second Compliance Order. MISO Filing Parties state that the Commission expressed concern in the Second Compliance Order that MISO's proposed 20 contiguous mile threshold could exclude a broad spectrum of transmission projects from the MISO competitive process such as projects with numerous contiguous segments of less than 20 miles where only a small fraction of the project is considered an upgrade. MISO Filing Parties argue that the revised proposal avoids this potential problem by reducing the mileage threshold to five miles. MISO Filing Parties state that their proposal also limits the exception from the competitive bidding process to those transmission projects for which a majority of the cost of the proposed transmission project is associated with upgrades to existing transmission line sections. MISO Filing Parties state their proposal ensures that transmission projects that contain new transmission line sections that are minor in comparison to the overall project are treated as upgrades while projects comprised mostly of new transmission line sections mixed with a lesser amount of upgrades to existing transmission line sections are subjected to MISO's competitive bidding process.<sup>77</sup>

38. MISO Filing Parties argue that their proposed combined cost percentage and mileage thresholds promote more efficient and cost-effective transmission development. MISO Filing Parties state that their proposal ensures that for projects containing both upgrades and new transmission line sections, the new transmission line sections are subjected to competitive bidding except when the mileage of line sections are small and the relative cost of the new sections is small in comparison to the total project cost. MISO Filing Parties contend that to require MISO to conduct a competitive process when the portion of new transmission line sections is minor or the cost associated with such sections is relatively inexpensive would be inefficient and would result in added costs that outweigh the benefit of engaging in the competitive process.<sup>78</sup>

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<sup>76</sup> MISO Filing Parties July 14, 2014 Compliance Filing Transmittal, Docket No. ER13-187-008, at 8.

<sup>77</sup> *Id.* at 7-9.

<sup>78</sup> *Id.* at 9.

**c. Protests and Comments**

39. LS Power argues that MISO Filing Parties' proposal fails to follow the Commission's directives in the Second Compliance Order because the proposal is not limited to "minor and/or inexpensive transmission projects."<sup>79</sup>

40. LS Power asserts that an arbitrary percentage dollar threshold, such as the 50 percent that MISO proposes, could exclude transmission projects regardless of length. LS Power states that, to the extent MISO Filing Parties want to rely on a cost threshold, it should be a specific, "inexpensive" dollar amount.<sup>80</sup> Furthermore, LS Power argues that MISO Filing Parties' assertion that a 50 percent cost threshold is necessary for efficiency is without merit. LS Power claims that MISO Filing Parties provide no evidence of efficiencies from having a 50 percent cost threshold. LS Power also notes that Southwest Power Pool, Inc. (SPP) proposed that only if 80 percent or more of the total cost of a transmission project is a rebuild of existing facilities would the entire project be considered an upgrade. LS Power asserts that, while the Commission has allowed regional differences, there is no reason to assume that it is efficient to bid a new transmission facility in SPP if only 20 percent of the overall costs are new transmission, but inefficient in MISO if 50 percent of the overall costs are new transmission.<sup>81</sup>

41. LS Power states that MISO Filing Parties' proposed five mile threshold allows for possible gaming and provides MISO with an incentive to "gerrymander" project parameters rather than determine the more efficient and cost-effective transmission project. LS Power asserts that no mileage threshold is appropriate and notes that in a recent PJM Interconnection, L.L.C. (PJM) reliability proposal process, an LS Power affiliate proposed multiple small projects at or smaller than five miles in length, some of which are now short-listed in PJM as more efficient or cost-effective transmission projects. LS Power further states that a new river crossing should be a competitively procured transmission project in all cases with no mileage threshold.<sup>82</sup>

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<sup>79</sup> LS Power Protest at 3 (citing Second Compliance Order, 147 FERC ¶ 61,127 at P 183).

<sup>80</sup> *Id.* at 3-4.

<sup>81</sup> *Id.* at 4. LS Power states that it also protested SPP's proposed 80 percent threshold because it believes any percentage based threshold is arbitrary unless there is an upper dollar limit to its application. *Id.*

<sup>82</sup> *Id.* at 5-6.

42. ATC/Duke/Transource argues that MISO Filing Parties' proposal would preserve a right of first refusal for any new transmission facilities included in a transmission project with upgrades if a single line segment of new facilities is less than five miles long. ATC/Duke/Transource asserts that MISO Filing Parties' proposal does not ensure that this provision is not unnecessarily broad and that the provision would allow significant new transmission lines that are regionally cost-shared to be kept from the competitive process.<sup>83</sup> ATC/Duke/Transource states that MISO Filing Parties' argument regarding inefficiencies is undermined by the fact that the competitive bidding process will be funded by the transmission developers submitting bids. ATC/Duke/Transource claims that there is no inefficiency concern where potential transmission developers believe a transmission project is worth bidding on and agree to pay their share of the cost of evaluating it.<sup>84</sup>

43. ATC/Duke/Transource argues that there should be no cost or distance threshold for proposed new transmission line segments other than the eligibility thresholds for Multi-Value Projects (MVP<sup>85</sup>) and Market Efficiency Projects (MEP<sup>86</sup>), which must be

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<sup>83</sup> ATC/Duke/Transource Protest at 5-6.

<sup>84</sup> *Id.* at 7.

<sup>85</sup> Attachment FF defines a Multi-Value Project as one or more network upgrades that address a common set of transmission issues and satisfy certain conditions. The conditions include: (1) The MVP must be evaluated as part of a portfolio of projects, as designated in the transmission expansion planning process, whose benefits are spread broadly across the footprint; (2) The MVP must meet one of three criteria: developed through the transmission expansion planning process for the purpose of enabling the transmission system to reliably and economically deliver energy in support of documented energy policy mandates or laws, or must provide multiple types of economic value across multiple pricing zones with a benefit-to-cost ratio of 1.0 or higher, or must address at least one transmission issue associated with a projected violation of a national or regional reliability standard and at least one economic-based transmission issue that provides economic value across multiple pricing zones; (3) The MVP must meet certain other conditions including evaluation through the MISO planning process and approval by the MISO Board, and total capital cost greater than or equal to \$20 million. *See* MISO, FERC Electric Tariff, Attachment FF, § II.C.

<sup>86</sup> Attachment FF defines Market Efficiency Projects as network upgrades: (i) that are proposed by the transmission provider, transmission owner(s), independent transmission companies, market participant(s), or regulatory authorities; (ii) that are found to be eligible for inclusion in the MISO transmission plan; (iii) that have a cost of

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met to qualify for the competitive process. ATC/Duke/Transource note that transmission projects that meet the MVP or MEP category criteria will be, by definition, of significant size and cost.<sup>87</sup> ATC/Duke/Transource argues that a transmission project that does not meet the \$5 million threshold for MEP eligibility or \$20 million for MVP eligibility would not be cost-shared to begin with, allowing for a right of first refusal. ATC/Duke/Transource argues that any other mileage or cost percentage threshold for new transmission facilities that are part of a transmission project with upgrades would be arbitrary and unnecessarily broad.<sup>88</sup>

**d. Answers**

44. MISO Filing Parties state that the proposed cost and mile thresholds are just and reasonable and consistent with the guidance provided in the Second Compliance Order. MISO Filing Parties assert that a five mile threshold ensures that minor new line sections interspersed within a larger upgrade project are not separated from the larger project and bid out when doing so would not be efficient or cost-effective. Furthermore, MISO Filing Parties claim that the proposed cost percentage threshold ensures that a transmission project comprised of mostly upgrades with a few relatively inexpensive new line sections would not be divided into multiple projects. MISO Filing Parties assert that these thresholds are consistent with what MISO claims to be the Commission's recognition that, when a transmission project mostly contains upgrades, efficiency and cost-effectiveness are not enhanced by requiring MISO to bid out minor and inexpensive new transmission line sections.<sup>89</sup>

45. MISO Filing Parties argue that if the Commission agreed with protestors that no mileage or cost percentage threshold was appropriate, the Commission would not have suggested that MISO adopt a cost percentage threshold, a reduced line segment threshold, or combination of methods. MISO Filing Parties note that they considered adopting a

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\$5 million or more; (iv) that involve facilities with voltages of 345 kV or higher; (v) that are not determined to be MVPs; and (vi) that are found to have regional benefits. *See* MISO, FERC Electric Tariff, Attachment FF, § II.B.

<sup>87</sup> ATC/Duke/Transource Protest at 7 (stating that provisions in Attachment FF require that MEPs have a proposed cost of \$5 million dollars or more and that MVPs have a cost of \$20 million or more).

<sup>88</sup> *Id.* at 7-8.

<sup>89</sup> MISO Filing Parties Answer at 6-7.

stated cost threshold, but determined that a percentage threshold is superior because costs may change over time and based on the characteristics of a transmission project.<sup>90</sup>

46. MISO Filing Parties argue that, even if sponsors of a new transmission proposal fund certain of MISO's evaluation costs, bidding out multiple small transmission line sections interspersed within larger upgrade projects will result in multiple, duplicative MISO evaluation and regulatory review processes, which is contrary to Order No. 1000's focus on efficiency and cost-effectiveness. MISO Filing Parties also argue that protestors ignore the economies and efficiencies that would be lost if multiple builders are constructing, operating, and maintaining minor portions of a single transmission project that is truly an upgrade.<sup>91</sup>

47. MISO Filing Parties state that protestors who argue that MISO should rely on the existing MEP and MVP cost thresholds misconstrue the purpose of the MEP and MVP cost thresholds and the proposed thresholds. MISO Filing Parties explain that the purpose of the MEP and MVP cost thresholds is to determine whether a transmission project would qualify as an MEP or MVP, not to determine whether a project is an upgrade or new transmission facility. MISO Filing Parties argue that, using the protestors' logic, an MEP or MVP that is entirely an upgrade would become a transmission project selected in the regional transmission plan for purposes of cost allocation, a result contrary to Order No. 1000.<sup>92</sup>

48. In response to LS Power's argument that MISO has an incentive to "gerrymander" project parameters, MISO Filing Parties state that MISO derives no financial gain by treating a new transmission project as an upgrade and is bound by its Tariff to determine the most efficient and cost-effective transmission plan.<sup>93</sup> Furthermore, MISO Filing Parties assert that stakeholders have the opportunity to comment on the most optimal transmission solutions. MISO Filing Parties claim that the proposed cost percentage and mileage thresholds are designed to ensure that, if efficiency and cost-effectiveness are undermined by bidding out minor new segments of an upgrade, efficiency and cost-effectiveness will prevail.<sup>94</sup>

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<sup>90</sup> *Id.* at 7-8.

<sup>91</sup> *Id.* at 8-9.

<sup>92</sup> *Id.* at 9-10.

<sup>93</sup> *Id.* at 10 (citing MISO, FERC Electric Tariff, Attachment FF, § I.D).

<sup>94</sup> *Id.* at 10-11.

49. In its response to MISO, ATC/Duke/Transource argue that MISO Filing Parties misrepresent their proposals in the July 14, 2014 compliance filing. ATC/Duke/Transource explain that the Commission instructed MISO to justify any exclusion from the competitive bidding process.<sup>95</sup> However, ATC/Duke/Transource assert that MISO Filing Parties' proposal again results in arbitrary and unreasonable exclusions from the competitive bidding process. ATC/Duke/Transource argue that the proposal substantially and unreasonably increases the number of transmission projects that would be considered upgrades under the MISO Tariff, and therefore decreases the number of projects that could be considered transmission projects selected in the regional transmission plan for purposes of cost allocation.<sup>96</sup>

50. In addition, ATC/Duke/Transource assert that MISO Filing Parties inaccurately characterize ATC/Duke/Transource's argument regarding MEP and MVP thresholds. ATC/Duke/Transource argue that upgrades are separately defined in the MISO Tariff, and it is not possible that an upgrade to an existing facility that meets the definition of an MEP or MVP could be made open to competition. ATC/Duke/Transource argue that any transmission project that meets the MEP or MVP criteria as a new project should not be combined with upgrades and excluded from competition, which could happen under MISO Filing Parties' proposal.<sup>97</sup>

**e. Commission Determination**

51. We find that MISO Filing Parties have not shown that the proposed mileage and cost thresholds are just and reasonable. As the Commission found in the Second Compliance Order, any proposed exception to the competitive bidding process should apply to "certain minor and/or relatively inexpensive transmission projects containing both new transmission facilities and upgrades to existing transmission facilities."<sup>98</sup> However, MISO Filing Parties' proposal continues to apply to an unnecessarily broad spectrum of transmission projects and fails to strike a reasonable balance between expanding competition in transmission development and promoting administrative, regulatory, and economic efficiency because it would exclude from the competitive bidding process transmission projects that, while they include some

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<sup>95</sup> ATC/Duke/Transource Answer at 2 (citing Second Compliance Order, 147 FERC ¶ 61,127 at P 182).

<sup>96</sup> *Id.* at 2-5.

<sup>97</sup> *Id.* at 5.

<sup>98</sup> Second Compliance Order, 147 FERC ¶ 61,127 at P 183.

upgrades, may also include significant new transmission facilities. In particular, under MISO Filing Parties' proposal, a transmission project consisting of both new transmission line sections and upgrades to existing transmission line sections will not be eligible for competitive bidding if it includes even a single new transmission line section of less than five miles in length. Furthermore, MISO Filing Parties offer no explanation as to why a transmission project should still qualify as primarily an upgrade when up to 50 percent of the costs of that transmission project are made up of new transmission line sections.

52. We note that, in the SPP Order, the Commission found that SPP's proposal of an 80 percent threshold strikes a reasonable balance between expanding competition in transmission development and promoting administrative, regulatory, and economic efficiency by excluding from the competitive bidding process transmission projects that, while they include some new transmission facilities, are primarily upgrades to existing transmission facilities.<sup>99</sup> While the Commission has accepted a percentage cost threshold in the SPP region,<sup>100</sup> MISO Filing Parties have not demonstrated here that their proposal strikes a reasonable balance and excludes only certain minor and/or relatively inexpensive transmission projects that contain both new transmission facilities and upgrades to existing transmission facilities.<sup>101</sup> Accordingly, we direct MISO to submit, within 30 days of the date of the issuance of this order, a further compliance filing removing the proposed section VIII.A.2.1.1 of Attachment FF, which specifies that a proposed transmission project consisting of both new transmission line sections and upgrades to existing transmission line sections will be considered an upgrade for the purpose of retaining a right of first refusal, unless: (1) more than 50 percent of the total transmission project cost is for the new transmission line sections; and (2) each new transmission line section is at least five miles in length.

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<sup>99</sup> *Southwest Power Pool, Inc.*, 149 FERC ¶ 61,048, at P 159 (2014) (SPP Order). The Commission accepted SPP's proposal to classify an entire transmission project as an upgrade only if more than 80 percent of the total cost of the project consists of a rebuild of existing transmission facilities.

<sup>100</sup> SPP Order, 149 FERC ¶ 61,048, at P 159-160.

<sup>101</sup> Second Compliance Order, 147 FERC ¶ 61,127 at P 183.

### 3. Qualification Criteria

#### a. Second Compliance Order

53. In the Second Compliance Order, the Commission found MISO's proposed legal requirement that a qualified transmission developer be authorized to do business in at least one state within the MISO footprint to be unjust and unreasonable and unduly discriminatory. The Commission explained that, 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>102</sup> The Commission disagreed 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. The Commission stated that, 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. Thus, the Commission explained that Order No. 1000-A discussed the qualification requirements in general, and did not distinguish between a competitive bidding or sponsorship model. Therefore, the Commission directed MISO to revise its Tariff 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.<sup>103</sup>

54. In addition, the Commission found in the Second Compliance Order that MISO must clarify what information a potential transmission developer can submit to show that it meets the proposed operations and maintenance qualification requirements and therefore directed MISO to revise its Tariff to specify the information it requires a potential transmission developer to submit to show that it meets the qualification requirements.<sup>104</sup> The Commission also directed MISO to revise its Tariff to allow a

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<sup>102</sup> Second Compliance Order, 147 FERC ¶ 61,127 at P 292 (citing Order No. 1000-A, 139 FERC ¶ 61,132 at P 441).

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

<sup>104</sup> *Id.* P 286.

potential transmission developer that wishes to qualify 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.<sup>105</sup>

**b. Compliance Filing**

55. In the July 14, 2014 compliance filing, MISO Filing Parties propose to remove from the Tariff the requirement that an applicant be qualified to do business in at least one state within MISO's footprint in order to become a qualified transmission developer.<sup>106</sup>

56. In addition to making the deletion, MISO proposes to add the following language to its Tariff as an information requirement:

**Compliance with Applicable State and Local Legal Requirements.** New Transmission Proposal Applicants that submit a New Transmission Proposal in response to a Transmission Proposal Request must demonstrate that, to the extent that the state and/or locality where the Open Transmission Project is to be located requires the Applicant to obtain registration, certification, or other legal status in order to develop the Open Transmission Project in accordance with the New Transmission Proposal, the Applicant can obtain such status within the appropriate timeframe for completing the Open Transmission Project.<sup>107</sup>

57. MISO contends that it remains necessary to inquire whether an entity meets certain local or state registration requirements or can obtain a certain legal status before being allowed to develop an open transmission project.<sup>108</sup> MISO states that this new requirement appears as an information requirement for new transmission proposals, and

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<sup>105</sup> *Id.* P 288.

<sup>106</sup> MISO Filing Parties July 14, 2014 Compliance Filing Transmittal, Docket No. ER13-187-008, at 11.

<sup>107</sup> MISO, FERC Electric Tariff, Attachment FF, § VIII.C.4.

<sup>108</sup> MISO Filing Parties July 14, 2014 Compliance Filing Transmittal, Docket No. ER13-187-008, at 11-12.

therefore the requirement would not impact qualification or otherwise bar entry for transmission developers. Additionally, MISO states that this requirement does not impose any new obligation on transmission developers since they will have to demonstrate the same information to satisfy relevant state or local laws, and if no such laws exist, the bidder would not be required to provide any information.<sup>109</sup> Lastly, MISO contends that the proposed language does not require a potential transmission developer to have the required legal status at the time of its proposal submission, only to demonstrate that it has the ability to obtain such status within a sufficient timeframe. MISO states that these proposed revisions strike the appropriate balance between removing barriers to entry and ensuring that relevant state and local laws are not ignored.<sup>110</sup>

58. To comply with the requirement to revise its Tariff to include the information a potential transmission developer must submit to show that it meets the qualification requirements, MISO Filing Parties propose that an applicant must submit documentation to demonstrate that it has or can obtain sufficient capabilities and competencies to satisfy the following project implementation requirements: (1) project management; (2) routing and siting studies, including public outreach; (3) regulatory permitting, including obtaining a certificate of public convenience and necessity (or equivalent) and other required permits from applicable regulatory authorities; (4) right-of-way and land acquisition including condemnation; (5) preliminary and detailed engineering and surveying; (6) material and equipment procurement; (7) construction; and (8) commissioning.<sup>111</sup>

59. To comply with the requirement to revise 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, MISO Filing Parties propose that an applicant can provide data regarding facilities that the applicant already owns or an applicant can submit a detailed business implementation plan describing how it would acquire the necessary capabilities and competencies to perform the specific project implementation tasks. MISO proposes that the detailed business implementation plans must explain the applicant's plan for: (1) retaining personnel or contractors; (2) utilizing infrastructure and resources owned and operated by an affiliate company; (3) qualifying personnel and contractors utilized;

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<sup>109</sup> *Id.* at 12.

<sup>110</sup> *Id.* at 13.

<sup>111</sup> *Id.* at 14-15; MISO, FERC Electric Tariff, Attachment FF, § VIII.B.4.

(4) acquiring required tools, equipment, and vehicles; (5) development of project management, engineering, material, and construction standards and practices to be followed for specific types of facilities; (6) route and site studies (including public outreach) and regulatory permitting; (7) obtaining public utility status and/or condemnation authority in applicable jurisdictions; and (8) procuring adequate capital to develop transmission projects.<sup>112</sup>

**c. Protest**

60. LS Power argues that MISO Filing Parties' proposed new provision regarding compliance with applicable state and local legal requirements was not ordered by the Commission and is thus inappropriate and should be rejected. LS Power argues that to the extent that MISO seeks to change its selection criteria in ways not directed by the Commission in the Second Compliance Order, MISO must make an appropriate section 205 filing.<sup>113</sup>

61. LS Power argues that MISO Filing Parties' proposed revision is vague and arbitrary and that MISO Filing Parties offer no information on how the proposal will be applied. LS Power notes that in order to be selected, a qualified transmission developer would need to demonstrate an ability to obtain the registrations, certifications, or other legal status in a state in order to develop the transmission project. LS Power states that MISO will have presumably already excluded transmission projects in any state with a definitive right of first refusal. LS Power states that MISO Filing Parties offer no information on how the showing of an ability to obtain appropriate state status will be demonstrated and thus it is unclear how to comply with the proposed provision. LS Power also contends that MISO Filing Parties offer no information on how MISO will use the ability to obtain the registrations, certifications, or other legal status in a state in the transmission developer selection process. LS Power argues that MISO Filing Parties have provided no information on which the Commission can judge whether the proposed revision is just and reasonable.<sup>114</sup> Therefore, LS Power argues that the Commission should reject the proposed revision because it was not ordered by the Commission and because MISO Filing Parties have not justified its reasonableness.<sup>115</sup>

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<sup>112</sup> MISO Filing Parties July 14, 2014 Compliance Filing Transmittal, Docket No. ER13-187-008, at 15; MISO, FERC Electric Tariff, Attachment FF, § VIII.B.4 & 5.

<sup>113</sup> LS Power Protest at 7.

<sup>114</sup> *Id.* at 7-8.

<sup>115</sup> *Id.* at 8.

**d. Answer**

62. MISO Filing Parties respond that LS Power's position ignores key language from Order No. 1000-A and reflects an unreasonably narrow view of MISO's compliance obligations under Order No. 1000 and the Second Compliance Order. MISO Filing Parties state that, while Order No. 1000-A expressed concern that requiring state authorization at the time of qualification could pose an unreasonable barrier to entry, Order No. 1000-A went on to explicitly direct potential transmission developers to submit a development schedule that describes the developer's plan for obtaining the state approvals necessary to build a transmission project.<sup>116</sup> MISO Filing Parties state that Order No. 1000-A also required transmission providers to establish a date by which state approvals to construct must have been achieved tied to when construction must begin to timely meet the need that the project is selected to address.<sup>117</sup> MISO Filing Parties argue that, while the Second Compliance Order required MISO to remove the state authorization requirement from its qualification process, the Second Compliance Order does not overrule the Commission's requirement from Order No. 1000-A for potential transmission developers to submit a development schedule that describes the developer's plan for obtaining the state approvals necessary to build a transmission project and to transmission providers to establish a date by which state approvals to construct must have been achieved. Thus, MISO Filing Parties state that MISO was required to propose the new information requirement to satisfy Order No. 1000-A.<sup>118</sup>

63. MISO Filing Parties also state that, regardless of whether MISO includes language in its Tariff requiring a bidder to show that it can meet requirements imposed by state and local law, the state and local requirements will continue to exist and prevent an entity that does not satisfy state and local requirements from constructing a transmission project regardless of MISO's selection.<sup>119</sup> MISO Filing Parties argue that it would be unfair to both the winning bidder and other bidders to award a transmission project that will be ultimately reassigned or cancelled for failure to anticipate and plan to obtain required regulatory approvals.<sup>120</sup> MISO Filing Parties state that MISO will no longer inquire of

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<sup>116</sup> MISO Filing Parties Answer at 11-12 (citing Order No. 1000-A, 139 FERC ¶ 61,132 at P 441).

<sup>117</sup> *Id.* at 13 (citing Order No. 1000-A, 139 FERC ¶ 61,132 at P 442).

<sup>118</sup> *Id.* at 13-14.

<sup>119</sup> *Id.* at 15.

<sup>120</sup> *Id.* at 16.

qualified transmission developer applicants about whether they are qualified to do business in a state within the MISO footprint, and no prospective developer will be denied qualified transmission developer status because it lacks such a qualification. Nor, MISO Filing Parties state, will a qualified transmission developer's bid be rejected because the qualified transmission developer does not meet state law requirements at the time of bidding.<sup>121</sup>

64. MISO Filing Parties state that there is no merit to LS Power's argument that MISO's proposal is too vague because it fails to specify what documents the bidder must provide. MISO Filing Parties state that what LS Power characterizes as vague is actually a necessary degree of flexibility. MISO Filing Parties state that there is no one form or set of forms that will show that a qualified transmission developer will be able to receive necessary qualifications. MISO Filing Parties state that if a qualified transmission developer is bidding in good faith, it must have some reason to believe that it can qualify. MISO Filing Parties state that the qualified transmission developer may estimate the typical approval time period in the relevant state or outline a plan for obtaining the needed approvals. MISO Filing Parties state that what is important is that bidders have thought about the state or local requirements before they are selected.<sup>122</sup>

**e. Commission Determination**

65. We find that MISO complies with the directive to remove the qualification requirement that an applicant be qualified to do business in at least one state within MISO's footprint. However, we reject MISO's proposal to include a new information requirement that a qualified transmission developer indicate how it will comply with the legal requirements of the state or locality where they plan to construct the transmission project.<sup>123</sup> We disagree with MISO's argument that the new requirement is necessary to be compliant with Order No. 1000-A. The development schedule required by Order No. 1000-A is already in MISO's Tariff and includes milestones for obtaining necessary approvals. Consequently, this additional requirement is beyond the scope of the Commission's directives in the Second Compliance Order and unnecessary for compliance with Order No. 1000-A.<sup>124</sup> Therefore, we reject the proposed information

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<sup>121</sup> *Id.* at 18.

<sup>122</sup> *Id.* at 18-19.

<sup>123</sup> MISO, FERC Electric Tariff, Attachment FF, § VIII.C.4.

<sup>124</sup> Second Compliance Order, 147 FERC ¶61,127 at P 358, 361 (citing MISO, FERC Electric Tariff, Attachment FF, § I.C.11.a, and citing section 4.2.3.1 of the

(continued ...)

requirement that developers demonstrate their ability to comply with relevant state and local laws and require MISO to file, within 30 days of the issuance of this order, a further compliance filing removing the new information requirement from its Tariff.

66. We find that MISO has partially complied with the directives to revise its Tariff to include the information a potential transmission developer must submit to show that it meets the qualification requirements and 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. We accept MISO's proposal that, in order to become a qualified transmission developer, an applicant must submit documentation to demonstrate that it has or can obtain sufficient capabilities and competencies regarding: (1) project management; (2) routing and siting studies, including public outreach; (3) preliminary and detailed engineering and surveying; (4) material and equipment procurement; (5) construction; and (6) commissioning.<sup>125</sup> We also accept MISO's proposal that a business plan submitted at the qualification stage must explain the applicant's plan for: (1) retaining personnel or contractors; (2) utilizing infrastructure and resources owned and operated by an affiliate company; (3) qualifying personnel and contractors utilized; (4) acquiring required tools, equipment, and vehicles; (5) development of project management, engineering, material, and construction standards and practices to be followed for specific types of facilities; (6) route and site studies (including public outreach); and (7) procuring adequate capital to develop transmission projects.<sup>126</sup>

67. However, we reject MISO's proposal to require a transmission developer to demonstrate at the qualification stage that it has or can obtain: (1) regulatory permitting, including obtaining a certificate of public convenience and necessity (or equivalent) and other required permits from applicable regulatory authorities; and (2) right-of-way and land acquisition including condemnation.<sup>127</sup> Similarly we reject MISO's proposal that a business plan submitted at the qualification stage must include a plan for (1) regulatory permitting; and (2) obtaining public utility status and/or condemnation authority in

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Transmission Planning Business Practices Manual, *available at* <https://www.misoenergy.org/Library/BusinessPracticesManuals/Pages/BusinessPracticesManuals.aspx>).

<sup>125</sup> MISO, FERC Electric Tariff, Attachment FF, § VIII.B.4.

<sup>126</sup> MISO Filing Parties July 14, 2014 Compliance Filing Transmittal, Docket No. ER13-187-008, at 15; MISO, FERC Electric Tariff, Attachment FF, § VIII.B.4 & 5.

<sup>127</sup> MISO, FERC Electric Tariff, Attachment FF, § VIII.B.4.

applicable jurisdictions. These qualification requirements violate the Commission's ruling in Order No. 1000-A that "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>128</sup> Accordingly, we direct MISO to file, within 30 days of the issuance of this order, a further compliance filing to: (1) remove the requirement that, in order to become a qualified transmission developer, an applicant must demonstrate it has or can obtain sufficient capabilities and competencies regarding (i) regulatory permitting, including obtaining a certificate of public convenience and necessity (or equivalent) and other required permits from applicable regulatory authorities and (ii) right-of-way and land acquisition including condemnation; and (2) remove the requirement that a business plan include a plan for: (i) regulatory permitting; and (ii) obtaining public utility status and/or condemnation authority in applicable jurisdictions.

**4. Evaluation Process for Transmission Proposals for Selection in the Regional Transmission Plan for Purposes of Cost Allocation**

**a. Second Compliance Order**

68. In the Second Compliance Order, the Commission found that, as a general matter, it is just and reasonable for MISO to consider a range of factors other than costs when it evaluates bids from qualified transmission developers. The Commission further found 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.<sup>129</sup>

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<sup>128</sup> Second Compliance Order, 147 FERC ¶ 61,127 at P 292 (citing Order No. 1000-A, 139 FERC ¶ 61,132 at P 441). *Compare Southwest Power Pool, Inc.*, 144 FERC ¶ 61,059, at P 229 (2013) (rejecting SPP's proposal to require a potential transmission developer to demonstrate its ability to comply with applicable local, state, and federal requirements even if the demonstration was simply a demonstration of an entity's plan as to how it would comply) *with Tampa Electric Co.*, 143 FERC ¶ 61,254, at P 133 (2013) (accepting Florida Parties' proposal to require a potential transmission developer "to demonstrate that its business practices are consistent with Good Utility Practices for proper licensing, designing, right-of-way acquisition, constructing, operating, and maintaining transmission facilities").

<sup>129</sup> Second Compliance Order, 147 FERC ¶ 61,127 at P 346.

69. In addition, the Commission found that MISO's process for identifying transmission projects 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 bids for the approved transmission project from qualified transmission developers. The Commission explained, therefore, that by the time MISO evaluates the bids from qualified transmission developers, 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, the Commission found, MISO solicits bids from qualified transmission developers only after stakeholders have vetted, and the MISO Board has approved the more efficient or cost-effective transmission project.<sup>130</sup>

70. The Commission stated that, on balance, MISO had 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.<sup>131</sup> In addition, the Commission stated that, 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. The Commission noted that MISO had explained that the 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. The Commission agreed with MISO that these other categories are directly related to determining whether a bid from a transmission developer is more efficient or cost-effective. The Commission found that 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. The Commission therefore disagreed with claims that MISO had not supported the 30 percent weighting of cost estimates.<sup>132</sup>

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<sup>130</sup> *Id.* P 347.

<sup>131</sup> *Id.* P 348.

<sup>132</sup> *Id.* P 349.

**b. Request for Rehearing**

71. LS Power requests rehearing of the Commission's finding in the Second Compliance Order 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."<sup>133</sup> LS Power argues that this finding is not supported by substantial evidence, is inconsistent with Order No. 1000, and is inconsistent with unchallenged portions of the First Compliance Order.<sup>134</sup>

72. LS Power argues that, by finding that "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," the Commission concludes that cost in the evaluation phase need not be a primary focus.<sup>135</sup> LS Power argues that this determination could be read to suggest that nonincumbent developer reforms are largely irrelevant to selection of the more efficient or cost-effective solution because those solutions have already been chosen before competition involving nonincumbents, which is not consistent with Order No. 1000.<sup>136</sup>

73. LS Power states that MISO's transmission solution determination process is largely no different than the process in place prior to Order No. 1000. LS Power states that the Commission found in Order No. 1000 that if nonincumbent transmission developers risk losing their projects under a federal right of first refusal, they may not participate in the planning process at all and, as a result, regional transmission services may be provided at rates, terms and conditions that are not just and reasonable.<sup>137</sup> LS Power argues that, if the Commission-approved competitive process offers the same opportunities for undue discrimination and preferential treatment against nonincumbent transmission developers as a federal right of first refusal, the lack of participation by nonincumbent transmission developers will be the same. LS Power argues that if nonincumbent transmission developers will be restricted from competing for transmission

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<sup>133</sup> LS Power Request for Rehearing at 13-14 (quoting Second Compliance Order, 147 FERC ¶ 61,127 at P 346).

<sup>134</sup> *Id.* at 14.

<sup>135</sup> *Id.* (quoting Second Compliance Order, 147 FERC ¶ 61,127 at P 347).

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

<sup>137</sup> *Id.* at 15 (citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 229).

projects that they propose because of flawed evaluation criteria, they may not propose any transmission projects, leading to the same issues that Order No. 1000 was designed to correct.<sup>138</sup>

74. In addition, LS Power contends that MISO's proposed evaluation criteria that consider a transmission developer's project implementation capabilities and operations, maintenance, repair, and replacement capabilities were designed so that incumbent transmission owners would meet them, which results in the incumbent transmission owner receiving 65 percent of the evaluation weighting.<sup>139</sup> LS Power argues that, while the Commission required MISO to eliminate the provision that allowed incumbent transmission owners to automatically meet these two evaluation criteria, the end result is no different if the criteria are designed to ensure that incumbent transmission owners satisfy them. LS Power states that it is concerned that MISO has decided that certain attributes are strengths, leading to an incumbent transmission owner receiving 65 percent of the evaluation weighting without any identification as to how those strengths inure to ratepayers' benefit.<sup>140</sup>

75. LS Power also argues that MISO's proposed evaluation criteria are not geared towards selecting more efficient and cost-effective transmission developers. LS Power disagrees with the Commission's conclusion in the Second Compliance Order that "[w]hile 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."<sup>141</sup> LS Power argues that this finding is arbitrary and capricious because the Commission's basis for accepting MISO's evaluation criteria proposal was unsupported and not reasoned decision-making. LS Power argues that MISO did not provide any evidence that transmission project implementation capabilities or operations, maintenance, repair, and replacement capabilities correlate to more efficient or cost effective transmission project development, or that the manner in which MISO measures the criteria identifies efficiency or cost effectiveness.<sup>142</sup>

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<sup>138</sup> *Id.* at 15-16.

<sup>139</sup> *Id.* at 16-17.

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

<sup>141</sup> *Id.* at 18 (quoting Second Compliance Order, 147 FERC ¶ 61,127 at P 349).

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

76. LS Power contends that the issue comes up in part because the Commission did not define “more efficient” for purposes of Order No. 1000. LS Power argues that the Commission has jurisdiction under the FPA only over rates and practices affecting rates, and thus, unless the transmission provider can demonstrate that the “efficiency” it has identified directly affects rates, it should not, and cannot, be jurisdictionally relevant to the determination of a more efficient or cost-effective transmission solution or bidder.<sup>143</sup> LS Power argues that, to the extent that a transmission provider claims that an identified difference makes one bidder more efficient than another, ratepayers should be told what the efficiency means to them in rates. LS Power states that, if the transmission provider cannot provide ratepayers with this information, the transmission provider should not play a role in determining the selected developer.<sup>144</sup> LS Power argues that the Commission must require MISO to not just reference efficiency and cost effectiveness, but also to actually measure efficiency and cost effectiveness.<sup>145</sup>

77. LS Power argues that the Commission did not engage in reasoned decision-making when it approved MISO’s proposal because the evaluation criteria do not address the factors the Commission referenced and the factors on which it relied. Specifically, LS Power argues that, while the Commission accepted MISO’s assertion that the proposed evaluation criteria measure the ability of the transmission developer to implement a transmission project and meet the in-service date, the evaluation section on project implementation focuses more on locations and jurisdiction where the proposed transmission project will be located rather than the in-service date. LS Power contends that this aspect of the evaluation process is intended to give the local incumbent an evaluation advantage.<sup>146</sup> LS Power argues that the lack of reference to in-service date in the evaluation criteria is not surprising as every bidder has already established sufficient project implementation capability to qualify in MISO. LS Power argues that to the extent that all bidders can be expected to meet the in-service date, how they meet that date is relevant only to the extent that it saves ratepayers money. LS Power states that the Commission thus concluded in an unchallenged finding of the First Compliance Order that project implementation capability and operations and maintenance capability were better addressed as qualification criteria and not evaluation criteria.<sup>147</sup>

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<sup>143</sup> *Id.* at 19.

<sup>144</sup> *Id.* at 19-20.

<sup>145</sup> *Id.* at 21.

<sup>146</sup> *Id.* at 22-23.

<sup>147</sup> *Id.* at 23-24 (citing First Compliance Order, 142 FERC ¶ 61,215 at P 338).

78. Similarly, LS Power argues that, while the Commission accepted MISO's assertion that the proposed evaluation criteria measure whether a transmission developer is likely to avoid major cost overruns during project implementation, each transmission developer already had to demonstrate this capability in order to be qualified. LS Power asserts that the evaluation criteria in the Tariff for project implementation provide no insight into how MISO will determine whether one bid is more efficient or cost-effective and did not address cost overrun concerns the Commission mentioned in the Second Compliance Order.<sup>148</sup>

79. In addition, LS Power finds flaw in what it states is MISO's claim that references to cost aspects of the evaluation process should be limited because cost estimates included in bids are not binding and thus not trustworthy. LS Power states that the Commission noted in the Second Compliance Order that MISO reviews cost estimates of identified potential transmission projects with stakeholders as part of the process to identify and select preferred transmission solutions and that the Commission agreed with MISO that the process identifying transmission projects to recommend to the MISO Board for approval results in MISO identifying the more efficient or cost-effective transmission solution to an identified need prior to MISO soliciting the bids from transmission developers.<sup>149</sup> However, LS Power asserts that if the cost estimates at the bidding stage are inherently inaccurate, as MISO asserts, then the cost estimates that MISO reviews with stakeholders to select the transmission solution are even more inaccurate. LS Power states that the cost estimates that MISO reviews with stakeholders are made months prior to the project going out to bid and not tied to any specific design or bid. LS Power argues that it is illogical to find that cost estimates at the bidding stage are less trustworthy than estimates at the project solution stage that are tied to no specific design standards or project proposal.<sup>150</sup>

80. LS Power states that much of MISO's defense of its low reliance on costs in determining the more efficient or cost-effective developer is based on the fact that under its proposed process cost estimates are not firm and binding. LS Power states that MISO appears to assert that the lack of binding bids is part of the inherent uncertainty of

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<sup>148</sup> *Id.* at 24-25 (citing Second Compliance Order, 147 FERC ¶ 61,127 at P 349). LS Power also asserts that its review of the evaluation criteria for operations and maintenance found nothing in the language of the evaluation criteria revealing how MISO would determine the efficiency or cost-effectiveness of any bid. *Id.* at 25.

<sup>149</sup> *Id.* at 26 (citing Second Compliance Order, 147 FERC ¶ 61,127 at P 347).

<sup>150</sup> *Id.* at 27-28.

transmission development. LS Power states that this assertion is false and that there is nothing that prevents cost estimates from being firm and binding. LS Power states that the fact that cost estimates are not binding under MISO's process is a choice made by MISO so that it could defend its diminished reliance on costs in the selection process.<sup>151</sup> LS Power states that the barriers to firmness of costs in bids, to the extent that there are any, are barriers created exclusively by MISO and should not be factored into the Commission's decision on whether to accept MISO's proposed evaluation criteria. LS Power argues that the Commission should direct MISO to place the majority emphasis in its evaluation on costs and cost-based factors.<sup>152</sup>

**c. Commission Determination**

81. We deny LS Power's request for rehearing and affirm the finding in the Second Compliance Order 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.

82. We disagree with LS Power that the Commission's acknowledgement that MISO solicits bids from transmission developers only after stakeholders have vetted, and the MISO Board has approved, the more efficient and cost-effective transmission project suggests that nonincumbent developer reforms are irrelevant to the selection of more efficient or cost-effective transmission solutions. As the Commission stated in the Second Compliance Order, the criteria used to evaluate and select among competing transmission solutions must consider the relative efficiency and cost effectiveness of any proposed solution and this 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.<sup>153</sup> With respect to LS Power's argument that MISO's transmission solution determination process is largely no different than the process in place prior to Order No. 1000, we note that, even if that were true, that does not necessarily mean that MISO does not comply with Order No. 1000. As the Commission stated in Order No. 1000, to the extent existing transmission planning processes satisfy the Order No. 1000 requirements, public utility transmission providers need not revise their OATTs and instead can describe in their compliance filings how the

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<sup>151</sup> *Id.* at 28.

<sup>152</sup> *Id.* at 29.

<sup>153</sup> Second Compliance Order, 147 FERC ¶ 61,127 at P 348.

relevant requirements are satisfied under their existing process.<sup>154</sup> Neither interests of efficiency nor the requirements of Order No. 1000 compel MISO to create an entirely new regional transmission planning process if many aspects of MISO's existing process comply with Order No. 1000.

83. We disagree with LS Power that MISO failed to establish that its evaluation process is not unduly discriminatory. LS Power provides no evidence or specific examples to support its claims that MISO's proposed project implementation criteria and operations, maintenance, repair, and replacement requirements criteria were designed so that the incumbent transmission owners would meet them. Similarly, LS Power provides no examples or other evidence to support its contention that the project implementation criteria appear to focus more on the locations and jurisdictions where the proposed transmission project will be located, which is intended to give the incumbent an advantage. In addition, the fact that an incumbent transmission provider may have particular strengths that are considered as part of the criteria used in the evaluation process does not make the evaluation process unduly discriminatory.<sup>155</sup>

84. If the Commission were to accept LS Power's arguments on the weighting of the evaluation criteria, we would essentially be directing MISO to place the majority emphasis in the evaluation on costs and cost-based factors;<sup>156</sup> however, Order No. 1000 does not include such a requirement. Rather, as the Commission explained in the Second Compliance Order, Order No. 1000 requires MISO to consider the relative efficiency and cost-effectiveness of proposed bids.<sup>157</sup> LS Power's argument on rehearing that the Commission should change this requirement is a collateral attack on Order No. 1000. There, the Commission declined a similar request from LS Power to impose a requirement to select the bidder that is willing to guarantee the lowest net present value of its annual revenue requirement and held that, other than to require that these selection criteria be transparent and not unduly discriminatory, the Commission would allow the selection criteria to vary in different transmission planning regions.<sup>158</sup>

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<sup>154</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at n.71 & n.139.

<sup>155</sup> *Id.* P 260; Order No. 1000-A, 139 FERC ¶ 61,132 at P 454 & n.535.

<sup>156</sup> LS Power Request for Rehearing at 29.

<sup>157</sup> Second Compliance Order, 147 FERC ¶ 61,127 at P 348.

<sup>158</sup> Order No. 1000-A, 139 FERC ¶ 61,132 at PP 450, 455.

85. In addition, we disagree with LS Power's argument that the Commission did not explain how variances in capabilities among competing bids can be considered to determine whether one bid is more efficient or cost-effective than another. The Commission found that, among other things, the evaluation criteria will allow MISO to consider (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 to actually 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. The Commission agreed with MISO that these other categories are directly related to determining whether a bid from a transmission developer is more efficient or cost-effective.<sup>159</sup>

We disagree with LS Power that the Commission did not engage in reasoned decision-making because MISO's proposed evaluation criteria do not specifically state that it will address the ability of the transmission developer to implement a transmission project and meet the in-service date or whether a transmission developer is likely to avoid major cost overruns during project implementation. The proposed evaluation criteria are broad enough to allow MISO to consider the attributes MISO noted in its compliance filing<sup>160</sup> (including the ability of the transmission developer to implement a transmission project and meet the in-service date) and to evaluate whether a transmission developer is likely to avoid major cost overruns during project implementation and therefore need not reference specifically every possible component of each factor MISO will consider in its evaluation.

86. We reject as a collateral attack on Order No. 1000 LS Power's argument that, unless the transmission provider can demonstrate on compliance that any "efficiency" factors it will use in the evaluation process directly affect rates, the Commission lacks jurisdiction under section 206 of the FPA over the evaluation factors used in the regional transmission planning process. In Order No. 1000, the Commission found that "transmission planning activities have a direct and discernable [e]ffect on rates," explaining that "[i]t is through the transmission planning process that public utility transmission providers determine which transmission facilities will more efficiently or cost-effectively meet the needs of the region, the development of which directly impacts the rates, terms and conditions of jurisdictional service."<sup>161</sup> The Commission also found

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<sup>159</sup> Second Compliance Order, 147 FERC ¶ 61,127 at P 349.

<sup>160</sup> MISO, Transmittal Letter, Docket Nos. ER13-187-003 and ER13-187-004, at 26 (filed July 22, 2013); *see also* Second Compliance Order, 147 FERC ¶ 61,127 at P 349.

<sup>161</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 112.

that, based on its review of the record, existing transmission planning processes were unjust and unreasonable or unduly discriminatory or preferential,<sup>162</sup> and that part of the remedy is for public utility transmission providers to establish a transparent and not unduly discriminatory process for evaluating whether to select a transmission facility in the regional transmission plan for purposes of cost allocation.<sup>163</sup> As part of the reforms to the regional transmission planning processes, the Commission required evaluation criteria and, although the Commission declined to require minimum evaluation criteria as LS Power requested,<sup>164</sup> it did note that an incumbent transmission provider is “free to highlight its strengths to support” a bid to undertake transmission projects in a transmission planning region that uses a solicitation process.<sup>165</sup> The United States Court of Appeals for the District of Columbia Circuit held that “the Commission reasonably interpreted [s]ection 206 to authorize [Order No. 1000’s] planning mandate.”<sup>166</sup> Thus, LS Power’s argument that the Commission and MISO are now required to demonstrate how the evaluation criteria, which are part of the transmission planning reforms the Commission required in Order No. 1000, are within the Commission’s jurisdiction is a collateral attack on Order No. 1000.

#### IV. Entergy

##### A. Second Compliance Order

87. In the Second Compliance Order, the Commission found that MISO’s compliance filing complied with the directives in the First Compliance Order addressing Entergy’s

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<sup>162</sup> *Id.* P 116.

<sup>163</sup> *Id.* P 328.

<sup>164</sup> See Order No. 1000-A, 139 FERC ¶ 61,132 at PP 452-456 (declining, for instance, to set certain minimum standards for the criteria used to select a transmission facility in a regional transmission plan for purposes of cost allocation other than to require that the selection criteria be transparent and not unduly discriminatory); Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at PP 328-331 (encouraging public utility transmission providers to build on existing regional transmission planning process that already set forth the criteria by which the public utility transmission provider evaluates the relative economics and effectiveness of performance for alternative solutions).

<sup>165</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 260.

<sup>166</sup> *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 58-59 (D.C. Cir. 2014).

Order No. 1000 compliance filing.<sup>167</sup> The Commission denied 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 because, 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.<sup>168</sup> The Commission noted that, in Order No. 1000-A, the Commission stated that, in the case of a Regional Transmission Organization or Independent System Operator 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>169</sup> The Commission stated that, 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>170</sup> The Commission explained that, 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, the Commission found that 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>171</sup> However, the Commission also noted that a transmission facility located

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<sup>167</sup> Second Compliance Order, 147 FERC ¶ 61,127 at P 412.

<sup>168</sup> *Id.* P 414.

<sup>169</sup> *Id.* (citing Order No. 1000-A, 139 FERC ¶ 61,132 at P 429).

<sup>170</sup> *Id.* (citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 63).

<sup>171</sup> The Commission also noted that it 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

(continued ...)

entirely within the retail distribution service territory of one or more of the Entergy Operating Companies or within the combined Entergy Operating Companies' footprint may still be eligible for potential selection in the regional transmission plan for purposes of cost allocation.<sup>172</sup>

**B. Request for Rehearing**

88. LS Power argues that the Commission's finding that 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 is directly contrary to Order No. 1000-A. Specifically, LS Power cites the following language in Order No. 1000-A:

In response to LS Power's concerns regarding the definition of a local transmission facility, we clarify 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.<sup>173</sup>

89. LS Power contends that this language is unequivocal and makes clear that if a public utility transmission provider has a retail distribution service territory, the geographic boundaries of the territory controls the definition of a "local" transmission project for Order No. 1000 purposes; it is only if there is no retail distribution service territory that the footprint then controls. LS Power argues further that, because the Commission acknowledged in the Second Compliance Order that the Entergy Operating Companies have retail distribution service territories, Order No. 1000-A mandates that local transmission facilities be defined by the individual geographic boundaries of each Entergy Operating Company's retail distribution service territory. LS Power argues that there is nothing in Order No. 1000 or Order No. 1000-A that suggests that retail

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will be a "local transmission facility" as defined by Order No. 1000. Second Compliance Order, 147 FERC ¶ 61,127 at n.781.

<sup>172</sup> Second Compliance Order, 147 FERC ¶ 61,127 at P 414.

<sup>173</sup> LS Power Request for Rehearing at 10 (quoting Order No. 1000-A, 139 FERC ¶ 61,132 at P 429).

distribution service territories can be combined to create a footprint that then controls the definition of a local transmission project.<sup>174</sup>

### C. Commission Determination

90. We deny LS Power's request for rehearing and affirm the finding in the Second Compliance Order that 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. However, we clarify that the reason the Entergy Operating Companies' combined retail distribution service territories constitute a single footprint for purposes of defining local transmission facilities pursuant to Order No. 1000 is because, for purposes of compliance with Order No. 1000, the Entergy Operating Companies together constitute a single transmission provider.<sup>175</sup> Therefore, the single Entergy transmission provider footprint is the combined retail distribution service territories of each of the Entergy Operating Companies. We also note that the Commission made the same finding in response to LS Power with respect to the combined retail distribution service territories of Duke Energy Carolinas, LLC and Carolina Power and Light Company.<sup>176</sup> This finding is also consistent with the finding 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.<sup>177</sup> Thus, if the transmission provider has a retail distribution service territory and/or footprint, then only a transmission facility that it decides to build within that retail distribution service territory

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<sup>174</sup> *Id.* at 9-10.

<sup>175</sup> For example, prior to joining MISO, the Energy Operating Companies provided transmission service as a single transmission provider under a single open access transmission tariff at an unpancaked transmission rate that provided access to the entire Entergy Operating Companies transmission system footprint, which was made up of their combined retail distribution service territories.

<sup>176</sup> *See Duke Energy Carolinas LLC*, 145 FERC ¶ 61,252, at PP 49-51 (2013) (clarifying that, because Duke Energy Carolinas LLC and Carolina Power and Light Company are together a single transmission provider for purposes of Order No. 1000 compliance, their retail distribution service territories taken together constitute a single footprint for purposes of defining local transmission facilities pursuant to Order No. 1000).

<sup>177</sup> Order No. 1000-A, 139 FERC ¶ 61,132 at P 429.

or footprint, and that is not selected in a regional transmission plan for purposes of cost allocation, may be considered a local transmission facility.<sup>178</sup> Here, the Entergy Operating Companies constitute a single transmission provider for purposes of Order No. 1000 compliance and, therefore, its footprint is based on the combined retail distribution service territories of the Entergy single transmission provider. However, we reiterate, as the Commission noted in the Second Compliance Order, that a transmission facility located entirely within the retail distribution service territory of one or more of the Entergy Operating Companies or within the combined Entergy Operating Companies footprint may still be eligible for potential selection in the regional transmission plan for purposes of cost allocation.<sup>179</sup>

## V. Other Compliance Directives

91. In the Second Compliance Order, the Commission directed MISO to revise the definition of Organization of MISO States Committee (OMS Committee) in 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.<sup>180</sup> In the July 14, 2014 compliance filing, MISO Filing Parties propose revisions to the Transmission Owners Agreement to state that the OMS Committee was established as an autonomous and self-governing body and that it will be funded through the provision of reasonable funding, with the costs recovered from transmission customers under Schedule 10 of the Tariff.<sup>181</sup>

92. In the Second Compliance Order, the Commission directed MISO to remove the term “Applicable Laws and Regulations” from its definition of Transmission Issues and to revise the definition to include enacted laws or regulations passed by local government entities in the definition of Transmission Issues.<sup>182</sup> In the July 14, 2014 compliance filing, MISO Filing Parties propose to delete from the definition of Transmission Issues the phrase “Applicable Laws and Regulations” and to revise the definition so that it now

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<sup>178</sup> *Id.*

<sup>179</sup> Second Compliance Order, 147 FERC ¶ 61,127 at P 414.

<sup>180</sup> *Id.* P 37.

<sup>181</sup> MISO, FERC Electric Tariff, MISO Rate Schedules, MISO Transmission Owner Agreement, Attachment FF, § 6.3.

<sup>182</sup> Second Compliance Order, 147 FERC ¶ 61,127 at P 56.

includes “compliance with applicable state and federal laws” and “duly enacted laws and regulations passed by a local governmental entity.”<sup>183</sup>

93. In the Second Compliance Order, the Commission directed MISO to resolve a discrepancy between 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 and proposed language giving MISO discretion to decide whether the transmission issues it will incorporate into the development of the MTEP include proposed transmission projects identified by transmission owners.<sup>184</sup> In the July 14, 2014 compliance filing, MISO Filing Parties propose revisions to the Tariff to make explicit that transmission needs identified by transmission owners automatically will be integrated into the MTEP process and considered as transmission issues.<sup>185</sup>

94. In the Second Compliance Order, in light of its decision to grant rehearing with respect to the directive to delete section VIII.A (State or Local Rights of First Refusal) of Attachment FF, the Commission directed MISO to restore this provision to Attachment FF.<sup>186</sup> In addition, the Commission found that several changes MISO proposed to the Tariff were moot because the Commission was granting rehearing of the directive that prompted those proposed changes and therefore directed MISO to delete those proposed changes.<sup>187</sup> In the July 14, 2014 compliance filing, MISO Filing Parties propose to restore section VIII.A (State or Local Rights of First Refusal) to Attachment

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<sup>183</sup> MISO, FERC Electric Tariff, Module A, Definitions –T (Transmission Issue).

<sup>184</sup> Second Compliance Order, 147 FERC ¶ 61,127 at P 59.

<sup>185</sup> MISO Filing Parties July 14, 2014 Compliance Filing Transmittal, Docket No. ER13-187-008, at 6 and MISO, FERC Electric Tariff, Attachment FF, §§ I.C, I.C.1.b, I.C.1.b.i, I.C.1.b.ii, and I.C.2.

<sup>186</sup> Second Compliance Order, 147 FERC ¶ 61,127 at P 167.

<sup>187</sup> *Id.* P 168. Specifically, MISO had proposed 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 and (2) states, “Pursuant to Applicable Laws and Regulations, only New Transmission Facilities eligible under state law will be included in the Open Transmission Project.” *Id.*

FF.<sup>188</sup> MISO Filing Parties also propose to remove the proposed changes that the Commission found moot.<sup>189</sup>

95. In the Second Compliance Order, the Commission directed MISO to remove the provision in its Tariff that provided a federal right of first refusal for new substations that interconnect multiple existing transmission lines.<sup>190</sup> In the July 14, 2014 compliance filing, MISO Filing Parties propose to delete the provision from the Tariff and to make the corresponding revision to the definition of New Substation Facility.<sup>191</sup>

96. In the Second Compliance Order, the Commission directed MISO to revise 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.<sup>192</sup> In the July 14, 2014 compliance filing, MISO Filing Parties propose to revise the Tariff to state that an upgrade includes the functionally equivalent capital replacement of any portion of an existing transmission line facility.<sup>193</sup>

97. In the Second Compliance Order, the Commission directed MISO to revise its qualification requirement that a transmission developer sign a written commitment to register with the North American Electric Reliability Corporation (NERC) upon being designated the selected transmission developer to delete that language and replace it with language that allows a selected transmission developer to register with NERC in accordance with NERC's registration guidelines.<sup>194</sup> In the July 14, 2014 compliance

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<sup>188</sup> MISO, FERC Electric Tariff, Attachment FF, § VIII.A.

<sup>189</sup> MISO, FERC Electric Tariff, Module A, Definitions – O (Open Transmission Project) and Attachment FF, § VII.C.1.

<sup>190</sup> Second Compliance Order, 147 FERC ¶ 61,127 at P 222 (citing MISO, FERC Electric Tariff, Attachment FF, § VIII.A.1.2.1).

<sup>191</sup> MISO Filing Parties July 14, 2014 Compliance Filing Transmittal, Docket No. ER13-187-008, at 9-10; MISO, FERC Electric Tariff, Module A, Definitions – N (New Substation Facility).

<sup>192</sup> Second Compliance Order, 147 FERC ¶ 61,127 at P 238.

<sup>193</sup> MISO, FERC Electric Tariff, Attachment FF, § VIII.A.2.1.f.

<sup>194</sup> Second Compliance Order, 147 FERC ¶ 61,127 at P 284.

filing, MISO Filing Parties propose to revise the Tariff such that the selected transmission developer will register with NERC in accordance with NERC's registration guidelines.<sup>195</sup>

98. In the Second Compliance Order, the Commission directed MISO to revise its Tariff to allow entities to provide evidence of their ability to obtain (rather than already possessing) sufficient capabilities to satisfy the operations and maintenance qualification requirements.<sup>196</sup> In the July 14, 2014 compliance filing, MISO Filing Parties propose Tariff revisions stating that, if the applicant intends to obtain the requisite capabilities, the applicant shall submit – either as part of its implementation plan or in separate documentation – an explanation of the capabilities that the applicant possesses at the time of the application and those capabilities and competencies the applicant intends to contract in order to meet the relevant qualification requirements. MISO Filing Parties also propose that, for each capability or competency the applicant does not possess but intends to procure through contracting with third parties, the applicant must provide a detailed contracting plan that contains a detailed description of the steps the applicant intends to take to procure the needed capabilities or competencies. MISO Filing Parties propose that the applicant will not be required to have executed contracts, but the applicant does bear the burden of identifying the capabilities it possesses and having a realistic contracting plan for those it does not.<sup>197</sup>

99. In the Second Compliance Order, the Commission directed MISO to revise its Tariff to provide examples of information that may be submitted to fulfill the qualification 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.<sup>198</sup> In the July 14, 2014 compliance filing, MISO Filing Parties propose that applicants must submit either data regarding their existing operations, maintenance and repair capabilities, or a detailed business implementation plan that specifies the applicant's plans for: (1) retaining personnel or contractors; (2) utilizing infrastructure and resources owned and operated by an affiliate company; (3) qualifying personnel and contractors utilized; (4) acquiring required tools, equipment,

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<sup>195</sup> MISO Filing Parties July 14, 2014 Compliance Filing Transmittal, Docket No. ER13-187-008, at 11; MISO, FERC Electric Tariff, Attachment FF, § VIII.B.3.d.

<sup>196</sup> Second Compliance Order, 147 FERC ¶ 61,127 at P 287.

<sup>197</sup> MISO Filing Parties July 14, 2014 Compliance Filing Transmittal, Docket No. ER13-187-008, at 18; MISO, FERC Electric Tariff, Attachment FF, § VIII.B.4 & 5.

<sup>198</sup> Second Compliance Order, 147 FERC ¶ 61,127 at P 289.

and vehicles; (5) development of maintenance standards and practices to be followed for specific types of facilities; (6) standards governing where personnel, equipment, and spare parts/equipment will be maintained with respect to potential future facilities (e.g., maximum distance between facility and local office, etc.); (7) emergency response times; and (8) financial strategy to maintain adequate capital procurement capabilities to rebuild facilities following major catastrophic outages (including property insurance and risk mitigation strategies).<sup>199</sup>

100. In the Second Compliance Order, the Commission directed MISO to revise its Tariff to establish that to meet the financial qualification requirements, an applicant may submit alternative financial information other than a credit rating to satisfy the financial qualification requirements.<sup>200</sup> In the July 14, 2014 compliance filing, MISO Filing Parties propose to delete the financial requirement that applicants must demonstrate and maintain an investment grade rating at all times. Instead, MISO Filing Parties propose that in the event an applicant does not have an investment grade rating, MISO will consider other information the applicant has submitted to evaluate its financial capability to construct the transmission facility in a timely manner and to maintain and operate the transmission facility for the long term.<sup>201</sup> MISO Filing Parties state that the other information includes financial statements and plans submitted by the applicant.<sup>202</sup>

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<sup>199</sup> MISO Filing Parties July 14, 2014 Compliance Filing Transmittal, Docket No. ER13-187-008, at 16-17; MISO, FERC Electric Tariff, Attachment FF, § VIII.B.5.

<sup>200</sup> Second Compliance Order, 147 FERC ¶ 61,127 at P 293.

<sup>201</sup> MISO, FERC Electric Tariff, Attachment FF, § VIII.B.7.b.

<sup>202</sup> MISO Filing Parties July 14, 2014 Compliance Filing Transmittal, Docket No. ER13-187-008, at 19. Section VIII.B.7 describes the other information that the applicant must submit including: (1) a proposed financial plan demonstrating the availability to the applicant of adequate capital resources (e.g., current assets, revolving lines, commercial paper, letter of credit, stock or bond issuance or other sources of liquidity); (2) general financial information, including two years of audited financial statements and a signed commitment by an authorized representative of the applicant that it is not aware of any material events or circumstances that would likely result in an adverse weakness in financial strength throughout project implementation; and (3) a summary of any history of bankruptcy, dissolution, merger, or acquisition of the applicant, or any predecessors in interest for the current calendar year and the five calendar years immediately preceding its submission of the application. MISO, FERC Electric Tariff, Attachment FF, § VIII.B.7.a-d.

101. In the Second Compliance Order, the Commission directed MISO to revise its Tariff to remove the provisions that exempt incumbent transmission owners from having to satisfy some or all of the qualification requirements.<sup>203</sup> In the June 4, 2014 compliance filing, MISO proposes to remove the Tariff provisions that grant incumbent transmission owners an exemption from the prequalification process for transmission projects located in their service territories.<sup>204</sup>

102. In the Second Compliance Order, the Commission directed MISO to revise its Tariff to delete the provision that required “additional information” from an entity that MISO has already designated as a qualified transmission developer.<sup>205</sup> In the July 14, 2014 compliance filing, MISO Filing Parties propose to delete the provision that contained the requirement that an already-qualified transmission developer must submit “additional information” to maintain its qualification status.<sup>206</sup>

103. In the Second Compliance Order, the Commission discussed interveners’ concern that MISO will unreasonably delay refunds to transmission developers that submit bids but “who are judged unqualified.”<sup>207</sup> The Commission directed MISO to revise the “who are judged unqualified” language to state “who are not chosen as the Selected Transmission Developer.”<sup>208</sup> In the July 14, 2014 compliance filing, MISO Filing Parties propose to replace the phrase “who are judge unqualified” to state those “who are not chosen as the Selected Transmission Developer.”<sup>209</sup>

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<sup>203</sup> Second Compliance Order, 147 FERC ¶ 61,127 at P 294.

<sup>204</sup> MISO June 4, 2014 Compliance Filing Transmittal, Docket No. ER13-187-006, at 4-5. *See also* MISO Filing Parties July 14, 2014 Compliance Filing Transmittal, Docket No. ER13-187-008, at 20-21 (noting that MISO had inadvertently omitted some of the tariff revisions described in the MISO June 4, 2014 Compliance Filing but that MISO Filing Parties included them in the July 14, 2014 Compliance Filing).

<sup>205</sup> Second Compliance Order, 147 FERC ¶ 61,127 at P 295.

<sup>206</sup> MISO Filing Parties July 14, 2014 Compliance Filing Transmittal, Docket No. ER13-187-008, at 19.

<sup>207</sup> Second Compliance Order, 147 FERC ¶ 61,127 at P 322 (citing MISO, FERC Electric Tariff, Attachment FF, § VIII.C.2.b).

<sup>208</sup> *Id.*

<sup>209</sup> MISO, FERC Electric Tariff, Attachment FF, § VIII.C.2.b.

104. In the Second Compliance Order, the Commission directed MISO to remove the provisions from its Tariff exempting incumbent transmission owners from having to fulfill certain of the information requirements.<sup>210</sup> In the June 4, 2014 compliance filing, MISO proposes to revise the Tariff remove the exemption for incumbent transmission owners from certain of the information requirements.<sup>211</sup>

105. In the Second Compliance Order, the Commission directed MISO to clarify in the Tariff that any entity that receives the transferred right to develop an Open Transmission Project, a transmission project selected in the regional transmission plan for purposes of cost allocation, has the same responsibilities and must meet the same requirements as the transmission developer that was originally selected to develop the project.<sup>212</sup> In the July 14, 2014 compliance filing, MISO Filing Parties propose to add language to the Tariff to provide that, in the event of reassignment, the new transmission developer must meet the same qualification criteria and undertake the same commitments as the original selected transmission developer.<sup>213</sup> In the Second Compliance Filing, the Commission directed MISO to revise its Tariff to make clear that for Baseline Reliability Projects located in more than one pricing zone, a transmission owner is responsible for all of the costs for the portion of a Baseline Reliability Project that is physically located in that transmission owner's pricing zone.<sup>214</sup> The Commission further directed MISO to make a related revision to the Transmission Owners Agreement.<sup>215</sup> In the July 14, 2014 compliance filing, MISO Filing Parties propose to revise the Tariff to state that a transmission owner developing a Baseline Reliability Project shall be responsible for all the costs of the portion of the Baseline Reliability Project that is physically located in the

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<sup>210</sup> Second Compliance Order, 147 FERC ¶ 61,127 at PP 325 & 358.

<sup>211</sup> MISO June 4, 2014 Compliance Filing Transmittal, Docket No. ER13-187-006, at 5; MISO, FERC Electric Tariff, Attachment FF, §§ VIII.C.7-8. *See also* MISO Filing Parties July 14, 2014 Compliance Filing Transmittal, Docket No. ER13-187-008, at 20 (noting that MISO had inadvertently omitted some of the tariff revisions described in the MISO June 4, 2014 Compliance Filing but that MISO Filing Parties included them in the July 14, 2014 Compliance Filing).

<sup>212</sup> Second Compliance Order, 147 FERC ¶ 61,127 at P 357.

<sup>213</sup> MISO Filing Parties July 14, 2014 Compliance Filing Transmittal, Docket No. ER13-187-008, at 21-23; MISO, FERC Electric Tariff, Attachment FF, § IX.c.1.

<sup>214</sup> Second Compliance Order, 147 FERC ¶ 61,127 at P 440.

<sup>215</sup> *Id.* P 441.

transmission owner's pricing zone.<sup>216</sup> MISO also proposes to make the required related revision to the Transmission Owners Agreement.<sup>217</sup>

106. We find that MISO's proposals, described above, comply with the directives of the Second Compliance Order. MISO has revised its Tariff and Transmission Owners Agreement as directed.

The Commission orders:

(A) The requests for rehearing are hereby denied, 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.

By the Commission. Commissioner Bay is concurring with a separate statement attached. Commissioner Honorable is voting present.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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<sup>216</sup> MISO, FERC Electric Tariff, Attachment FF, § III.A.2.c.

<sup>217</sup> MISO, FERC Electric Tariff, MISO Rate Schedules, MISO Transmission Owners Agreement, Appendix B, § VI.

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Midwest Independent Transmission System Operator, Inc. and the MISO Transmission Owners	Docket Nos.	ER13-187-006 ER13-187-007 ER13-187-008 ER13-187-009
Midwest Independent Transmission System Operator, Inc. and the MISO Transmission Owners	Docket No.	ER13-186-004
MidAmerican Energy Company and Midwest Independent Transmission System Operator, Inc.	Docket No.	ER13-89-003
Cleco Power LLC	Docket No.	ER13-84-002
Entergy Arkansas, Inc.	Docket No.	ER13-95-002

(Issued January 22, 2015)

BAY, Commissioner, *concurring*:

In Order No. 1000, the Commission determined that “federal rights of first refusal in favor of incumbent transmission providers deprive customers of the benefits of competition in transmission development, and associated potential savings” and therefore ordered that they be removed from Commission-approved tariffs.<sup>1</sup> The Commission noted, however, that Order No. 1000 was not “intended to limit, preempt, or otherwise affect state or local laws or regulations with respect to construction of transmission facilities.”<sup>2</sup>

In a series of orders issued today, the Commission finds that Order No. 1000 does not compel the removal of tariff provisions that permit, in the transmission planning process, the recognition of state laws and regulations that grant a right of first refusal with respect to the construction of transmission facilities or the use of existing rights of way.<sup>3</sup> While I concur in the result of these orders, I write separately to note that the Constitution

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<sup>1</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 285.

<sup>2</sup> *Id.* at P 287.

<sup>3</sup> See also *South Carolina Electric & Gas Company*, 150 FERC ¶ 61,036 (2015); *PJM Interconnection, L.L.C.*, 150 FERC ¶ 61,038 (2015).

limits the ability of states to erect barriers to interstate commerce.<sup>4</sup> State laws that discriminate against interstate commerce – that protect or favor in-state enterprise at the expense of out-of-state competition – may run afoul of the dormant commerce clause.<sup>5</sup> The Commission’s order today does not determine the constitutionality of any particular state right-of-first-refusal law. That determination, if it is made, lies with a different forum, whether state or federal court.

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Norman C. Bay  
Commissioner

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<sup>4</sup> *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 87 (1984) (the Commerce Clause “has long been recognized as a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce”).

<sup>5</sup> *See C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 394 (1994) (“State and local governments may not use their regulatory power to favor local enterprise by prohibiting patronage of out-of-state competitors or their facilities.”); *New England Power Co. v. New Hampshire*, 455 U.S. 331, 339 (1982) (“The order of the New Hampshire Commission, prohibiting New England Power from selling its hydroelectric energy outside the State of New Hampshire, is precisely the sort of protectionist regulation that the Commerce Clause declares off-limits to the states.”); *Hunt v. Washington State Apple Adver. Comm’n*, 432 U.S. 333, 352 (1977) (invalidating a state law that “offers the . . . [in-state] industry the very sort of protection against competing out-of-state products that the Commerce Clause was designed to prohibit”).