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1. This case is before the Commission on exceptions to the July 16, 2013 Initial Decision.<sup>1</sup> The central question presented is whether American Transmission Systems, Incorporated (ATSI) and Duke Energy Ohio, Inc./Duke Energy Kentucky, Inc. (Duke) are responsible for a share of the costs of Multi-Value Projects (MVPs) approved by the Midcontinent Independent System Operator, Inc. (MISO) Board of Directors (MISO Board) before their withdrawal from MISO.<sup>2</sup> As discussed below, we: (1) reverse the finding in the Initial Decision that Schedule 39 of MISO’s Open Access Transmission,

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<sup>1</sup> *Midwest Indep. Transmission Sys. Operator, Inc.*, 144 FERC ¶ 63,007 (2013) (Initial Decision). Effective April 26, 2013, MISO changed its name from “Midwest Independent Transmission System Operator, Inc.” to “Midcontinent Independent System Operator, Inc.”

<sup>2</sup> ATSI and Duke joined PJM Interconnection, L.L.C (PJM) in 2011.

Energy, and Operating Reserve Markets Tariff (Tariff) is consistent with the Tariff that was in effect at the time that ATSI and Duke withdrew from MISO (the pre-withdrawal Tariff), and that the Schedule 39 methodology of MVP cost allocation may therefore be applied to Duke and ATSI for the MVPs listed in Appendices A and B of Schedule 39; and (2) reverse the finding in the Initial Decision that it would be just and reasonable to apply the MVP cost allocation methodology in Schedule 39 to Duke and ATSI if Schedule 39 is inconsistent with the terms of the pre-withdrawal Tariff.

2. This order also addresses requests for rehearing of the Commission order accepting MISO's proposed addition of Schedule 39 ([MVP] Financial Obligations and Cost Recovery for Withdrawing Transmission Owners) to its Tariff, establishing hearing and settlement judge procedures as to ATSI and Duke's MVP cost responsibility upon withdrawal, and dismissing FirstEnergy Service Company's petition for declaratory order and complaint against MISO concerning MISO's assessment of certain MVP transmission charges.<sup>3</sup> As discussed below, we deny rehearing.

## **I. Background**

### **A. RECB and MVP Proceedings**

3. The Commission approved Attachment FF (Transmission Expansion Planning Protocol) to the Tariff as part of the Regional Expansion Criteria and Benefits (RECB) provisions that were added in order to allocate the costs of regionally planned projects in MISO.<sup>4</sup> Attachment FF described the process used by MISO in the consideration and development of the MISO Transmission Expansion Plan (MTEP) projects, which fell into three categories: (1) Baseline Reliability Projects, mainly involving reliability benefits; (2) New Transmission Access Projects; and (3) Market Efficiency Projects (approved under the name Regionally Beneficial Projects in the RECB II Order), mainly involving economic benefits. After rehearing and compliance, the Commission conditionally

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<sup>3</sup> *Midwest Indep. Transmission Sys. Operator, Inc.*, 138 FERC ¶ 61,140 (2012) (Schedule 39 Order).

<sup>4</sup> *See Midwest Indep. Transmission Sys. Operator, Inc.*, 114 FERC ¶ 61,106 (RECB I Order), *order on reh'g*, 117 FERC ¶ 61,241 (2006) (RECB I Rehearing Order); *Midwest Indep. Transmission Sys. Operator, Inc.*, 118 FERC ¶ 61,209 (RECB II Order), *order on reh'g*, 120 FERC ¶ 61,080 (2007) (RECB II Rehearing Order).

accepted Section III.A.2.i of Attachment FF,<sup>5</sup> subject to minor clean-up changes, which contained the following exit fee language:

A Party that withdraws from [MISO] shall remain responsible for all financial obligations incurred pursuant to this Attachment FF while a [m]ember of [MISO] and payments applicable to time periods prior to the effective date of such withdrawal shall be honored by [MISO] and the withdrawing [m]ember.

4. On July 15, 2010, in Docket No. ER10-1791-000, MISO and certain MISO transmission owners proposed revisions to the Tariff to include MVPs and a cost allocation methodology applicable to such projects.<sup>6</sup> The proposal provided for an “MVP charge . . . based on the annual revenue requirements reported by each [MISO] Transmission Owner for projects that meet the MVP criteria,” and “recovery for 100%” of such costs “from load and exports using a per-MWh charge.”<sup>7</sup> MISO also proposed that a transmission owner that withdraws from MISO will remain responsible for all financial obligations incurred under Attachment FF while a member of MISO.<sup>8</sup> In its

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<sup>5</sup> *Midwest Indep. Transmission Sys. Operator, Inc.*, 122 FERC ¶ 61,127, at P 51 (2008).

<sup>6</sup> *See Midwest Indep. Transmission Sys. Operator, Inc.*, Docket No. ER10-1791-000, Proposed Revisions to the Midwest ISO Open Access Transmission, Energy and Operating Reserve Markets Tariff of MISO and the MISO Transmission Owners (filed Jul. 15, 2010) (MVP Filing). The MISO transmission owners that submitted the MVP Filing included the following: Ameren Services Company, as agent for Union Electric Company, Central Illinois Public Service Company, Central Illinois Light Co., and Illinois Power Company; American Transmission Company LLC (ATC); Dairyland Power Cooperative; Duke Energy Corporation for Duke Energy Ohio, Inc., Duke Energy Indiana, Inc., and Duke Energy Kentucky, Inc.; Great River Energy; Minnesota Power (and its subsidiary Superior Water, L&P); Montana-Dakota Utilities Co.; Northern Indiana Public Service Company; Northern States Power Company (Minnesota); Northern States Power Company (Wisconsin); Northwestern Wisconsin Electric Company; Otter Tail Power Company; Southern Indiana Gas & Electric Company; and Southern Minnesota Municipal Power Agency.

<sup>7</sup> MVP Filing at 24.

<sup>8</sup> The Tariff language previously provided that a Party that withdraws from MISO shall remain responsible for all financial obligations incurred under Attachment FF while a member of MISO.

order conditionally accepting the MVP Filing,<sup>9</sup> the Commission responded to the question of whether load that withdraws from MISO is subject to the MVP usage charge.<sup>10</sup> The Commission stated that its understanding of the Attachment FF exit fee language is that a withdrawing transmission owner “would remain responsible for all financial obligations incurred with respect to the MVP tariff provisions while a member of [MISO].”<sup>11</sup> The Commission also responded to concerns about the process of withdrawal and the costs that a particular withdrawing member may face, finding that existing transmission owners are on notice for potential MVP cost responsibility,<sup>12</sup> but that the specific MVP costs that a particular withdrawing member may face were beyond the scope of the generic rate proceeding.<sup>13</sup> The Commission stated that such amounts would be determined at the time of the withdrawal.<sup>14</sup> The Commission added that such determinations should be made at the time an application to withdraw is made, with the appropriate notice and opportunity for comments.

5. On rehearing, the Commission: (1) reiterated that it would not prejudice any settlement agreement between a regional transmission organization (RTO) and a withdrawing member for fees that withdrawing member owes to the RTO; and (2) in response to ATSI and others, clarified that the withdrawal language in Attachment FF puts parties on notice that, once cost responsibility for transmission system upgrades is established, withdrawing members will remain responsible for any costs incurred before their withdrawal date subject to a negotiated or contested exit agreement accepted by the Commission.<sup>15</sup>

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<sup>9</sup> *Midwest Indep. Transmission Sys. Operator, Inc.*, 133 FERC ¶ 61,221, at P 471 (2010) (MVP Order), *order on reh’g*, 137 FERC ¶ 61,074 (2011) (MVP Rehearing Order) (collectively, MVP Orders). The acceptance was conditioned upon MISO submitting a compliance filing to clarify certain aspects of the MVP charge.

<sup>10</sup> MVP Order, 133 FERC ¶ 61,221 at P 471.

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

<sup>12</sup> *Id.* P 470.

<sup>13</sup> *Id.* P 472.

<sup>14</sup> *Id.* P 471.

<sup>15</sup> MVP Rehearing Order, 137 FERC ¶ 61,074 at P 322.

**B. Withdrawals**

6. On July 31, 2009, ATSI notified MISO of its intent to withdraw from MISO effective May 31, 2011.<sup>16</sup> On August 17, 2009, ATSI submitted a filing requesting Commission approval for: (1) the termination of its status as a transmission operator, owner, and local balancing authority in MISO effective May 31, 2011; and (2) the transfer of operational control of ATSI's transmission facilities to, and the integration of the ATSI-zone load into, the PJM RTO.<sup>17</sup> On December 17, 2009, the Commission authorized ATSI's withdrawal from MISO and integration into PJM, subject to submission of related filings and receipt of applicable federal and state regulatory approvals.<sup>18</sup>

7. On May 20, 2010, Duke notified MISO of its intent to withdraw from MISO effective December 31, 2011.<sup>19</sup> On June 25, 2010, Duke filed a request for the Commission to authorize its departure from MISO.<sup>20</sup> On October 21, 2010, the Commission conditionally authorized Duke to withdraw from MISO.<sup>21</sup>

8. As discussed below, in the Schedule 39 Order, the Commission accepted Schedule 39 prospectively, to become effective January 1, 2012, noting that ATSI and Duke withdrew from MISO prior to that date.<sup>22</sup>

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<sup>16</sup> *Am. Transmission Sys., Inc., et al.*, 129 FERC ¶ 61,249, at PP 31, 58 (2009) (Realignment Order), *order addressing partial requests for clarification and reh'g*, 130 FERC ¶ 61,171 (2010), *order addressing remaining requests for clarification and reh'g*, 140 FERC ¶ 61,226 (2012), *aff'd sub nom. FirstEnergy Service Co. v. FERC*, D.C. Cir. No. 12-1461 (July 18, 2014).

<sup>17</sup> Realignment Order, 129 FERC ¶ 61,249 at P 1.

<sup>18</sup> *Id.* P 4.

<sup>19</sup> *Duke Energy Ohio, Inc. and Duke Energy Kentucky, Inc.*, 133 FERC ¶ 61,058, at P 71 (2010), *order denying reh'g*, 134 FERC ¶ 61,235 (2011).

<sup>20</sup> *Duke Energy Ohio, Inc. and Duke Energy Kentucky, Inc.*, 133 FERC ¶ 61,058 at P 1.

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

<sup>22</sup> *See infra* P 25.

**C. Provisions of the MISO Transmission Owners Agreement and the MISO Tariff in Effect at the Time of Withdrawal**

9. At the time of Duke and ATSI's respective withdrawals, the Agreement of Transmission Facilities Owners to Organize the Midwest Independent Transmission System Operator, Inc. (MISO Transmission Owners Agreement), as well as the pre-withdrawal Tariff, established Duke and ATSI's withdrawal-related obligations. Article Five, Section II.B of the MISO Transmission Owners Agreement provided:

All financial obligations incurred and payments applicable to time periods prior to the effective date of such [transmission owner's] withdrawal shall be honored by [MISO] and the withdrawing [o]wner.

10. Section III.A.2.j of Attachment FF to MISO's pre-withdrawal Tariff described the cost obligations of a transmission owner withdrawing from MISO as follows:

a [transmission owner] that withdraws from [MISO] shall remain responsible for all financial obligations incurred pursuant to this Attachment FF while a [m]ember of [MISO] and payments applicable to time periods prior to the effective date of such withdrawal shall be honored by [MISO] and the withdrawing [m]ember.

11. Section III of Attachment FF to MISO's pre-withdrawal Tariff contained provisions that designated cost responsibility for MTEP projects. The introductory paragraph of section III of Attachment FF provided:

the recommended MTEP shall, for any enhancement or expansion that is included in the plan, designate: (i) the Market Participant(s) in one or more pricing zones that will bear cost responsibility for such enhancement or expansion, as and to the extent provided by any applicable provision of the Tariff, including ... any applicable cost allocation method ordered by the Commission; or (ii) in the event and to the extent that no provision of the Tariff so assigns cost responsibility, the Market Participants(s) or Transmission Customers(s) in one or more pricing zones from which the cost of such enhancements or expansions shall be recovered through charges established pursuant to Attachment GG of this Tariff, or as otherwise provided for under this Attachment FF.

12. Subsection A of section III of Attachment FF contained provisions for the assignment of MTEP transmission project costs within the MISO region. Section III.A.2 provided that MISO “will designate and assign cost responsibility on a regional, and sub-regional basis for Network Upgrades identified in the MTEP[.]”<sup>23</sup> The pre-withdrawal Tariff contained specific provisions addressing cost allocation for the various types of MTEP projects. For instance, Section III.A.2.c.ii of Attachment FF stated that:

20 [percent] of the Project Cost for Baseline Reliability Projects with a voltage class of 345 kV or higher shall be allocated on a system-wide basis to all Transmission Customers and recovered through a system-wide rate. The remaining 80 [percent] of the Project Cost for Baseline Reliability Projects with a voltage class of 345 kV or higher shall be allocated on a sub-regional basis to all Transmission Customers in designated pricing zones. The designated pricing zones and the sub-regional allocation of the Project Cost shall be determined on a case-by-case basis in accordance with a Line Outage Distribution Factor Table[.]

13. Similarly, Section III.A.2.f of Attachment FF allocated the cost of Market Efficiency Projects as follows: 20 percent of the project cost will be allocated on a system-wide basis to all Transmission Customers and recovered through a system-wide rate. The remaining 80 percent of the costs will be allocated on a sub region-wide basis to all Transmission Customers in each of the Local Resource Zones, based on the relative benefit determined for each Local Resource Zone that has a positive present value of annual benefits over the evaluation period. Section II of Attachment FF described the development process for MTEP projects and provided certain criteria used to categorize expansion projects in the MTEP for the purposes of assigning cost responsibility. Section II.B.1.c specified that the cost allocation for Market Efficiency Projects “shall be determined one time at the time that the Market Efficiency Project is presented to the Board of Directors for approval.”

14. The costs of Market Efficiency Projects and Baseline Reliability Projects were recovered through charges established pursuant to Attachment GG (Network Upgrade Charge). Attachment GG provided formulas for calculating the rates applicable to customers in each pricing zone to recover the costs of the Network Upgrades. The rates calculated under the Attachment GG formulas were then recovered from customers through Schedule 26 (Network Upgrade Charge From Transmission Expansion Plan).

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<sup>23</sup> Network Upgrades include Generator Interconnection Projects, Baseline Reliability Projects, Market Efficiency Projects, and MVPs.

Attachment GG provided that the network upgrade charge applicable to a pricing zone was calculated by summing the revenue requirements of all transmission owners apportioned to that pricing zone, including those annual revenue requirements allocated on a system-wide basis to all pricing zones, and then developing a per-unit charge using the zonal divisor in the Attachment O formula rate.

15. The costs of MVPs were allocated according to section III.A.2.g of Attachment FF, which provided that 100 percent of the annual revenue requirement of MVPs was to be allocated “on a system-wide basis to [t]ransmission [c]ustomers that withdraw energy. . . and recovered through an MVP Usage Charge pursuant to Attachment MM.” Attachment MM and Schedule 26-A, in turn, provided for the annual recalculation of the MVP Usage Charge and its assessment to all customers that withdrew energy from the MISO transmission system each month. Section 1 of Attachment MM stated that Attachment MM “sets forth the method for collecting the charges associated with [MVPs] and for distributing the revenues associated with such charges in accordance with Schedule 26-A.” Section 3 of Attachment MM described the calculation of the annual revenue requirement for each MVP. Section 4 of Attachment MM described the MVP Usage Rate, which is a system-wide rate based on the annual revenue requirement and charged monthly to market participants based on their actual energy withdrawals from MISO.

#### **D. Exit Fee Agreements**

16. ATSI and MISO negotiated an Exit Fee Agreement (ATSI-MISO Exit Fee Agreement) that was executed and filed with the Commission on April 21, 2011. On June 20, 2011, the Commission accepted the ATSI-MISO Exit Fee Agreement, subject to submission of a compliance filing setting forth the calculation of the final exit fee and revising certain cost schedules.<sup>24</sup>

17. On December 15, 2011, the Commission conditionally accepted an exit fee agreement negotiated between Duke and MISO (Duke-MISO Exit Fee Agreement), subject to submission of a compliance filing setting forth the calculation of the final exit fee and revising certain cost schedules, which provided the methodology for calculating Duke’s exit fees under Schedules 10, 16, and 17 of MISO’s Tariff.<sup>25</sup>

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<sup>24</sup> *Midwest Indep. Transmission Sys. Operator, Inc.*, 135 FERC ¶ 61,255, at PP 16, 20 (2011) (ATSI-MISO Exit Fee Order).

<sup>25</sup> *Midwest Indep. Transmission Sys. Operator, Inc.*, 137 FERC ¶ 61,198, at P 19 (2011). Schedule 10 (ISO Cost Recovery Adder) provides for the recovery of the costs associated with operating MISO, exclusive of those costs recovered under Schedules 1,

(continued...)

**E. Schedules 37 and 38**

18. On May 31, 2011, the Commission conditionally accepted a new Schedule 37 (MTEP Project Cost Recovery For ATSI Zone), as well as revisions to Attachment GG (Network Upgrade Charge) of the pre-withdrawal Tariff in order to provide a mechanism to collect and distribute revenues related to the non-MVP MTEP projects associated with the ATSI zone.<sup>26</sup>

19. On December 30, 2011, the Commission approved a new Schedule 38 (MTEP Project Cost Recovery For Duke Ohio and Duke Kentucky Zones), as well as revisions to Attachment GG (Network Upgrade Charge) to the pre-withdrawal Tariff in order to provide a mechanism to collect and distribute revenues related to the non-MVP MTEP projects associated with the Duke zones.<sup>27</sup>

**F. Petition for Declaratory Order and Complaint**

20. On August 3, 2011, in Docket No. EL11-56-000, ATSI<sup>28</sup> filed a petition for declaratory order and complaint against MISO concerning MISO's assessment of certain

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16, and 17. Schedule 16 (Financial Transmission Rights (FTR) Administrative Service Cost Recovery Adder) provides for the recovery of the costs associated with administering MISO's FTR market. Schedule 17 (Energy Market Support Administrative Service Cost Recovery Adder) provides for the recovery of the costs associated with administering MISO's energy markets.

<sup>26</sup> *Midwest Indep. Transmission Sys. Operator, Inc.*, 135 FERC ¶ 61,204 (2011) (Schedule 37 Order). Schedule 37 addresses Baseline Reliability Projects and Market Efficiency Projects that have been approved for regional cost sharing under the MTEP, but does not address MVPs that have been approved under the MTEP.

<sup>27</sup> *Midwest Indep. Transmission Sys. Operator, Inc.*, 137 FERC ¶ 61,254 (2011) (Schedule 38 Order). Schedule 38 addresses Baseline Reliability Projects and Market Efficiency Projects that have been approved for regional cost sharing under the MTEP, but does not address MVPs that have been approved under the MTEP.

<sup>28</sup> FirstEnergy Service Company (FirstEnergy) made the filing on behalf of its six affiliates: ATSI; Cleveland Electric Illuminating Company; Ohio Edison Company; The Toledo Edison Company; Pennsylvania Power Company; and FirstEnergy Solutions Corp. For purposes of this order, we will refer to FirstEnergy as ATSI, which is the transmission-owning affiliate of FirstEnergy.

MVP transmission charges to ATSI.<sup>29</sup> ATSI requested a Commission determination that MISO may not allocate the costs of the Michigan Thumb Project<sup>30</sup> to ATSI or to other entities in the ATSI pricing zone in light of ATSI's announced withdrawal from MISO. ATSI stated that MISO intended to allocate 11.5 percent of the costs of the Michigan Thumb Project to the loads in the ATSI zone, even though ATSI had been authorized to withdraw from MISO one year before MISO filed its proposed MVP cost allocation methodology and then approved the Michigan Thumb Project as an MVP. ATSI asserted that: (1) the loads in the ATSI zone did not cause the Michigan Thumb Project to be approved because the ATSI transmission zone was not included in the planning models used to approve the project; (2) the loads in the ATSI zone were not beneficiaries of the Michigan Thumb Project because those loads would not be in MISO when the project becomes operational; and (3) there was no lawful basis for allocating the Michigan Thumb Project costs to the ATSI zone, based on the MISO Transmission Owners Agreement, the pre-withdrawal Tariff, the ATSI-MISO Exit Fee Agreement and the Commission's orders on MISO's RECB filings.

21. MISO responded that the Michigan Thumb Project was approved for inclusion in Appendix A of the MTEP as an MVP before ATSI's withdrawal became effective.<sup>31</sup> MISO stated that although ATSI was not modeled as part of MISO for purposes of the Michigan Thumb Project, ATSI was included in modeling the expected utilization of the project's facilities. Accordingly, MISO stated that it determined that the project would result in regional benefits beyond Michigan, including the vicinity of ATSI's operations. Further, MISO stated that the portfolio of MVPs that include the Michigan Thumb Project was expected to benefit ATSI even after it joined PJM. Thus, MISO argued that it may treat a share of the costs of the Michigan Thumb Project as a financial obligation incurred by ATSI prior to its withdrawal from MISO.

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<sup>29</sup> FirstEnergy, Petition for Declaratory Order and Alternative Complaint, Docket No. EL11-56-000 (filed Aug. 3, 2011).

<sup>30</sup> The Michigan Thumb Project was the only MVP approved by the MISO Board for inclusion in Appendix A of the MTEP prior to ATSI's withdrawal from MISO.

<sup>31</sup> MISO, Answer to the Petition for Declaratory Order and Alternative Complaint, Docket No. EL11-56-000, at 22 (filed Sept. 2, 2011).

**G. Schedule 39**

22. On December 29, 2011, in Docket No. ER12-715-000, MISO and MISO Transmission Owners<sup>32</sup> (jointly, Applicants) submitted new Schedule 39 ([MVP] Financial Obligations and Cost Recovery for Withdrawing Transmission Owners) and proposed revisions to Attachment MM ([MVP] Charge) to MISO's Tariff. The proposed revisions allowed MISO to charge, on an on-going basis, a withdrawing transmission owner<sup>33</sup> a monthly MVP Usage Rate that includes a share of the costs of all MVPs that the MISO Board approved prior to the effective date of the transmission owner's withdrawal. The MVP Usage Rate for a withdrawing transmission owner would be calculated in substantially the same way as the MVP Usage Rate applicable to others who are assessed costs of MVPs under Schedule 26-A ([MVP] Usage Rate).

23. Under proposed Schedule 39, a withdrawing transmission owner's monthly Schedule 39 MVP Usage Rate is equal to its monthly net actual energy withdrawals<sup>34</sup> multiplied by the MVP Usage Rate. Proposed Schedule 39 also required a withdrawing transmission owner to provide its monthly net actual energy withdrawals for the previous month; if it does not do so, MISO proposed to use a monthly estimate based on historical

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<sup>32</sup> MISO Transmission Owners for this proceeding consist of: Ameren Services Company, as agent for Union Electric Company d/b/a Ameren Missouri, Ameren Illinois Company d/b/a Ameren Illinois and Ameren Transmission Company of Illinois; American Transmission Company LLC; City Water, Light & Power (Springfield, Illinois); Dairyland Power Cooperative; Great River Energy; Hoosier Energy Rural Electric Cooperative, Inc.; MidAmerican Energy Company; Minnesota Power (and its subsidiary Superior Water, L&P); Missouri River 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, subsidiaries of Xcel Energy Inc.; Northwestern Wisconsin Electric Company; Otter Tail Power Company; Southern Illinois Power Cooperative; Southern Minnesota Municipal Power Agency; Wabash Valley Power Association, Inc.; and Wolverine Power Supply Cooperative, Inc.

<sup>33</sup> Section I.E of proposed Schedule 39 defined a withdrawing transmission owner as an owner of transmission facilities that withdraws its transmission facilities from the operational control of MISO after July 16, 2010.

<sup>34</sup> Section III.B of proposed Schedule 39 provided that monthly net actual energy withdrawals are based on the sum total of the actual energy of customers taking service for delivery in the withdrawing transmission owner's zone in the period for which charges are applicable.

data plus a five percent annual growth factor. In addition, proposed Schedule 39 required MISO to forward any monies due to the withdrawing transmission owner for MVPs that the withdrawing transmission owner has built or is obligated to build. Applicants also proposed revisions to Attachment MM, which sets forth the method for collecting the charges associated with MVPs. Proposed Schedule 39 provided that MISO will distribute the amounts collected under Schedule 39 from a withdrawing transmission owner in accordance with the methodology set forth in Schedule 26-A.<sup>35</sup> Applicants stated that Schedule 39 implemented Section III.A.2.j of Attachment FF to the pre-withdrawal Tariff and was consistent with Article Five, Section II.B of the MISO Transmission Owners Agreement.

24. Applicants proposed Appendix A and Appendix B to Schedule 39 for ATSI and Duke, respectively, which list the MVPs approved by the MISO Board prior to the effective date of ATSI's and Duke's withdrawals from MISO.<sup>36</sup> Thus, Schedule 39 made ATSI and Duke responsible for the costs of these MVPs. If another transmission owner withdraws from MISO in the future, MISO stated that it will update the Appendices to Schedule 39 to provide a similar list for that withdrawing transmission owner.

#### **H. Schedule 39 Order**

25. On February 27, 2012, the Commission dismissed ATSI's petition for declaratory order and denied the relief requested in its complaint.<sup>37</sup> The Commission also conditionally accepted Schedule 39 and the related revisions to Attachment MM, to become effective January 1, 2012.<sup>38</sup> However, noting that ATSI and Duke withdrew from MISO prior to that date, the Commission concluded that "MISO cannot automatically apply [the Schedule 39] Tariff provisions to ATSI and Duke unless those provisions are consistent with the MVP-related withdrawal obligations in the Tariff at the

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<sup>35</sup> The MISO Transmission Owners periodically update the annual revenue requirements for MVPs using the methodology provided under Attachment MM. MISO proposed to calculate the annual revenue requirements for withdrawing transmission owner's MVPs pursuant to Schedule 39.

<sup>36</sup> ATSI withdrew from MISO effective at 11:59 p.m. on May 31, 2011; Duke withdrew from MISO effective at 11:59 p.m. on December 31, 2011.

<sup>37</sup> Schedule 39 Order, 138 FERC ¶ 61,140 at PP 3, 101. The Commission dismissed ATSI's petition for declaratory order on the grounds that the concerns raised by ATSI are addressed in the Schedule 39 proceeding. *Id.* P 100.

<sup>38</sup> *Id.* P 3.

time that ATSI and Duke withdrew from MISO.”<sup>39</sup> The Commission set for hearing and settlement judge procedures the issues of: (1) whether MISO’s proposal to use the methodology in Schedule 39 to calculate ATSI’s and Duke’s obligations under the Tariff at the time that they withdrew from MISO was consistent with the MVP-related withdrawal obligations in the Tariff at that time; and (2) if not, what the amount of, and methodology for calculating, ATSI’s and Duke’s MVP cost responsibility should be.<sup>40</sup> The Commission also set for hearing the issue of whether ATSI retains any responsibility for MVP costs under the terms of the ATSI-MISO Exit Fee Agreement, and if so, the amount of that cost responsibility.<sup>41</sup>

26. On March 28, 2012, ATSI and Duke filed requests for rehearing of the Schedule 39 Order.<sup>42</sup>

### **I. Initial Decision**

27. On July 16, 2013, presiding Administrative Law Judge H. Peter Young (Presiding Judge) issued an Initial Decision in Docket No. ER12-715-003. The Initial Decision generally defined the scope of the issues set for hearing and found that: (1) the cost calculation methodology in Schedule 39 may be automatically applied to ATSI and Duke; (2) it still might be just and reasonable to apply the Schedule 39 methodology to ATSI and Duke even if the Schedule 39 obligations are found to be inconsistent with the MVP-related withdrawal obligations in the pre-withdrawal Tariff; and (3) the ATSI-MISO Exit Fee Agreement does not absolve ATSI of cost responsibility under Article Five, Section II.B of the MISO Transmission Owners Agreement.

28. Briefs on exceptions to the Initial Decision were filed by Duke, ATSI, and Trial Staff on August 15, 2013. Briefs opposing exceptions were filed by Madison Gas and

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<sup>39</sup> *Id.* P 74.

<sup>40</sup> *Id.* Earlier in the Schedule 39 Order, the Commission phrased the issues to be set for hearing slightly differently. The Commission set for hearing “whether ATSI and Duke are responsible for MVP costs and, if so, the amount of, and methodology for calculating, ATSI’s and Duke’s MVP cost responsibility.” *Id.* P 3.

<sup>41</sup> *Id.* P 75.

<sup>42</sup> Request for Clarification and Rehearing of FirstEnergy Service Company, Docket Nos. ER12-715-001 and EL11-56-001 (filed Mar. 28, 2012) (ATSI Rehearing Request); Request for Rehearing of Duke Energy Ohio Inc. and Duke Energy Kentucky, Inc., Docket No. ER12-715-001 (filed Mar. 28, 2012) (Duke Rehearing Request).

Electric Company and WPPI Energy (Midwest TDUs), MISO, and MISO Transmission Owners on September 4, 2013.

## II. Discussion

29. We will affirm the Initial Decision in part and reverse the Initial Decision in part. As discussed below, we will: (1) affirm the Presiding Judge’s interpretation of the consistency standard to be applied to the analysis; (2) reverse the Presiding Judge’s determination that the MVP cost calculation methodology in Schedule 39 may be applied to ATSI and Duke because Schedule 39 is consistent with the terms of the pre-withdrawal Tariff in effect when ATSI and Duke were members of MISO; (3) affirm the Presiding Judge’s determination that the MISO witness did not submit conflicting testimony about the definition of the term “allocation;” (4) affirm the Presiding Judge’s finding that cost causation issues are outside the scope of the matters set for hearing; and (5) reverse the Presiding Judge’s determination that it would be just and reasonable to apply the MVP cost calculation methodology under Schedule 39 to ATSI and Duke even if Schedule 39 is inconsistent with the terms of the pre-withdrawal Tariff.

30. We also will deny the requests for rehearing of the Schedule 39 Order. As discussed below, we find that our partial reversal of the Initial Decision addresses the issues on rehearing specific to the application of the Schedule 39 methodology to ATSI and Duke. In addition, we affirm our finding in the Schedule 39 Order that Schedule 39 is just and reasonable as applied prospectively because Schedule 39 specifies how MVP cost responsibility for a withdrawing transmission owner is determined and billed under the terms of the MISO Transmission Owners Agreement and the Tariff.

### A. Initial Decision

#### 1. Hearing Issue 1: Whether MISO’s Proposal to Use the Schedule 39 Methodology to Calculate ATSI’s and Duke’s Obligations to Pay for MVP Costs is Consistent With the MVP-Related Withdrawal Obligations in the Tariff at the Time That ATSI and Duke Withdrew From MISO

##### a. The “Consistency” Standard and the Filed Rate Doctrine

##### i. Initial Decision

31. As an initial matter, the Presiding Judge first considered the meaning of “consistent,” as the Commission used the term in the Schedule 39 Order.<sup>43</sup> The Presiding

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<sup>43</sup> Initial Decision, 144 FERC ¶ 63,007 at PP 14-25.

Judge's analysis of the definition in the Merriam-Webster dictionary and the Schedule 39 Order led him to conclude that the "consistent" standard was not intended to mean "identical to" or "the same as," because Schedule 39 was added to the pre-withdrawal Tariff to provide a defined MVP cost allocation/calculation methodology for withdrawing transmission owners as a substitute for an unspecified *ad hoc* settlement procedure.<sup>44</sup> The Presiding Judge noted that it therefore is impossible for Schedule 39 to affirmatively contradict the Tariff in effect when ATSI and Duke withdrew from MISO, because there was no MVP cost allocation/calculation mechanism stated in the Tariff for Schedule 39 to contradict. Instead, he concluded that he must consider whether the Schedule 39 MVP cost calculation methodology is "non-contradictory" or "compatible" with the Tariff in effect when ATSI and Duke withdrew from MISO. If so, the Presiding Judge held that Schedule 39 may be applied to ATSI and Duke without further analysis.<sup>45</sup>

**ii. Briefs On Exceptions**

32. Duke, ATSI and Trial Staff argue that the Initial Decision is at odds with the filed rate doctrine, which provides that MISO may only charge Duke and ATSI for MVPs to the extent provided for in the filed rates in existence at the time they were in privity with MISO.<sup>46</sup> They note that a corollary to the filed rate doctrine is the rule against retroactive ratemaking, which prevents the Commission from imposing a retroactive rate allocation.<sup>47</sup> Accordingly, they argue that Duke and ATSI can only be charged MVP costs after their withdrawal to the extent provided for under the Tariff and the MISO Transmission Owners Agreement that were in effect prior to withdrawal.

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<sup>44</sup> *Id.* P 23.

<sup>45</sup> *Id.* P 25.

<sup>46</sup> Brief on Exceptions of Duke, Docket No. ER12-715-003, at 35-47 (filed Aug. 15, 2013) (Duke Brief on Exceptions); Brief on Exceptions of FirstEnergy Service Company, Docket No. ER12-715-003, at 24-28 (filed Aug. 15, 2013) (ATSI Brief on Exceptions); Brief on Exceptions of the Commission Trial Staff, Docket No. ER12-715-003, at 11-16 (filed Aug. 15, 2013) (Trial Staff Brief on Exceptions).

<sup>47</sup> Duke Brief on Exceptions at 37 (citing *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 578 (1981); *Pacific Gas and Elec. Co. v. FERC*, 373 F.3d 1315, 1319 (D.C. Cir. 2004); *Consol. Edison Co. v. FERC*, 347 F.3d 964, 969 (D.C. Cir. 2003); *Columbia Gas Transmission Corp. v. FERC*, 831 F.2d 1135, 1140 (D.C. Cir. 1987)); ATSI Brief on Exceptions at 25; Trial Staff Brief on Exceptions at 13-14.

33. Duke, ATSI and Trial Staff assert that the Initial Decision improperly creates a legal standard that allows the Presiding Judge to impose a new obligation that was not present in the pre-withdrawal Tariff, in violation of the filed rate doctrine.<sup>48</sup> Specifically, Duke and ATSI point to the Presiding Judge's determination that "even if Schedule 39 specifies an obligation that was not expressly stated in the Tariff at the times that ATSI and [Duke] withdrew from MISO, such a new obligation would be insufficient to establish inconsistency if the difference is otherwise reconcilable with the [pre-withdrawal] Tariff."<sup>49</sup> Trial Staff claims that the consistency standard adopted by the Initial Decision is considerably less stringent than the strict application of the Tariff that is required by the filed rate doctrine, which would require a determination of whether Schedule 39 deviates from the rate on file when ATSI and Duke withdrew from MISO.<sup>50</sup>

34. Duke and Trial Staff argue that the Presiding Judge erred in concluding that, because there was no MVP cost calculation methodology specified in the pre-withdrawal Tariff, there could be no incompatibility with the Schedule 39 methodology.<sup>51</sup> Even assuming that the pre-withdrawal Tariff lacked such a mechanism, Trial Staff argues that such absence does not prove that Schedule 39 is consistent with the pre-withdrawal Tariff. Rather, Trial Staff and Duke highlight that the only legal authority to impose MVP-related withdrawal obligations on ATSI and Duke must be found in the Tariff in effect at the time that they withdrew. Duke argues that Attachment FF and Attachment MM in the pre-withdrawal Tariff provided the exclusive mechanism for recovering MVP costs, and MISO is not at liberty to devise a new cost calculation method after withdrawal.<sup>52</sup>

35. ATSI and Trial Staff compare the pre-withdrawal Tariff with Schedule 39 and conclude that Schedule 39 imposes new obligations on withdrawing transmission owners in contravention of the filed rate doctrine and the rule against retroactive ratemaking. ATSI and Trial Staff note that Schedule 39 creates a new methodology for billing

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<sup>48</sup> Duke Brief on Exceptions at 41-43; ATSI Brief on Exceptions at 26-27; Trial Staff Brief on Exceptions at 15-16.

<sup>49</sup> Duke Brief on Exceptions at 41 (quoting Initial Decision, 144 FERC ¶ 63,007 at P 45) (internal quotations omitted); ATSI Brief on Exceptions at 26-27.

<sup>50</sup> Trial Staff Brief on Exceptions at 15-16.

<sup>51</sup> Duke Brief on Exceptions at 43-44; Trial Staff Brief on Exceptions at 30-31 (citing Initial Decision, 144 FERC ¶ 63,007 at PP 23-24, 45, 73).

<sup>52</sup> Duke Brief on Exceptions at 43-44.

withdrawn transmission owners for MVP charges based on that transmission owner's use of a transmission system other than MISO's, whereas the pre-withdrawal Tariff reflected a cost allocation methodology and recovery based on energy usage on the MISO system.<sup>53</sup> Trial Staff states that the Schedule 39 rate based on historical estimates and a five percent annual growth factor is significantly different from the pre-withdrawal Tariff rate based solely on usage.<sup>54</sup> ATSI states that Schedule 39 makes a withdrawing transmission owner directly responsible for MVP charges and fixes the assignment of cost responsibility at the point in time when an MVP is approved by the MISO Board.<sup>55</sup> ATSI argues that this added language contradicts the erroneous assertion in the Initial Decision that Schedule 39 addresses only calculation and recovery, but not assignment of MVP cost responsibility. ATSI argues that, by dictating that MVP-related obligations are incurred at MISO Board approval, Schedule 39 is allocating (or assigning) MVP cost responsibility to a withdrawing transmission owner upon MISO Board approval of a project. As further discussed below, ATSI claims that this is a fundamental departure from the pre-withdrawal Tariff, which has no comparable provision and offers no means of achieving this result.<sup>56</sup>

### iii. Briefs Opposing Exceptions

36. MISO argues that the Presiding Judge did not create a new legal standard, and that the judge's analysis of the term "consistent," was necessitated by the Schedule 39 Order's directive to determine if Schedule 39 is "consistent" with the pre-withdrawal Tariff.<sup>57</sup> MISO argues that the Presiding Judge had authority to analyze the term's meaning, and that he appropriately analyzed the directives of the Schedule 39 Order to determine the proper boundaries for the hearing. Moreover, MISO maintains that the Presiding Judge interpreted the Schedule 39 Order correctly in finding that the criteria for evaluating consistency was "compatibility" and "non-contradiction," as opposed to identicalness.<sup>58</sup> MISO argues that the Presiding Judge could not have viewed a mere difference as

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<sup>53</sup> ATSI Brief on Exceptions at 42; Trial Staff Brief on Exceptions at 27-29.

<sup>54</sup> Trial Staff Brief on Exceptions at 28.

<sup>55</sup> ATSI Brief on Exceptions at 40.

<sup>56</sup> *See infra* PP 50-55.

<sup>57</sup> Brief Opposing Exceptions of MISO, Docket No. ER12-715-003, at 23-24 (filed Sept. 4, 2013) (MISO Brief Opposing Exceptions).

<sup>58</sup> *Id.* at 26-28.

precluding consistency, because Schedule 39 is different than the prior approach of using an *ad hoc* settlement process.<sup>59</sup> MISO argues that, since the pre-withdrawal Tariff did not include a methodology for calculating or quantifying a withdrawing transmission owner's MVP cost responsibility, the Presiding Judge logically concluded that there could be no textual incompatibility between the Schedule 39 methodology and the pre-withdrawal Tariff.<sup>60</sup>

37. MISO and MISO Transmission Owners argue that the Initial Decision does not conflict with the filed rate doctrine or the corollary prohibition of retroactive ratemaking. MISO states that the basis for the excepting parties' argument is the false premise that Schedule 39 is inconsistent with the pre-withdrawal Tariff because MVP costs are not allocated upon MISO Board approval of MVPs.<sup>61</sup> Instead, MISO and the MISO Transmission Owners argue that Schedule 39 is consistent with the pre-withdrawal Tariff because it merely quantified the method for determining the withdrawing transmission owner's MVP financial obligation, and thus does not violate the filed rate doctrine.<sup>62</sup> MISO and MISO Transmission Owners argue that so long as affected parties have reasonable notice of potential adjustments to their applicable charges, the filed rate doctrine has been satisfied. MISO and MISO Transmission Owners argue that Duke and ATSI were put on notice by the pre-withdrawal Tariff language, the MVP Orders and the Schedule 39 Order, which ruled that withdrawing transmission owners can incur MVP cost responsibility upon withdrawal as a contractual and tariff obligation. For instance, MISO states that the MVP Order found that "a transmission owner that withdraws from [MISO] would remain responsible for all financial obligations incurred with respect to the MVP Tariff provisions," which could include "MVP costs allocated to its zonal load."<sup>63</sup> MISO argues that the filed rate need not be confined to absolute numbers, and therefore, although the pre-withdrawal Tariff did not specify the amounts owed by withdrawing transmission owners or the specific method for recovering amounts owed, it

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<sup>59</sup> *Id.* at 26.

<sup>60</sup> *Id.* at 67.

<sup>61</sup> *Id.* at 15.

<sup>62</sup> *Id.* at 29-31; Brief Opposing Exceptions of the MISO Transmission Owners, Docket No. ER12-715-003, at 40-45 (filed Sept. 4, 2013) (MISO Transmission Owners Brief Opposing Exceptions).

<sup>63</sup> MISO Brief Opposing Exceptions at 31 (citing MVP Order, 133 FERC ¶ 61,221 at P 471).

put ATSI and Duke on notice of cost obligations which are now being properly applied though Schedule 39 in accordance with the filed rate doctrine.<sup>64</sup>

38. In addition, MISO Transmission Owners argue that retroactive ratemaking involves making up for previous over- or under-collections or imposing an additional charge for services already purchased, neither of which is implicated by applying the Schedule 39 methodology to ATSI and Duke.<sup>65</sup> MISO Transmission Owners argue that Schedule 39's use of transmission owners' historic energy usage to calculate MVP cost responsibility does not constitute retroactive ratemaking, because Schedule 39 only permits MISO to utilize a transmission owner's historic usage of the MISO system in the event that a withdrawing transmission owner does not report the amount of its current zonal energy withdrawals to MISO.<sup>66</sup> Under those circumstances, MISO Transmission Owners assert that it would be appropriate for MISO to use adjusted historic energy withdrawals as a proxy.

#### iv. Commission Determination

39. We affirm the Presiding Judge's interpretation of the consistency standard. In the Schedule 39 Order, the Commission noted that MISO proposed to use the method in Schedule 39 to calculate ATSI's and Duke's MVP cost responsibility, but because ATSI and Duke withdrew before the effective date for Schedule 39, the Commission found that MISO could not automatically apply those provisions to ATSI and Duke.<sup>67</sup> The Commission set for hearing:

whether MISO's proposal to use the methodology in Schedule 39 to calculate ATSI's and Duke's obligation to pay for MVP costs is consistent with the MVP-related withdrawal obligations in the Tariff at the time that ATSI and Duke withdrew from MISO, and if not, what the amount of, and methodology for calculating, ATSI's and Duke's MVP cost responsibility should be.<sup>[68]</sup>

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<sup>64</sup> *Id.* at 31-33.

<sup>65</sup> MISO Transmission Owners Brief Opposing Exceptions at 43.

<sup>66</sup> *Id.* at 44.

<sup>67</sup> Schedule 39 Order, 138 FERC ¶ 61,140 at P 74.

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

We find it reasonable for the Presiding Judge to determine that the “consistency” standard requires only that the Schedule 39 cost calculation methodology be non-contradictory to or compatible with the pre-withdrawal Tariff, because Schedule 39 clarified the methodology for calculation and recovery of a withdrawing transmission owner’s MVP cost responsibility, and there would have been no need for the hearing if identicalness was required for consistency.

40. However, as further discussed below, we find that the imposition of the Schedule 39 methodology to Duke and ATSI would violate the filed rate doctrine because the Schedule 39 cost calculation methodology is not consistent with the Tariff in effect at the time that Duke and ATSI withdrew from MISO (i.e., the pre-withdrawal Tariff).<sup>69</sup> Duke and ATSI should only be charged for MVPs to the extent provided for in the filed rates in existence at the time they withdrew – namely, the MISO Transmission Owners Agreement and the pre-withdrawal Tariff. We agree with ATSI and Duke that the MVP-related financial obligations that would be imposed on ATSI and Duke under Schedule 39 were not incurred under the terms of the MISO Transmission Owners Agreement and the pre-withdrawal Tariff.<sup>70</sup>

41. We also agree with the argument from ATSI and Trial Staff that the imposition of the Schedule 39 methodology to ATSI and Duke would violate the rule against retroactive ratemaking because it fills a gap in the pre-withdrawal Tariff by creating a new method for billing withdrawn transmission owners for MVP charges based on that transmission owner’s use of a transmission system other than MISO’s, whereas the pre-withdrawal Tariff reflected a cost allocation methodology and recovery based on energy usage on the MISO system.<sup>71</sup> We will reverse the Presiding Judge’s conclusion that any filed rate doctrine/retroactive ratemaking claim is undercut by the fact that the uniform cost calculation methodology expressly stated in Schedule 39 merely implements recovery of the MVP-related financial obligations of ATSI and Duke under the pre-withdrawal Tariff<sup>72</sup> because we find (as further discussed below) that the pre-withdrawal

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<sup>69</sup> See *Western Resources, Inc. v. FERC*, 72 F.3d 147, 149 (D.C. Cir. 1995) (*Western Resources*) (noting that the filed rate doctrine forbids a regulated entity from charging rates for its services other than those properly filed with the appropriate federal regulatory authority).

<sup>70</sup> See *infra* PP 69-78.

<sup>71</sup> See ATSI Brief on Exceptions at 42; Trial Staff Brief on Exceptions at 27-29. Trial Staff states that the Schedule 39 rate is based on historical estimates and a five percent annual growth factor.

<sup>72</sup> See Initial Decision, 144 FERC ¶ 63,007 at P 73 n.175.

Tariff did not impose MVP cost obligations upon approval of the MVP(s) by the MISO Board.<sup>73</sup> We find that the Schedule 39 billing method is therefore inconsistent with the pre-withdrawal Tariff, and constitutes impermissible retroactive ratemaking when applied to ATSI and Duke.

**b. The MISO Transmission Owners Agreement and Pre-Withdrawal Tariff**

**i. Initial Decision**

42. The Presiding Judge stated that the next step after defining the applicable standard is to determine the precise MVP-related withdrawal obligations that were present in the pre-withdrawal Tariff.<sup>74</sup> He stated that the Schedule 39 obligations must be compared to the obligations the pre-withdrawal Tariff imposed at the time ATSI and Duke withdrew from MISO, and the comparison must apply the “non-contradictory”/“compatible” standard to analyze whether the Schedule 39 MVP cost calculation methodology logically can be reconciled with the pre-withdrawal Tariff.

43. The Presiding Judge noted that Article Five, Section II.B of the MISO Transmission Owners Agreement and Section III.A.2.j of Attachment FF to the pre-withdrawal Tariff formed the fundamental framework of a withdrawing transmission owner’s MVP-related withdrawal obligation.<sup>75</sup> The Presiding Judge first interpreted Article Five, Section II.B of the MISO Transmission Owners Agreement, which stated:

All financial obligations incurred and payments applicable to time periods prior to the effective date of such withdrawal shall be honored by [MISO] and the withdrawing [transmission owner].

The Presiding Judge concluded that the Commission had already specifically determined that the financial obligations referenced in that section: (1) were not confined to payments for services received by the transmission owner prior to the date of withdrawal; and (2) included transmission system upgrade costs incurred prior to withdrawal.<sup>76</sup> The

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<sup>73</sup> See *infra* PP 69-78.

<sup>74</sup> Initial Decision, 144 FERC ¶ 63,007 at P 45.

<sup>75</sup> *Id.* P 46.

<sup>76</sup> *Id.* P 46 (citing *Midwest Indep. Sys. Operator, Inc.*, 103 FERC ¶ 61,035, at P 9 (2003); *Midwest Indep. Sys. Operator, Inc.*, 118 FERC ¶ 61,209, at P 193 (2007)).

Presiding Judge next reviewed Section III.A.2.j of Attachment FF to the pre-withdrawal Tariff, which stated:

a [transmission owner] that withdraws from [MISO] as a [transmission owner] shall remain responsible for all financial obligations incurred pursuant to this Attachment FF while a [member] of [MISO] and payments applicable to time periods prior to the effective date of such withdrawal shall be honored by [MISO] and the withdrawing [m]ember.

The Presiding Judge noted that the Schedule 39 Order confirmed that the financial obligations referenced in both provisions above included any MVP costs incurred prior to withdrawal.<sup>77</sup>

44. The Presiding Judge then explained that in order for any MVP-related “financial obligation” referenced in these provisions to have been “incurred” by ATSI or Duke prior to the times they withdrew from MISO, the obligation(s) somehow must have been allocated to ATSI or Duke while they were MISO members.<sup>78</sup> The Presiding Judge observed that Section III.A.2.j of Attachment FF did not reflect the term “allocate” or any variant of that term, and that the only pre-withdrawal Tariff provision that specifically referenced MVP cost allocation was Section III.A.2.g.i of Attachment FF, which stated that MVP costs “will be allocated” as follows:

One-hundred percent (100%) of the annual revenue requirements of the [MVPs] shall be allocated on a system-wide basis to Transmission Customers that withdraw energy, including External Transactions sinking outside the Transmission Provider’s region, and recovered through an MVP Usage Charge pursuant to Attachment MM.

The Presiding Judge interpreted the framing of Section III.A.2.g.i of Attachment FF to suggest some distinction between the system-wide *allocation* specified in the first clause,

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<sup>77</sup> *Id.* P 48 (citing Schedule 39 Order, 138 FERC ¶ 61,140 at P 63).

<sup>78</sup> *Id.* P 49. The Presiding Judge noted that the term “allocate” and its variants are ratemaking terms of art which are commonly used in multiple senses, including assign, impute, distribute, apportion, quantify, calculate, charge, and collect. He noted that this is problematic because the various meanings are routinely confused, combined, or conflated.

and the MVP Usage Charge *recovery* specified in the second.<sup>79</sup> The Presiding Judge found it reasonable to infer that if the intent was to conjoin the two clauses, Section III.A.2.g.i would have been framed as “allocated and recovered through an MVP Usage Charge pursuant to Attachment MM” or some alternate phrasing which clearly established that the MVP cost allocation and recovery mechanism was one and the same.

45. The Presiding Judge found this inference reinforced by the fact that Section 1 of cross-referenced Attachment MM to the pre-withdrawal Tariff set forth “the method for *collecting* the charges associated with [MVPs] and for *distributing* the revenues associated with such charges in accordance with Schedule 26-A [of MISO’s Tariff].”<sup>80</sup> The Presiding Judge found that the same analysis holds true for Section 3 and 4 of Attachment MM. He found that Section 4(a) described an MVP Usage Rate as a “system-wide rate *charged* via Schedule 26-A.”<sup>81</sup> He then found that Schedule 26-A defined the MVP Usage Rate and referred back to the MVP annual revenue requirement *calculation* formula in Section 3 of Attachment MM, which listed five cost of service elements and specified how Annual Allocation Factors for those elements, expressed as percentages of costs taken from pre-withdrawal Tariff Attachment O, shall be calculated.<sup>82</sup> In other words, the Presiding Judge found no indication that Attachment MM was a usage-based cost allocator in any sense other than distributing, calculating, charging and collecting an underlying (i.e. otherwise allocated, assigned, or imputed) MVP cost responsibility.<sup>83</sup> The Presiding Judge stated that nothing in Attachment MM indicated that the MVP Usage Charge also assigned or imputed the system-wide MVP cost responsibility referenced in the first clause of Section III.A.2.g.i of Attachment FF, and that drawing any such inference would conflate the underlying MVP cost responsibility/obligation with the rate designed to recover it.

46. The Presiding Judge then identified the mechanism that allocated the underlying MVP cost obligation. Observing that MVPs are a category of projects developed under the MTEP, the Presiding Judge stated that cost responsibility for all MTEP projects was incurred by market participants upon approval by the MISO Board.<sup>84</sup> He referenced

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<sup>79</sup> *Id.* P 54.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* PP 50, 54.

<sup>83</sup> *Id.* PP 54-55.

<sup>84</sup> *Id.* P 56.

Section III of Attachment FF (Designation of Cost Responsibility for MTEP Projects), which specified:

. . . the recommended MTEP shall, for any expansion or enhancement that is included in the plan, designate: (i) the Market Participant(s) in one or more pricing zones that will bear cost responsibility for such expansion or enhancement . . .  
. [.]

The Presiding Judge found that this pre-withdrawal Tariff provision did not differentiate among the various categories of MTEP projects.<sup>85</sup> He stated that an MTEP project is categorized (i.e. approved) when the MISO Board votes to move it from the projects listed in MTEP Appendix B to the list of projects in MTEP Appendix A, and that there is no dispute that the costs associated with non-MVP MTEP categories, such as Baseline Reliability Projects, New Transmission Access Projects, and Market Efficiency Projects, are “allocated” in the sense of “financial obligations incurred” under Section III.A.2.j of Attachment FF when the MISO Board approves them. Thus, because MVPs are a category of MTEP projects, and because allocation upon MISO Board approval satisfied the “financial obligations incurred” requirement reflected in Section III.A.2.j of Attachment FF, the Presiding Judge concluded that Duke and ATSI incurred financial obligations for MVPs approved prior to their withdrawal from MISO, at the time the relevant projects were approved by the MISO Board.<sup>86</sup>

47. The Presiding Judge found no merit in the argument that, because Section III.A.2.g.i of Attachment FF did not expressly reference MISO Board approval for MVPs, they were not allocated at that time, because costs for other categories of MTEP Projects (such as Baseline Reliability Projects and New Transmission Access Projects) also are allocated upon MISO Board approval without express Tariff language.<sup>87</sup>

48. With the aforementioned interpretation of consistency in mind, the Presiding Judge compared the terms of Schedule 39 to the obligations imposed by the pre-withdrawal Tariff.<sup>88</sup> The Presiding Judge stated that, although Schedule 39 does not

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<sup>85</sup> *Id.* P 57.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* P 57 n.157.

<sup>88</sup> *Id.* PP 70-74.

expressly reference MVP cost allocation, it indicates that MVP-related financial obligations are incurred at MISO Board approval and specifies a new mechanism by which those financial obligations will be calculated and charged to a withdrawing transmission owner over time through the same transactions as the pre-withdrawal Tariff (i.e., the MVP Usage Charge and the MVP Usage Rate).<sup>89</sup>

49. The Presiding Judge found nothing in Schedule 39 that contradicts or is otherwise incompatible with the pre-withdrawal Tariff or the MISO Transmission Owners Agreement. The Presiding Judge held that the only material change Schedule 39 makes is to quantify the actual MVP cost calculation/recovery process for withdrawing transmission owners, which previously was relegated to an *ad hoc* negotiated/contested settlement procedure neither referenced nor defined in the pre-withdrawal Tariff.<sup>90</sup> The Presiding Judge found that Schedule 39 expressly clarifies that MVP cost allocation occurs upon MISO Board approval, but the underlying allocation itself remains unchanged from the pre-withdrawal allocation process. The Presiding Judge concluded that Schedule 39 did not impose any withdrawal-related financial obligations on ATSI or Duke that were not consistent with obligations otherwise imposed on them by the pre-withdrawal Tariff and the MISO Transmission Owners Agreement. The Presiding Judge found that Schedule 39 could therefore be automatically applied to ATSI and Duke.<sup>91</sup>

## ii. Briefs On Exceptions

50. ATSI, Duke, and Trial Staff contend that Article Five, Section II.B of the MISO Transmission Owners Agreement is a savings provision that does not create a financial obligation, but merely serves as an agreement to pay an already existing financial obligation.<sup>92</sup> Trial Staff asserts that the Commission's recognition that the Tariff obligates withdrawing transmission owners to pay MVP costs incurred does not prove that Duke and ATSI ever incurred MVP cost responsibility in the first place. Further, Trial Staff claims that the Presiding Judge overemphasized the importance of avoiding

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<sup>89</sup> *Id.* P 70.

<sup>90</sup> *Id.* PP 71, 74.

<sup>91</sup> *Id.* P 74. The Presiding Judge's ruling subjected ATSI to \$136 million in MVP-related costs associated with the Michigan Thumb Project and exposed Duke to \$514.2 million in MVP-related costs associated with 17 MVPs.

<sup>92</sup> ATSI Brief on Exceptions at 29-30; Duke Brief on Exceptions at 48-50; Trial Staff Brief on Exceptions at 17-18.

inappropriate cost shifts in this proceeding because, “[i]t is not a cost shift at all since the costs were never [Duke’s or ATSI’s] to bear.”<sup>93</sup>

51. Although ATSI notes that the Commission determined that MVP charges can be considered to be “financial obligations” with respect to future withdrawals from MISO, the Commission recognized that the MISO Transmission Owners Agreement does not specify what “financial obligations” consist of.<sup>94</sup> According to ATSI, the very purpose of the hearing was to determine whether MVP costs were ATSI’s financial obligations at the time of its withdrawal. ATSI, Duke, and Trial Staff generally argue that, prior to MISO’s proposal of Schedule 39, Duke and ATSI were not liable for any MVP-related costs under the pre-withdrawal Tariff.<sup>95</sup> According to ATSI and Trial Staff, MISO has previously acknowledged that, prior to the submission of Schedule 39, the pre-withdrawal Tariff did not include a mechanism for implementing the allocation and recovery of MVP costs after a transmission owner withdraws from MISO.<sup>96</sup>

52. Duke and ATSI challenge the Presiding Judge’s conclusion that cost responsibility for MVPs under the pre-withdrawal Tariff was determined in the same manner that cost responsibility was established for all MTEP projects.<sup>97</sup> Duke states that projects became eligible for classification as MVPs at the time of the MISO Board’s approval, but that eligibility did not amount to allocation of the project’s costs. Duke states that the Presiding Judge failed to meaningfully address and give effect to relevant pre-withdrawal Tariff language that illustrated this point.

53. Duke states that the starting point for interpretation of cost sharing in the pre-withdrawal Tariff was Attachment FF, which established the categories of cost-shared projects, the eligibility criteria for each category of project and the general parameters for cost responsibility for such projects.<sup>98</sup> Duke points out that the Presiding Judge did not

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<sup>93</sup> Trial Staff Brief on Exceptions at 19-20.

<sup>94</sup> ATSI Brief on Exceptions at 29-32.

<sup>95</sup> *Id.* at 40-43; Duke Brief on Exceptions at 86; Trial Staff Brief on Exceptions at 28-29.

<sup>96</sup> ATSI Brief on Exceptions at 40 (citing Ex. FE-32 at 4 n.13, 61); Trial Staff Brief on Exceptions at 22-27.

<sup>97</sup> Duke Brief on Exceptions at 50-68; ATSI Brief on Exceptions at 38-40.

<sup>98</sup> Duke Brief on Exceptions at 51.

consider the entire introductory paragraph of Section III of Attachment FF (Designation of Cost Responsibility for MTEP Projects) before concluding that the provision did not differentiate between the various categories of MTEPs. That paragraph provided that:

the recommended MTEP shall . . . designate: (i) the Market Participant(s) in one or more pricing zones that will bear cost responsibility for such enhancement or expansion, *as and to the extent provided by any applicable provision of the Tariff, including ... any applicable cost allocation method ordered by the Commission*; or (ii) *in the event and to the extent that no provision of the Tariff so assigns cost responsibility*, the Market Participants(s) or Transmission Customers(s) in one or more pricing zones from which the cost of such enhancements or expansions shall be recovered through charges established pursuant to Attachment GG of this Tariff, or as otherwise provided for under this Attachment FF (emphasis added).

Duke contends that the “as and to the extent” language made clear that cost allocations would be provided only in accordance with the Commission’s orders discussing MVP cost allocation or an applicable provision of the Tariff, which uniformly required that MVP cost responsibility is allocated based on usage.<sup>99</sup> Duke further states that the language in romanette two would not be included if the language in the first romanette generically assigned cost responsibility for all categories of MTEP projects. ATSI asserts that Section III of Attachment FF did, in fact, differentiate among various MTEP project categories by providing that the designation of cost responsibility for MTEP projects will be in accordance with “charges established pursuant to Attachment GG of this tariff, or as otherwise provided for under this Attachment FF,” which includes Section III.A.2.g’s express explanation of how costs of MVPs “will be allocated.”<sup>100</sup> ATSI argues that it is unreasonable as a matter of textual interpretation to deny that this provision addressed the allocation of cost responsibility for MVPs. Trial Staff adds that the introductory paragraph of Section III of Attachment FF was written and approved before the concept of MVPs was filed with the Commission, and even if this language did not differentiate between the various MTEP project categories, that reflects nothing more than that the provision was written before there was any such thing as an MVP.<sup>101</sup>

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<sup>99</sup> *Id.* at 55-56.

<sup>100</sup> ATSI Brief on Exceptions at 38.

<sup>101</sup> Trial Staff Brief on Exceptions at 32.

54. Trial Staff, Duke and ATSI contend that the assignment and calculation of MVP cost responsibility was determined differently than other MTEP projects in the pre-withdrawal Tariff.<sup>102</sup> Specifically, they state that non-MVP MTEP projects were allocated on a fixed percentage basis at the time of the MISO Board's approval and that such percentages did not change over time, while MVP cost responsibility was simultaneously assigned and calculated in accordance with transmission customers' actual usage of the MISO system. For instance, Duke states that Section II.B.1.c of Attachment FF provided that the benefits of Market Efficiency Projects and the cost allocations as a percentage of project cost were determined one time at the time that the project was presented to the MISO Board for approval, and Attachment GG specified that the system-wide portion of the allocation of the costs of such projects was carved up by Transmission Pricing Zones. Duke references Section 2.f of Attachment GG, which provided that the network upgrade annual revenue requirement apportioned to a pricing zone was the sum of all network upgrade charges for the pricing zone, including those network upgrade charges allocated on a system-wide basis to all pricing zones as provided under Attachment FF. In contrast, Duke states that there were no similar statements about MISO Board approval or zonal fixed percentage allocations for MVPs anywhere in the pre-withdrawal Tariff, and that such an important provision should not be read into the Tariff to justify imposition of a nearly three billion dollar obligation.<sup>103</sup> Duke states that the Presiding Judge erred in concluding that this obligation could be read in solely because Baseline Reliability Project and New Transmission Access Project costs also are allocated at the time of the MISO Board's approval without express Tariff language. Duke states that, even supposing that the non-MVP MTEP language could control over the language that expressly applied to MVPs in Section III.A.2.g of Attachment FF, Schedule 38 clearly indicates that the MISO Board's approval is necessary for the cost allocation to occur for Baseline Reliability Projects.<sup>104</sup>

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<sup>102</sup> *Id.* at 22-27; Duke Brief on Exceptions at 58-66; ATSI Brief on Exceptions at 34.

<sup>103</sup> Duke Brief on Exceptions at 64.

<sup>104</sup> *Id.* at 65. Schedule 38 provides a mechanism to collect and distribute revenues related to non-MVP MTEP projects associated with the Duke zones upon the withdrawal of Duke from MISO. Schedule 38 provides that the allocations for the non-MVP MTEP projects identified in Schedule 38 "become fixed percentages at the time of the project's approval by the MISO Board, and do not change over time." *See* Exhibit MTO-19 at 11.

55. Duke, ATSI, and Trial Staff state that the only obligation for MVP costs in the pre-withdrawal Tariff was contained in Section III.A.2.g.i of Attachment FF and Attachment MM.<sup>105</sup> Section II.A.2.g.i stated that MVP costs will be allocated as follows:

One-hundred percent (100%) of the annual revenue requirements of the [MVPs] shall be allocated on a system-wide basis to Transmission Customers that withdraw energy, including External Transactions sinking outside the Transmission Provider's region, and recovered through an MVP Usage Charge pursuant to Attachment MM.

ATSI notes that Section III.A.2.g.i did not identify MISO Board approval as having any bearing on cost allocation, but plainly defined allocation for MVPs as encompassing both an assignment of cost responsibility and the recovery (or quantification) *on a usage basis*: MVP costs “shall be allocated on a system-wide basis *to Transmission Customers that withdraw energy*, . . . and recovered through an MVP Usage Charge.”<sup>106</sup> ATSI contends that this obligation did not include an “up-front” allocation upon the MISO Board’s approval; rather, Attachment MM was the only allocator for MVP costs in the Tariff when ATSI and Duke withdrew from MISO. ATSI further asserts that there is no indication in the MVP Filing or MISO’s testimony that MISO intended to craft a methodology where cost responsibility is imposed at one point in time, but only quantified at a later point in time.<sup>107</sup> Duke notes that Section III.A.2.g.i of Attachment FF allocated MVP costs to transmission customers that withdraw energy, which demonstrates that MVP costs were allocated over time based on usage.<sup>108</sup> ATSI observes that the usage-based nature of MVP cost allocation was one of the hallmark features of MISO’s original MVP proposal.<sup>109</sup>

56. Trial Staff does not disagree that there is some distinction between the two clauses in Section III.A.2.g.i of Attachment FF, but argues that any distinction does not mean there are two allocations in that single sentence, one up-front at the time of the MISO

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<sup>105</sup> Duke Brief on Exceptions at 58; ATSI Brief on Exceptions at 34; Trial Staff Brief on Exceptions at 22.

<sup>106</sup> ATSI Brief on Exceptions at 35.

<sup>107</sup> *Id.* at 39.

<sup>108</sup> Duke Brief on Exceptions at 60.

<sup>109</sup> ATSI Brief on Exceptions at 35.

Board's approval and one a usage-based allocation occurring through the mechanism of Attachment MM. Trial Staff states that it is more reasonable to understand the distinction as the first clause describing the allocation methodology that will be implemented through Attachment MM, and pointing to the only actual allocation occurring through Attachment MM by usage of the MISO system. According to Trial Staff, only that interpretation is consistent with the manner in which MISO instructed the Commission in its MVP Filing to understand the MVP Tariff as having no up-front allocation of costs.<sup>110</sup> Trial Staff contends that the first clause of Section III.A.2.g.i of Attachment FF used the term "allocation" and then pointed to Attachment MM as the mechanism that did the actual cost assignment.<sup>111</sup> Duke states that the Presiding Judge failed in interpreting the distinction between the clauses in Section III.A.2.g.i, arguing that subsection g's lead-in statement that MVP costs "will be allocated as follows" does not leave room for a determination that a portion of the subsection that "follows" is concerned with something other than how MVP costs "will be allocated."<sup>112</sup> Duke states that the Presiding Judge failed to take into account the fact that Section III.A.2.g.i allocated MVP "annual revenue requirements," and therefore had a variable, temporal aspect, whereas each of the specific provisions governing non-MVP MTEP cost allocation provided for the allocation of "Project Costs," a term that did *not* include a temporal quality but rather included all costs over the life of the project.<sup>113</sup>

57. Duke notes that the Presiding Judge's finding that the MVP Usage Rate developed in Attachment MM did not "assign or impute the system-wide MVP cost responsibility referenced in the first clause of Section III.A.2.g.i of Attachment FF" does not stand up even under analysis of Section III.A.2.g.i alone, which required that 100 percent of MVP costs be recovered through Attachment MM.<sup>114</sup> Duke and ATSI state that Attachment MM provided for the annual recalculation of the MVP Usage Rate, a system-wide rate assessed to all customers that withdrew energy from the MISO transmission system each month. Duke explains that Section 3 of Attachment MM described the calculation of the annual revenue requirement for each MVP, and Section 4 of Attachment MM described the MVP Usage Rate.<sup>115</sup> Duke states that the formula for the

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<sup>110</sup> Trial Staff Brief on Exceptions at 25.

<sup>111</sup> *Id.* at 26.

<sup>112</sup> Duke Brief on Exceptions at 63.

<sup>113</sup> *Id.* at 59.

<sup>114</sup> *Id.* at 69.

<sup>115</sup> *Id.* at 70.

MVP Usage Rate provided for a monthly system-wide postage-stamp rate based on the annual revenue requirement, and each monthly calculation of MVP costs resulted in an entirely new distribution of cost responsibility, i.e., an entirely new allocation resulting from a fresh matching of 100 percent of MVP revenue requirements for the month to the usage of the system in that month.<sup>116</sup> Duke asserts that pricing zones had no role in this calculation; rather, it was a fresh calculation each month based on the usage of the MISO system as it then existed. In contrast, Duke states that non-MVP cost responsibility was assigned on a zonal basis under Attachment GG, which required that non-MVP MTEP costs be “apportioned” to pricing zones.<sup>117</sup> Duke argues that, while the Attachment FF provisions of both MVP and non-MVP MTEP costs referred to “system-wide allocation” of costs, reading the pre-withdrawal Tariff as a whole shows that system-wide allocation for non-MVPs had a zonal component while system-wide allocation for MVPs did not.

58. ATSI notes that at the time ATSI withdrew from MISO, the Michigan Thumb Project had not yet been constructed, no annual revenue requirement had been established, and MISO had not billed ATSI or anyone else for charges associated with the Project.<sup>118</sup> Thus, ATSI asserts that it is not possible for it to have “incurred” any “financial obligations” under Attachment FF, Section III.A.2.j of the pre-withdrawal Tariff.

59. Duke argues that it is clear that Attachment MM affected cost allocation because it was the only place in the pre-withdrawal Tariff that provided an important exception to MVP cost allocation – namely, exports to PJM were exempted from cost responsibility.<sup>119</sup> Duke argues that this fact demonstrates that the Presiding Judge erred in his conclusion that Attachment MM did not allocate costs.

### iii. Briefs Opposing Exceptions

60. MISO states that the Presiding Judge properly found that Article Five, Section II.B of the MISO Transmission Owners Agreement does not limit financial responsibility of withdrawing transmission owners to transmission service received by the transmission owners prior to withdrawal.<sup>120</sup> MISO states that the Presiding Judge appropriately

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<sup>116</sup> *Id.* at 73.

<sup>117</sup> *Id.* at 74.

<sup>118</sup> ATSI Brief on Exceptions at 36.

<sup>119</sup> Duke Brief on Exceptions at 71.

<sup>120</sup> MISO Brief Opposing Exceptions at 36.

recognized that the Commission has considered this provision applicable to the costs of transmission projects approved before the withdrawal of the transmission owner.<sup>121</sup>

61. MISO, MISO Transmission Owners, and Midwest Transmission Dependent Utilities (TDUs) state that the Presiding Judge correctly found that the MVP cost calculation methodology in Schedule 39 is consistent with the pre-withdrawal Tariff, and that it may therefore be applied to Duke and ATSI.<sup>122</sup> MISO argues that Schedule 39 is simply a substitute that quantifies the ad hoc exit fee negotiation process used under the pre-withdrawal Tariff to calculate a withdrawing owner's MVP cost responsibility, and therefore does not impose any new obligations on withdrawing transmission owners.<sup>123</sup>

62. MISO, MISO Transmission Owners and Midwest TDUs contend that Attachment FF to the pre-withdrawal Tariff made clear that MVP costs were: (i) 100 percent "allocated" on a system-wide basis immediately upon approval by the MISO Board; and then (ii) calculated and recovered over time through the MVP Usage Rate. MISO and Midwest TDUs state that Section II of Attachment FF identified projects for MTEP inclusion and specified the criteria for categorizing projects "[f]or purposes of assigning cost responsibility."<sup>124</sup> Because the MISO Board approved a project within one of these categories when it voted to place the project in Appendix A of the MTEP, MISO Transmission Owners and Midwest TDUs state that a cost allocation for each project was adopted upon MISO Board approval.<sup>125</sup> MISO states that the MISO Board's approval of an MTEP certified it as the transmission plan to be implemented by MISO, thereby finalizing the project classifications that determine the assignment of cost responsibility for each project.<sup>126</sup> MISO states that, once the project was approved, it was known that the project was wholly allocated system-wide, and matters of system use and

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<sup>121</sup> *Id.* (citing Initial Decision, 144 FERC ¶ 63,007 at P 46).

<sup>122</sup> *Id.* at 28-44, 73-75; MISO Transmission Owners Brief Opposing Exceptions at 15-25; Brief Opposing Exceptions of the Madison Gas and Electric Company and WPPI Energy, Docket No. ER12-715-003, at 5-8 (filed Sept., 4, 2013) (Midwest TDUs Brief Opposing Exceptions).

<sup>123</sup> MISO Brief Opposing Exceptions at 38-39.

<sup>124</sup> *Id.* at 47-48; Midwest TDUs Brief Opposing Exceptions at 11.

<sup>125</sup> MISO Transmission Owners Brief Opposing Exceptions at 15; Midwest TDUs Brief Opposing Exceptions at 11-12.

<sup>126</sup> MISO Brief Opposing Exceptions at 48.

revenue requirements were only needed for the purpose of implementing the original system-wide cost allocation that was determined upon MISO Board approval.<sup>127</sup>

63. MISO Transmission Owners argue that Section III of Attachment FF to the pre-withdrawal Tariff required a designation of “the Market Participant(s) in one or more pricing zones that will bear cost responsibility for” each transmission project that is included in the MTEP, and since the MISO Board’s approval is what puts each project into the MTEP, and Section III made no distinction between MVPs and other types of MTEP projects, cost responsibility for MVPs was assigned at the time of the MISO Board’s approval under the pre-withdrawal Tariff.<sup>128</sup> MISO also argues that there is no merit to Duke’s suggestion that the “as and to the extent” language in the introductory paragraph of Section III of Attachment FF precludes any finding that no significant distinctions exist between MVPs and non-MVPs with regard to allocation of their respective costs at the time of MISO Board approval.<sup>129</sup> MISO states that the Presiding Judge correctly found that express Tariff language on cost allocation upon MISO Board approval is not needed for MVPs, because costs of Baseline Reliability Projects and New Transmission Access Projects are also allocated upon the MISO Board’s approval without express Tariff Language.<sup>130</sup> MISO argues that Duke’s citation of the MISO Board’s approval language for Baseline Reliability Projects in Schedule 38 is misplaced because Schedule 38 took effect after Duke’s withdrawal. In addition, MISO and MISO Transmission Owners state that the MISO Board’s approval was an explicit criterion for an MVP to be included in Appendix A of the MTEP under Attachment FF, Section II.C.3.b, providing further support for their position that MISO Board approval determines cost allocation.<sup>131</sup>

64. MISO Transmission Owners, MISO and Midwest TDUs argue that Section III.A.2.g.i of Attachment FF to the pre-withdrawal Tariff did not allocate MVP costs, for the Presiding Judge properly found that it plainly distinguished between the system-wide allocation of MVP costs to all Transmission Customers and the recovery of

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<sup>127</sup> *Id.* at 49.

<sup>128</sup> MISO Transmission Owners Brief Opposing Exceptions at 28.

<sup>129</sup> MISO Brief Opposing Exceptions at 58.

<sup>130</sup> *Id.* at 50-51.

<sup>131</sup> MISO Transmission Owners Brief Opposing Exceptions at 23.

such costs through the MVP charge under Attachment MM.<sup>132</sup> Midwest TDUs state that it was the system-wide allocation, effective upon the MISO Board's approval, that "create[d] the class for the allocation" and established the financial obligations of a withdrawing Transmission Owner.<sup>133</sup> MISO Transmission Owners state that Section III.A.2.g.i of Attachment FF defined the class of ratepayers to which an approved MVP's revenue requirement was allocated at the time the MISO Board approved the project for inclusion of Appendix A to the MTEP, and that the revenue requirement was recovered through the MVP Usage Rate described in Attachment MM.<sup>134</sup> MISO Transmission Owners state that Trial Staff was incorrect in suggesting that Section III.A.2.g.i referenced Attachment MM as the mechanism that allocated MVP costs, because the Tariff clearly stated that MVP costs were *recovered or collected* through Attachment MM.<sup>135</sup>

65. MISO Transmission Owners and Midwest TDUs state that Attachment MM's purpose was to "set[] forth the method for collecting the charges associated with MVPs" and did not mention allocating MVP costs or revenue requirements to or among any market participants or groups of market participants; therefore, Attachment MM addressed only rate design and cost recovery.<sup>136</sup> MISO Transmission Owners challenge Duke's assertion that the monthly recalculation of the MVP Usage Rate pursuant to Attachment MM (in order to recover each month's portion of the aggregate MVP annual revenue requirement) was an entirely new allocation. Instead, MISO Transmission Owners state that the monthly adjustment of the rate was merely a recalculation of the rate that divided the revenue requirement among those to whom MVP cost responsibility was allocated by Section III.A.2.g.i of Attachment FF when the MISO Board approved the MVPs for which the revenue requirements were determined.<sup>137</sup> MISO argues that, if

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<sup>132</sup> *Id.* at 21, 28-29; MISO Brief Opposing Exceptions at 55; Midwest TDUs Brief Opposing Exceptions at 9.

<sup>133</sup> Midwest TDUs Brief Opposing Exceptions at 9-10.

<sup>134</sup> MISO Transmission Owners Brief Opposing Exceptions at 16-17.

<sup>135</sup> *Id.* at 22-23 (citing pre-withdrawal Tariff language in Section 1 of Attachment MM noting that the purpose of Attachment MM was to "set[] forth the method for collecting the charges associated with [MVPs]" and pre-withdrawal Tariff language in Section 5 of Attachment MM preserving each transmission owner's right to propose alternative ways "to recover the cost of" MVPs.).

<sup>136</sup> *Id.* at 29; Midwest TDUs Brief Opposing Exceptions at 10-11.

<sup>137</sup> MISO Transmission Owners Brief Opposing Exceptions at 32.

the pre-withdrawal Tariff intended Attachment MM to be the sole mechanism for MVP costs to be allocated to and recovered from withdrawing transmission owners, there would have been no need for Schedule 39 to quantify and establish a recovery mechanism for the MVP cost responsibility of withdrawing transmission owners.<sup>138</sup>

66. MISO and MISO Transmission Owners refute Duke's claim that MVP cost allocation under the pre-withdrawal Tariff was distinguished from cost allocation for non-MVP MTEP projects because MVP costs were not allocated to pricing zones.<sup>139</sup> MISO states that both MVP and non-MVP costs were allocated to pricing zones, as evidenced by the fact that the pre-withdrawal Tariff used almost identical language to state the cost allocation and cost recovery methods for every other type of MTEP project that was subject to a system-wide cost allocation.<sup>140</sup> MISO states that there is only one accepted meaning when a project's cost are allocated "system-wide" under Attachment FF – those costs are allocated to all pricing zones to be recovered from Transmission Customers in such pricing zones. For instance, MISO Transmission Owners state that 20 percent of the Baseline Reliability Costs and Market Efficiency Projects under the pre-withdrawal Tariff were allocated on a system-wide basis and recovered through a system-wide rate from all pricing zones existing at the time of MISO Board approval,<sup>141</sup> and there is no reason why the allocation of 100 percent of MVP costs under Section III.A.2.g.i of Attachment FF should also not be deemed made to all pricing zones in existence at the time of MISO Board approval.<sup>142</sup>

67. MISO also refutes Duke's claim that the revenue requirements referenced in Section III.A.2.g.i of Attachment FF had a variable, temporal aspect, unlike the "Project Costs" that were allocated for non-MVP MTEPs.<sup>143</sup> MISO states that Baseline Reliability

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<sup>138</sup> MISO Brief Opposing Exceptions at 57.

<sup>139</sup> *Id.* at 53-55; MISO Transmission Owners Brief Opposing Exceptions at 32.

<sup>140</sup> MISO Transmission Owners Brief Opposing Exceptions at 24.

<sup>141</sup> Section III.A.2.c.ii of Attachment FF stated that 20 percent of the cost for Baseline Reliability Projects with a voltage class of 345 kV or higher "shall be allocated on a system-wide basis to all Transmission Customers and recovered through a system-wide rate." Similarly, Section III.A.2.f of Attachment FF allocated 20 percent of the project cost of Market Efficiency Projects "on a system-wide basis to all Transmission Customers and recovered through a system-wide rate."

<sup>142</sup> MISO Transmission Owners Brief Opposing Exceptions at 24.

<sup>143</sup> MISO Brief Opposing Exceptions at 60-61.

Projects and Market Efficiency Projects also had an annual revenue requirement that was recovered, and that such revenue requirements changed year by year over the life of the project.

68. MISO and MISO Transmission Owners refute Duke's claim that Attachment MM affected cost allocation because it was the only place in the pre-withdrawal Tariff that provided an important exception to MVP cost allocation – namely, that exports to PJM were exempted from cost responsibility.<sup>144</sup> They first note that the provision at issue was vacated by the U.S. Court of Appeals for the Seventh Circuit (Seventh Circuit). They next state that the provision merely exempted certain types of transactions from the application of the MVP Usage Rate, and so Attachment MM was the logical place for the provision because Attachment MM set forth the rate design of the cost recovery mechanism, which was separate from the provisions of Attachment FF regarding the allocation/assignment of MVP cost responsibility.

#### iv. Commission Determination

69. We will reverse the Presiding Judge's finding that Schedule 39 is consistent with the pre-withdrawal Tariff, and that the Schedule 39 methodology of MVP cost allocation may therefore be applied to Duke and ATSI for the MVPs listed in Appendices A and B of Schedule 39. Specifically, we will reverse the Presiding Judge's finding that MVP costs were incurred by withdrawing transmission owners upon approval of the MVP(s) by the MISO Board, and that the pre-withdrawal Tariff is therefore consistent with Schedule 39. As further discussed below, the Presiding Judge's conclusion that Schedule 39 is consistent with the pre-withdrawal Tariff fails to recognize that the pre-withdrawal Tariff established that cost responsibility for MVPs was assigned differently than cost responsibility for non-MVPs.

70. Contrary to the assertions in the briefs opposing exceptions,<sup>145</sup> no Tariff provision, agreement, or other legal authority established that Duke and ATSI incurred MVP-related financial obligations before they withdrew from the MISO membership. The MISO Transmission Owners Agreement stated that “[a]ll financial obligations incurred and payments applicable to time periods prior to the effective date of such withdrawal shall be honored by [MISO] and the withdrawing [o]wner.”<sup>146</sup> The withdrawal provision of

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<sup>144</sup> *Id.* at 66; MISO Transmission Owners Brief Opposing Exceptions at 31.

<sup>145</sup> MISO Transmission Owners Brief Opposing Exceptions at 40-45; MISO Brief Opposing Exceptions at 28-44, 73-75; Midwest TDUs Brief Opposing Exceptions at 5-8.

<sup>146</sup> MISO Transmission Owners Agreement, art. V, § II.B.

Attachment FF of the pre-withdrawal Tariff similarly provided that a party that withdraws from MISO “shall *remain* responsible for all financial obligations *incurred . . . while a [m]ember of [MISO]* and payments *applicable to time periods prior to* the effective date of such withdrawal shall be honored by [MISO] and the withdrawing [m]ember.”<sup>147</sup> Neither the pre-withdrawal Tariff nor the Commission’s orders stated that MVP cost responsibility is established at the time the MISO Board approves the MTEP. Rather, in the MVP Order, the Commission held that withdrawing transmission owners “would remain responsible for all financial obligations incurred” and those “amounts would be determined at the time of the withdrawal.”<sup>148</sup> In the MVP Rehearing Order, the Commission clarified that, once cost responsibility for transmission system upgrades is established, withdrawing members would retain responsibility for any costs incurred prior to their withdrawal.<sup>149</sup> The Seventh Circuit has recognized that neither the MVP Order nor the MVP Rehearing Order concluded that Duke and ATSI are responsible for MVP costs, noting that the MVP Order merely states that “if they’re liable they’re liable.”<sup>150</sup> Thus, these provisions establish that costs incurred prior to withdrawal are part of the withdrawing transmission owners financial obligations, but do not answer the question of if and, if so, when, a transmission owner incurs a specific MVP-related financial obligation that must be included in an exit fee.

71. Article Five, Section II.B of the MISO Transmission Owners Agreement and Section III.A.2.j of Attachment FF to MISO’s pre-withdrawal Tariff provided the framework for determining ATSI and Duke’s MVP-related withdrawal obligations. As the Presiding Judge noted, in order for any MVP-related “financial obligations” referenced in those provisions to have been “incurred” by ATSI or Duke prior to withdrawal, they must have been allocated to ATSI and Duke while they were MISO members.<sup>151</sup> We affirm the Presiding Judge’s finding that Section III.A.2.g.i of Attachment FF was the only pre-withdrawal Tariff provision that specifically referenced MVP cost allocation, stating that MVP costs “will be allocated as follows:”

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<sup>147</sup> MISO, FERC Electric Tariff, Attachment FF, § III.A.2.j (Withdrawal from Midwest ISO) (3.0.0) (emphasis added).

<sup>148</sup> MVP Order, 133 FERC ¶ 61,221 at P 471.

<sup>149</sup> MVP Rehearing Order, 137 FERC ¶ 61,074 at P 322.

<sup>150</sup> *Ill. Commerce Comm’n v. FERC*, 721 F.3d 764, 780 (7th Cir. 2013).

<sup>151</sup> Initial Decision, 144 FERC ¶ 63,007 at P 49.

One-hundred percent (100%) of the annual revenue requirements of the [MVPs] shall be allocated on a system-wide basis to Transmission Customers that withdraw energy, including External Transactions sinking outside the Transmission Provider's region, and recovered through an MVP Usage Charge pursuant to Attachment MM.

72. However, we will reverse the Presiding Judge's finding that Section III.A.2.g.i distinguished between the system-wide allocation of MVP costs to all Transmission Customers and the recovery of such costs through the MVP Usage Charge under Attachment MM. We agree with Duke that the lead-in statement in Section III.A.2.g.i, indicating that MVP costs "will be allocated as follows," does not leave room for a determination that a portion of the subsection that "follows" is concerned with something other than how MVP costs will be allocated. We agree with Trial Staff that the two clauses of Section III.A.2.g.i are properly read to describe, in the first clause, the allocation methodology to be implemented through Attachment MM, which is identified in the second clause. We agree with ATSI and Duke that Section III.A.2.g.i defined allocation for MVPs as encompassing both an assignment of cost responsibility and the recovery (or quantification) on a usage basis over time to transmission customers that withdraw energy. We find that Section III.A.2.g.i did not identify MISO Board approval as having any bearing on MVP cost allocation. Thus, we will reject the Presiding Judge's conclusion that the MVP Usage Charge was not the pre-withdrawal Tariff provision that allocated MVP costs such that they were "financial obligations incurred" under the MISO Transmission Owners Agreement and Section III.A.2.j of Attachment FF.

73. We also will reverse the Presiding Judge's finding that pre-withdrawal Attachment MM calculated, distributed, and collected an underlying (i.e., previously allocated) MVP cost obligation, but that did not itself establish a transmission owner's underlying financial responsibility for MVP costs. The Presiding Judge examined the language of Attachment MM: Section 1 set forth "the method for *collecting* the charges associated with [MVPs] and for *distributing* the revenues associated with such charges in accordance with Schedule 26-A [of MISO's Tariff]," and Section 4(a) described the MVP Usage Rate as a "system-wide rate *charged* via Schedule 26-A."<sup>152</sup> The Presiding Judge then noted that Schedule 26-A referred back to the MVP annual revenue requirement *calculation* formula in Section 3 of Attachment MM.<sup>153</sup> Section 4 described the MVP Usage Rate as a system-wide rate based on the annual revenue requirement and charged monthly to market participants based on their actual energy withdrawals from

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

<sup>153</sup> *Id.* PP 50, 54.

MISO. We will reverse the Presiding Judge's conclusion that nothing in the language of Attachment MM indicated that the MVP Usage Rate was the mechanism that assigned or imputed the system-wide MVP cost responsibility referenced in the first clause of Section III.A.2.g.i of Attachment FF. Section 3 of Attachment MM described the calculation of the annual revenue requirement for each MVP, and Section 4 of Attachment MM described the MVP Usage Rate. We agree with Duke that the formula for the MVP Usage Rate provided for a monthly system-wide rate based on the annual revenue requirement for each MVP, and each monthly calculation of MVP costs resulted in a new allocation of MVP costs resulting from the usage of the system in that month.

74. We find that the Presiding Judge's Tariff interpretation that MVP costs are allocated to specific transmission owners at the time of the MISO Board's approval fails to account for the full text of the introductory paragraph to Section III of Attachment FF to the pre-withdrawal Tariff. After erroneously concluding that the MVP Usage Charge referenced in Section III.A.2.g.i of Attachment FF did not initially allocate MVP costs for the purposes of being "financial obligations incurred" by withdrawing transmission owners, the Presiding Judge stated that, because MVPs are a category of MTEP, Section III of Attachment FF (Designation of Cost Responsibility for MTEP Projects) contained such provisions. The introductory paragraph of Section III required a designation of "the Market Participant(s) in one or more pricing zones that will bear cost responsibility for" each transmission project that is included in the MTEP. Section III of Attachment FF identified projects for MTEP inclusion and specified the criteria for categorizing projects "[f]or purposes of assigning cost responsibility." The Presiding Judge concluded that Section III of Attachment FF made no relevant distinction between MVPs and other types of MTEP projects (i.e., Baseline Reliability Projects and Market Efficiency Projects), and found that, because the MISO Board approved a project within one of these categories when it voted to place the project in Appendix A of the MTEP, a financial obligation for each project included in Appendix A of the MTEP (regardless of category) can be said to have been incurred upon the MISO Board's approval.

75. We will reverse the Presiding Judge's interpretation of Section III of Attachment FF. Contrary to the Presiding Judge's conclusion, we find that Section III did not establish that financial responsibility for all MTEP projects was determined at the same point in time; namely, upon the MISO Board's approval of the MTEP. We agree with Duke and ATSI that the Presiding Judge did not consider the full text of the introductory paragraph to Section III of Attachment FF, which stated that:

the recommended MTEP shall . . . designate: (i) the Market Participant(s) in one or more pricing zones that will bear cost responsibility for such enhancement or expansion, *as and to the extent provided by any applicable provision of the Tariff, including ... any applicable cost allocation method ordered by the Commission*; or (ii) *in the event and to the extent that*

*no provision of the Tariff so assigns cost responsibility, the Market Participants(s) or Transmission Customers(s) in one or more pricing zones from which the cost of such enhancements or expansions shall be recovered through charges established pursuant to Attachment GG of this Tariff, or as otherwise provided for under this Attachment FF (emphasis added).*

We agree with Duke and ATSI that this paragraph required any cost responsibility in Section III of Attachment FF to be subject to the remainder of Section III, which made clear that financial obligations for non-MVPs were assigned differently than financial obligations for MVPs. Specifically, as discussed above, Section III.A.2.g.i of Attachment FF allocated MVP cost responsibility based on usage. Whereas the costs associated with non-MVP MTEP projects were predetermined and assigned by virtue of the MISO Board's approval of the MTEP, Section IIIA.2.g.i allocated 100 percent of MVP costs on a system-wide basis to transmission customers that withdrew energy in accordance with the usage-based formula set forth in Attachment MM. Attachment MM and Schedule 26-A in turn provided for the annual recalculation of the MVP Usage Charge and its assessment to all customers that withdrew energy from the MISO transmission system each month. As a result, MVP costs were not allocated by zone up front; instead, the annual revenue requirement associated with MVPs was allocated based upon each transmission customer's use of the MISO system during that year.

76. We find that the Presiding Judge's interpretation of Section III.A.2.g.i and Section III of Attachment FF is inconsistent with the pre-withdrawal Tariff language discussing the allocation of costs for other MTEP categories, which shows that cost responsibility for MVPs was assigned differently than cost responsibility for non-MVPs. For instance, Sections III.A.2.c.ii and III.A.2.f of Attachment FF provided that 20 percent of the costs of Baseline Reliability Projects and Market Efficiency Projects were allocated on a system-wide basis and recovered through a system-wide rate, while the remaining 80 percent of costs were allocated on a sub-regional basis to all transmission customers in designated pricing zone (for Baseline Reliability Projects) or sub-regions (for Market Efficiency Projects). The allocated costs to each sub-region for Market Efficiency Projects was established in Section II.B.1.c of Attachment FF, which stated that the "cost allocations as a percentage of project cost shall be determined one time at the time that the project is presented to [the Board of Directors] for approval." Under Section III.A.c.ii of Attachment FF, the sub-regional allocation of costs to each pricing zone for Baseline Reliability Projects was determined on a case-by-case basis in accordance with a Line Outage Distribution Factor Table (LODF Table) developed by MISO. The LODF Table was used to determine the pricing zones to be included in the sub-regional allocation of the project cost, as well as the percentage of the sub-regional allocation assigned to each designated pricing zone. The costs of Baseline Reliability Projects and Market Efficiency Projects were recovered through charges established

pursuant to Attachment GG (Network Upgrade Charge). Attachment GG provided formulas for calculating the rates applicable to customers in each pricing zone to recover the costs of the Network Upgrades. Attachment GG provided that the network upgrade charge applicable to a pricing zone was calculated by summing the revenue requirements of all transmission owners apportioned to that pricing zone, including those annual revenue requirements allocated on a system-wide basis to all pricing zones, and then developed a per-unit charge using the zonal rate divisor in the Attachment O formula rate. The project costs for both Baseline Reliability Projects and Market Efficiency Projects were apportioned at the time of the MISO Board's approval, with such apportionment reflected in Appendix A of the MTEP (which lists the projects approved by the MISO Board of Directors).

77. In contrast, the MVP provisions of the pre-withdrawal Tariff did not contain any language about the MISO Board's approval or an up-front allocation to pricing zones, and instead, Section III.A.2.g.i provided that the annual revenue requirement associated with each MVP was allocated based upon each transmission customer's monthly use of the MISO system during that year. Furthermore, MISO did not specify zonal allocation for the costs of MVPs in Appendix A of the MTEP as it did for Baseline Reliability Projects and Market Efficiency Projects. We note that MISO could have proposed language in its pre-withdrawal Tariff making clear that MVP costs were allocated to specific transmission owners' zones at the time of MISO Board approval, as it did for Market Efficiency Projects, but MISO did not do so until it filed Schedule 39. In addition, MISO's Business Practice Manual for Transmission Planning specifically states that Market Efficiency Projects are allocated one time at the time of MISO Board approval,<sup>154</sup> while the subsequent section applicable to MVPs does not contain this same language.<sup>155</sup>

78. We will reverse the Presiding Judge's conclusion that Schedule 39 does not impose on ATSI and Duke any withdrawal-related financial obligations that are not consistent with the obligations otherwise imposed on them by the pre-withdrawal Tariff. Schedule 39 indicates that MVP financial obligations are incurred when the MISO Board approves the project, which is inconsistent with the pre-withdrawal Tariff, as discussed above. Thus, we will reverse the Presiding Judge's determination that ATSI and Duke

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<sup>154</sup> MISO Transmission Planning Business Practice Manual, BPM-029-r9 § 7.4.2 (effective May 28, 2013).

<sup>155</sup> *Id.* § 7.5.

are responsible for the costs of the MVPs listed in Appendices A and B of Schedule 39, all of which were approved by the MISO Board prior to their withdrawal.<sup>156</sup>

**c. Witness Testimony and Commission Precedent**

**i. Initial Decision**

79. The Presiding Judge dismissed arguments from ATSI and Duke that MISO's witness in this proceeding reversed her prior position about the cost allocation of MVPs – namely, that the witness stated in the MVP Filing that pre-withdrawal Tariff Attachment FF did *not* impose any up-front allocation of MVP costs. The Presiding Judge stated that the term “allocation” has more than one meaning, and that the witness' position in the MVP Filing is not incongruent with her position in this proceeding.<sup>157</sup> He found that the testimony in the MVP Filing focused on the use-based MVP cost calculation, apportionment and recovery over time through the MVP Usage Charge, while the testimony in this case distinguished the pre-withdrawal Tariff's recovery-oriented allocation procedures from the underlying MVP cost obligation/responsibility they were designed to recover. The Presiding Judge also dismissed arguments that the Commission recognized in the MVP Order and MVP Rehearing Order that MVP costs are allocated over time on the basis of usage.<sup>158</sup>

**ii. Briefs On Exceptions**

80. Duke and ATSI contend that the Presiding Judge erred in dismissing arguments related to the fact that MISO's witness submitted conflicting testimony about the nature of MVP cost allocation. Duke and ATSI state that, in the MVP Filing, the MISO witness emphasized that there is no up-front allocation for MVPs and that MVP allocation is based on usage over time; however, in this proceeding, the same witness re-characterized her position and endorsed a much vaguer concept of MVP cost allocation as a “continuum.”<sup>159</sup> Trial Staff notes that the Initial Decision acknowledges that “[t]he various ratemaking senses [of the term allocation] include (i) assign, (ii) impute, (iii) distribute, (iv) apportion, (v) quantify, (vi) calculate, (vii) charge, and (viii) collect.”

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<sup>156</sup> See Initial Decision, 144 FERC ¶ 63,007 at P 74; Ex. MTO-1 at 29-30; Ex. MTO-2 at 8-11.

<sup>157</sup> Initial Decision, 144 FERC ¶ 63,007 at P 55 n.156.

<sup>158</sup> *Id.*

<sup>159</sup> Duke Brief on Exceptions 78-81; ATSI Brief on Exceptions at 37.

Trial Staff contends that Attachment MM can reasonably be understood to assign, distribute, apportion, quantify, calculate, charge, and collect MVP costs through usage, thereby encompassing six of the seven ratemaking characteristics of allocation identified by the Initial Decision.<sup>160</sup>

81. Duke emphasizes that the Initial Decision overlooks the Commission's previous recognition that MVP costs are allocated over time on the basis of usage.<sup>161</sup> According to Duke, the Commission has previously pointed to the usage-based allocation of MVP costs as the reason that MISO's MVP proposal satisfied principles of cost causation.<sup>162</sup> Further, Duke states that the Commission reiterated those findings with respect to MISO's Order No. 1000 compliance filing.<sup>163</sup>

82. Duke argues that the Initial Decision gives undue weight to the passage in the MVP Rehearing Order stating that "the withdrawal language in Attachment FF puts parties on notice that once cost responsibility for transmission system upgrades are established, withdrawing members will retain any costs incurred before their withdrawal date subject to a negotiated or contested exit agreement accepted by the Commission."<sup>164</sup> According to Duke, the quoted passage merely reflects a truism that a withdrawing transmission owner must settle any incurred obligations, and "does not resolve whether such 'cost responsibility' was 'established' for [Duke]," but "leaves the issue open, saying that [Duke] 'will retain *any* costs incurred before [its] withdrawal.'"<sup>165</sup> Duke also notes that the Commission elaborated on this point, explaining that it would not prejudge any exit fee agreement.<sup>166</sup> Thus, Duke emphasizes that the mere recognition that a withdrawing transmission owner may have potential MVP liabilities to settle does not justify the creation of such obligations. Trial Staff points out that the Seventh Circuit has

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<sup>160</sup> Trial Staff Brief on Exceptions at 26.

<sup>161</sup> Duke Brief on Exceptions at 76-78.

<sup>162</sup> *Id.* at 76 (citing MVP Order, 133 FERC ¶ 61,221 at PP 383, 385; MVP Rehearing Order, 137 FERC ¶ 61,074 at P 253).

<sup>163</sup> *Id.* at 76-77 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 142 FERC ¶ 61,215, at P 438 (2013)).

<sup>164</sup> *Id.* at 44-45 (citing Initial Decision, 144 FERC ¶ 63,007 at P 72).

<sup>165</sup> *Id.* at 45.

<sup>166</sup> *Id.* (citing MVP Rehearing Order, 137 FERC ¶ 61,074 at P 321).

recognized that the MVP Order and the MVP Rehearing Order do not address the MVP-cost responsibility of Duke and ATSI because the Commission concluded that those issues were beyond the scope of the proceeding.<sup>167</sup>

**iii. Briefs Opposing Exceptions**

83. MISO states that the Presiding Judge properly rejected arguments that MISO reversed its interpretation of the meaning of the term “allocation.” MISO states that its testimony explained that the term “allocation” has been loosely used in the past, which has sometimes resulted in the use of the word to encompass “recovery.”<sup>168</sup> MISO’s testimony acknowledges that previous testimony filed in support of the MVP Filing referenced no “upfront allocation” of MVP costs, but MISO clarified that this statement was meant to mean that there is no fixed allocation percentage. MISO argues that the Presiding Judge properly found that the word “allocate” is a ratemaking term of art, and concluded that the pre-withdrawal Tariff’s use of the word allocate is consistent with the assignment of MVP costs upon MISO Board approval.<sup>169</sup>

84. MISO Transmission Owners and Midwest TDUs dispute the claim that the Commission’s decisions in the MVP Order and the MVP Rehearing Order demonstrate that responsibility for MVP costs is determined based on usage.<sup>170</sup> For instance, they assert that the passages cited by Duke, such as language in the MVP Order stating that “the proposed MVP rate design allocates cost based on usage over time,” address rate design and cost recovery, rather than how or when transmission owners become responsible for MVP costs in the first place.<sup>171</sup> Midwest TDUs state that although the MVP Order and the MVP Rehearing Order did not determine the costs that particular withdrawing transmission owners may face, they are relevant to this proceeding because the Commission approved and interpreted the Tariff’s withdrawal provisions to hold

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<sup>167</sup> Trial Staff Brief on Exceptions at 33-35 (citing *Ill. Commerce Comm’n v. FERC*, 721 F.3d at 780).

<sup>168</sup> MISO Brief Opposing Exceptions at 46 n.106 (referencing Exhibit MTO-14 at 59:30, 60:1-2).

<sup>169</sup> *Id.* at 46-47.

<sup>170</sup> MISO Transmission Owners Brief Opposing Exceptions at 33-37; Midwest TDUs Brief Opposing Exceptions at 13-19.

<sup>171</sup> MISO Transmission Owners Brief Opposing Exceptions at 34; Midwest TDUs Brief Opposing Exceptions at 17.

withdrawing transmission owners responsible for MVP costs.<sup>172</sup> MISO Transmission Owners state that the MVP Order found that “a transmission owner that withdraws from MISO would remain responsible for all financial obligations incurred with respect to the MVP Tariff provisions while a member of MISO” and that a withdrawing transmission owner could be “subject to an exit fee reflecting MVP costs allocated to its zonal load.”<sup>173</sup>

#### iv. Commission Determination

85. We will affirm the Presiding Judge’s determination that the MISO witness did not submit conflicting testimony about the definition of the term “allocation.” Although the briefs on exception note that the MISO witness previously stated in the MVP Filing that MVP cost allocation is not up-front, but rather based on usage over time, the Presiding Judge stated that the term “allocation” does not have one meaning and, based on a review of the MVP Filing and the witness’ testimony in this proceeding, reasonably concluded that the witness’ testimony does not conflict with MISO’s position in this case. After similarly reviewing the MISO witness’ 2010 testimony in support of the MVP Filing,<sup>174</sup> we find reasonable the Presiding Judge’s finding that the seemingly different uses of the term “allocate” can be explained by the fact that the term has been used imprecisely by the parties in the past, and the testimony in the MVP Filing focused on apportionment and recovery of MVP costs over time through the MVP Usage Charge, while the testimony in this case attempted to distinguish the Tariff’s recovery-oriented allocation procedures from the underlying MVP cost obligation/responsibility they were designed to recover.

86. The briefs on and opposing exceptions quote various Commission orders to suggest that the Commission has already ruled on the issue of MVP cost allocation. For instance, Duke states that the MVP Orders held that MVP costs are not allocated upfront and that MVP cost allocations change over time to reflect changes in MVP beneficiaries.<sup>175</sup> However, Commission dicta in prior proceedings is not dispositive. In the MVP Orders, the Commission accepted MVPs as a new category of transmission

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<sup>172</sup> Midwest TDUs Brief Opposing Exceptions at 18.

<sup>173</sup> MISO Transmission Owners Brief Opposing Exceptions at 26 (citing MVP Order, 133 FERC ¶ 61,221 at PP 470-471).

<sup>174</sup> Ex. D-11.

<sup>175</sup> Duke Brief on Exceptions at 77 (referencing MVP Order, 133 FERC ¶ 61,221 at PP 383, 385; MVP Rehearing Order, 137 FERC ¶ 61,074 at P 253).

project and found MISO's proposed MVP rate design to be generally just and reasonable, but the Commission did not address the specific point in time that initial MVP cost allocation should occur.<sup>176</sup> Here, the specific issue being considered is at what point in time the costs of MVPs are allocated such that they are "financial obligations incurred" under the MISO Transmission Owners Agreement and Section III.A.2.j of MISO's pre-withdrawal Tariff. The Commission's prior use of the term "allocate" was not used in the specific context of the time at which withdrawing transmission owners become initially responsible for MVP costs, but rather in the context of approving generally the usage-based cost allocation methodology for MVP cost recovery.<sup>177</sup>

87. In the same vein, prior Commission orders did not determine which MVP costs withdrawing transmission owners would be responsible for upon withdrawal, as suggested by the briefs opposing exceptions - they merely indicate the potential responsibility for such costs, which would be determined on a case-by-case basis for each withdrawing transmission owner based on the approved Tariff provisions in effect prior to their withdrawal. In the MVP Order, the Commission stated that "a transmission owner that withdraws from [MISO] would remain responsible for all financial obligations incurred with respect to the MVP Tariff provisions while a member of [MISO]."<sup>178</sup> The Commission did not reach the question of which MVP costs would be considered "financial obligations incurred," but found that the MVP costs that a particular withdrawing member may face were beyond the scope of the generic rate proceeding.<sup>179</sup>

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<sup>176</sup> MVP Order, 133 FERC ¶ 61,221 at PP 383-388; MVP Rehearing Order, 137 FERC ¶ 61,074 at PP 253-259.

<sup>177</sup> MVP Order, 133 FERC ¶ 61,221 at PP 383-388; MVP Rehearing Order, 137 FERC ¶ 61,074 at PP 253-259.

<sup>178</sup> MVP Order, 133 FERC ¶ 61,221 at PP 470-471.

<sup>179</sup> *Id.* P 472.

**d. Cost Causation**

**i. Initial Decision**

88. The Presiding Judge rejected all arguments related to cost causation, finding that the Commission determined in the Schedule 39 Order that cost causation issues are irrelevant to this proceeding.<sup>180</sup>

**ii. Briefs On Exceptions**

89. Duke notes that 16 of the 17 MVPs for which MISO holds Duke responsible were approved just three weeks before Duke withdrew from MISO, and MISO knew long before it approved the projects that Duke would withdraw.<sup>181</sup> Duke states that MISO nevertheless failed to include in its transmission planning a contingency for Duke's withdrawal, and now wants Duke to pay \$2.3 billion over 60 years for projects that it will not use or benefit from, which will shift costs away from actual users of MISO transmission service to entities that have withdrawn and that do not take such service.<sup>182</sup> Duke also claims that the Seventh Circuit has explained that the purpose of exit fees is to prevent a departed transmission owner from reaping a windfall, not to act as a barrier to exit.<sup>183</sup> Duke argues that the filed rate doctrine would prevent MISO from charging for MVPs without any nexus to transmission service and without any basis in the pre-withdrawal Tariff.<sup>184</sup>

90. ATSI argues that MISO has acknowledged that the Michigan Thumb Project in particular was not planned for ATSI, nor is there any evidence that the project will benefit customers in the ATSI zone.<sup>185</sup> ATSI argues that it is unjust and unreasonable to interpret "financial obligations" under the MISO Transmission Owners Agreement to

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<sup>180</sup> Initial Decision, 144 FERC ¶ 63,007 at P 60 (citing Schedule 39 Order, 138 FERC ¶ 61,140).

<sup>181</sup> Duke Brief on Exceptions at 90-91.

<sup>182</sup> *Id.* at 25, 75, 92.

<sup>183</sup> *Id.* at 9 (citing *Ill. Commerce Comm'n v. FERC*, 721 F.3d at 777).

<sup>184</sup> *Id.* at 92-93.

<sup>185</sup> ATSI Brief on Exceptions at 31.

charge ATSI for a project that was not caused by ATSI's transmission customers and that will not benefit those customers.

**iii. Briefs Opposing Exceptions**

91. MISO Transmission Owners state that the Presiding Judge properly rejected arguments that Duke and ATSI should not pay for MVP costs that they allegedly did not cause and purportedly will not benefit from, because the Schedule 39 Order already determined that the interpretation of financial obligations under Attachment FF to the pre-withdrawal Tariff is a tariff and contract matter, and not a cost causation matter.<sup>186</sup> MISO Transmission Owners state that utilities which elect to change from one RTO to another must bear the costs of their decision, and holding Duke and ATSI responsible for obligations incurred prior to withdrawal represents proper application of the filed rate.<sup>187</sup>

92. MISO dismisses Duke's argument that MISO should have evaluated whether to reconsider building the MVPs in light of Duke's withdrawal notice, stating that this argument has no bearing on Duke's ultimate cost responsibility for those projects.<sup>188</sup> MISO states that the mere expectation of withdrawal does not shield the withdrawing owner from incurring financial obligations for transmission projects approved prior to withdrawal. In fact, MISO notes that both ATSI and Duke have previously agreed to accept cost responsibility for non-MVPs that were approved after the entities gave notice of withdrawal but before the actual withdrawal date.<sup>189</sup> MISO also states that Duke's arguments alleging the impropriety of MISO's system planning procedures are beyond the scope of the hearing and were already addressed by the Seventh Circuit.

93. MISO states that the Schedule 39 Order already rejected arguments suggesting that assignment of MVP cost responsibility to withdrawing transmission owners constitutes an improper barrier to exit from RTOs.<sup>190</sup> MISO believes the Presiding Judge properly disregarded any alleged adverse effect associated with the liability of withdrawing transmission owners.

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<sup>186</sup> MISO Transmission Owners Brief Opposing Exceptions at 51 (citing Schedule 39 Order, 138 FERC ¶ 61,140 at P 60).

<sup>187</sup> *Id.* at 52.

<sup>188</sup> MISO Brief Opposing Exceptions at 40.

<sup>189</sup> *Id.* at 41 (referring to Schedules 37 and 38).

<sup>190</sup> *Id.* at 72 (citing Schedule 39 Order, 138 FERC ¶ 61,140 at P 68).

iv. **Commission Determination**

94. We will affirm the Presiding Judge’s finding that cost causation issues are outside the scope of the matters set for hearing. The Commission found in the Schedule 39 Order<sup>191</sup> (and we affirm below in our determination on the requests for rehearing)<sup>192</sup> that the issues presented for hearing relate to the obligation to pay for already-approved MVPs that is placed on withdrawing transmission owners by the MISO Transmission Owners Agreement and the pre-withdrawal Tariff. As stated in the Schedule 39 Order, the calculation of the “financial obligations incurred” while a member of MISO under Section III of Attachment FF to the pre-withdrawal Tariff and Article Five, Section II.B of the MISO Transmission Owners Agreement is a tariff and contract interpretation matter. The determining factor is whether the cost responsibility has been assigned before the withdrawal date, and if it has, the withdrawing transmission owner will be responsible for those costs. Although the withdrawing transmission owner may not benefit from the system upgrades after withdrawal to the extent that it would benefit had it remained a member of MISO, that circumstance is a consequence of the transmission owner’s business decision to withdraw. We find that the exit fee language in the pre-withdrawal Tariff was intended to prevent the volatility in cost assignments that would occur from transferring cost responsibility to remaining MISO members as a result of the transmission owner’s withdrawal.

e. **The Michigan Thumb Project**

i. **Initial Decision**

95. The Presiding Judge dismissed several arguments challenging the imposition on ATSI of costs related specifically to the Michigan Thumb Project.<sup>193</sup> First, ATSI argued that it is impermissible to allocate any MVP costs associated with the project to ATSI because ATSI will not benefit from the project. The Presiding Judge summarily rejected

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<sup>191</sup> Schedule 39 Order, 138 FERC ¶ 61,140 at P 63.

<sup>192</sup> *See infra* P 166.

<sup>193</sup> Initial Decision, 144 FERC ¶ 63,007 at PP 58-68. Though the Presiding Judge found that none of ATSI’s challenges regarding the Michigan Thumb Project fell within the consistency analysis required by the Schedule 39 Order, the Presiding Judge considered ATSI’s arguments as a matter of administrative efficiency. *Id.* P 59.

this argument, finding that the Schedule 39 Order concluded that cost causation arguments are irrelevant.<sup>194</sup>

96. Second, ATSI argued that the MISO Board's decision to approve the Michigan Thumb Project violated the pre-withdrawal Tariff's system planning requirements because MISO was aware that ATSI intended to withdraw when ATSI gave notice on June 31, 2009, more than two years before the project was approved. The Presiding Judge accepted the arguments of the MISO Transmission Owners and MISO that the pre-withdrawal Tariff's transmission planning requirements are irrelevant to when a withdrawing transmission owner stops incurring MVP-related financial obligations.<sup>195</sup> The Presiding Judge found that, under Article Five, Section II of the MISO Transmission Owners Agreement, the cut-off date for accrual of any financial obligations is the withdrawal effective date, rather than the date that a transmission owner notifies MISO of its intent to withdraw. The Presiding Judge noted that a transmission owner may rescind its notice of withdrawal or extend its withdrawal at any time, and transmission owners must not be allowed to avoid MVP cost responsibility by serving a notice of withdrawal with a protracted effective date.<sup>196</sup>

97. Third, ATSI argued that the Michigan Thumb Project was not properly approved as part of a portfolio of projects, as required under Section II of Attachment FF under the pre-withdrawal Tariff, until after ATSI withdrew from MISO on May 31, 2011. ATSI argued that the project was not properly approved because it was approved out of cycle and in isolation.<sup>197</sup> The Presiding Judge noted that Section I.B.1.c of Attachment FF to the pre-withdrawal Tariff allowed for an expedited "out-of-cycle" MTEP approval process to facilitate the development of system enhancements that would be jeopardized under the normal MTEP planning cycle.<sup>198</sup> The Presiding Judge noted that MISO must follow this streamlined process if it receives a valid project sponsor request to do so. The Presiding Judge found that the Michigan Thumb Project was properly approved under this out-of-cycle process on August 19, 2010. The Presiding Judge also found that the pre-withdrawal Tariff did not forbid approval of a project in isolation; instead, it only

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<sup>194</sup> *Id.* P 60 (citing Schedule 39 Order, 138 FERC ¶ 61,140 at P 63).

<sup>195</sup> *Id.* P 61.

<sup>196</sup> *Id.* P 63.

<sup>197</sup> *Id.* P 65.

<sup>198</sup> *Id.* P 66.

required projects to be evaluated as part of a portfolio of projects.<sup>199</sup> The Presiding Judge found that the Michigan Thumb Project was evaluated as part of a portfolio of projects identified in the MVP Filing as a “starter list” of potential MVPs. The Presiding Judge concluded that the Michigan Thumb Project, which was listed in Appendix A of Schedule 39, qualified for MVP cost allocation under the pre-withdrawal Tariff.<sup>200</sup> Thus, the Presiding Judge found that the application of Schedule 39 to ATSI was consistent with the pre-withdrawal Tariff.

**ii. Briefs On Exceptions**

98. ATSI argues that charging ATSI for the Michigan Thumb Project conflicts with the rationale underlying the requirement that MVPs be approved as part of a portfolio.<sup>201</sup> According to ATSI, the portfolio requirement helps to ensure that the costs and benefits of a project are spread broadly throughout the MISO region.<sup>202</sup> ATSI maintains that charging it for the Michigan Thumb Project would conflict with this goal by effectively holding ATSI responsible for a single slice of the 2011 MVP portfolio “even though all agree ATSI is *not* responsible for the [p]ortfolio (as a matter of contract).”<sup>203</sup> In sum, ATSI argues that MISO cannot remove a single project from the MVP portfolio and claim that project is eligible for region-wide cost allocation. ATSI argues that a single project, standing alone, would not qualify as an MVP because it could not be shown to spread benefits throughout the MISO footprint.

99. ATSI also argues that the Presiding Judge erred in finding that the Michigan Thumb Project satisfied the pre-withdrawal Tariff’s portfolio requirement.<sup>204</sup> ATSI states that the MISO Board did not consider whether the Michigan Thumb Project satisfied the portfolio requirement, because the requirement did not yet exist when the MISO Board approved the Michigan Thumb Project in August 2010—approximately one month after

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<sup>199</sup> *Id.* P 67 (citing the requirement under Section II of Attachment FF that an MVP “must be evaluated as part of a Portfolio of projects, as designated in the transmission expansion planning process...”).

<sup>200</sup> *Id.* P 68.

<sup>201</sup> ATSI Brief on Exceptions at 43-46.

<sup>202</sup> *Id.* at 44 (citing MVP Order, 133 FERC ¶ 61,221 at P 202).

<sup>203</sup> *Id.* at 45.

<sup>204</sup> *Id.* at 46-52.

MISO's MVP proposal was filed but before the Commission issued the MVP Order, which required MISO to establish the portfolio requirement.<sup>205</sup>

100. ATSI argues that the Initial Decision erred when it found that the Michigan Thumb Project nevertheless satisfied the portfolio requirement because it was evaluated with the "MVP Starter Projects" identified in the MVP Filing.<sup>206</sup> ATSI notes that, according to MISO's testimony supporting the MVP Filing, the MVP Starter Projects were a set of potential transmission projects that could qualify as MVPs.<sup>207</sup> ATSI notes that MISO's MTEP June 2011 Report confirms that, as of June 2011—after ATSI's withdrawal from MISO on May 31, 2011—the evaluation of the candidates for the 2011 MVP Portfolio was still preliminary. ATSI states that the preliminary study of the MVP Starter Projects was insufficient to satisfy the portfolio requirement. ATSI asserts that the portfolio requirement contemplates an evaluation that defines and justifies the portfolio as a whole, and claims that MISO did not complete the cost-benefit analysis necessary to justify region-wide cost allocation of the 2011 MVP portfolio (which included the Michigan Thumb Project) until after ATSI withdrew from MISO on May 31, 2011.<sup>208</sup>

101. ATSI argues that MISO's treatment of the Brookings Project, another "MVP Starter Project" listed in the MVP Filing, demonstrates that ATSI is not responsible for any MVP costs as a result of MISO's failure to justify the 2011 MVP Portfolio prior to ATSI's withdrawal.<sup>209</sup> ATSI explains that the Brookings Project was conditionally accepted in June of 2011 because the analysis of the portfolio of MVPs was ongoing, and MISO stated that the project would not meet the pre-withdrawal Tariff requirements to qualify as an MVP until the portfolio analysis was complete. ATSI argues that MISO's reliance on the fact that the Michigan Thumb Project was the subject of an out-of-cycle request is unavailing. ATSI states that the out-of-cycle process does not suggest that MISO was required to approve a type of cost allocation that the Commission had not yet authorized.

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<sup>205</sup> *Id.* at 46-47.

<sup>206</sup> *Id.* at 47-49.

<sup>207</sup> *Id.* at 47.

<sup>208</sup> *Id.* at 49-52.

<sup>209</sup> *Id.* at 52-53.

### iii. Briefs Opposing Exceptions

102. MISO, MISO Transmission Owners and Midwest TDUs agree with the finding in the Initial Decision to reject ATSI's argument that, because ATSI will not benefit from the Michigan Thumb Project and because the project was not approved in accordance with the portfolio requirement, ATSI should not have to make payments associated with that project.<sup>210</sup> First, MISO and MISO Transmission Owners state that the Presiding Judge properly rejected ATSI's cost causation/benefits challenge related to the Michigan Thumb Project as outside the scope of the issues set for hearing.<sup>211</sup> Second, MISO Transmission Owners state that the Presiding Judge properly concluded that arguments related to the proper approval of the Michigan Thumb Project are also unrelated to whether Schedule 39 is inconsistent with ATSI's MVP-related obligations under the pre-withdrawal Tariff.<sup>212</sup> MISO and MISO Transmission Owners state that ATSI's arguments do not involve any inconsistency between Schedule 39 and the pre-withdrawal Tariff, because the Michigan Thumb Project was approved one and a half years before Schedule 39 was filed with the Commission; therefore, Schedule 39 had no effect on the classification of the Michigan Thumb Project as an MVP.<sup>213</sup> MISO, MISO Transmission Owners and Midwest TDUs state that the Michigan Thumb Project was approved as an MVP before ATSI withdrew from MISO and was properly included in Appendix A to Schedule 39; thus, ATSI is responsible for a share of the project's costs.<sup>214</sup>

103. Nevertheless, MISO argues that it properly implemented the out-of-cycle process in approving the Michigan Thumb Project as an MVP. MISO notes that the MVP Order recognized that the project was approved by the MISO Board on August 19, 2010, and that acceptance of the MVP provisions effective July 16, 2010 would result in being

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<sup>210</sup> MISO Brief Opposing Exceptions at 76-69; MISO Transmission Owners Brief Opposing Exceptions at 55-62; Midwest TDUs Brief Opposing Exceptions at 21-22.

<sup>211</sup> MISO Brief Opposing Exceptions at 79; MISO Transmission Owners Brief Opposing Exceptions at 51.

<sup>212</sup> MISO Transmission Owners Brief Opposing Exceptions at 56.

<sup>213</sup> *Id.* at 56; MISO Brief Opposing Exceptions at 77.

<sup>214</sup> MISO Brief Opposing Exceptions at 76-69; MISO Transmission Owners Brief Opposing Exceptions at 55-62; Midwest TDUs Brief Opposing Exceptions at 21-22.

qualified as an MVP.<sup>215</sup> Similarly, MISO states that the MVP Rehearing Order found that the Michigan Thumb Project was approved in a timely manner. MISO states that the MVP Orders rejected arguments against the out-of-cycle process that was used to approve the Michigan Thumb Project, and that outcome cannot be affected by the Commission's handling of the Brookings Project, which was not similarly shown to be eligible for approval under the out-of-cycle process.<sup>216</sup> MISO Transmission Owners state that ATSI mischaracterizes the portfolio evaluation as something MISO would begin in the future, rather than the approach that MISO was using with respect to the Michigan Thumb Project.<sup>217</sup> MISO Transmission Owners state that MVPs need only be *evaluated* on a portfolio basis, and that MISO's extensive consideration of the "MVP Starter Projects" identified in the MVP Filing, followed by acting on a valid request for out-of-cycle approval as required under the Tariff, met that requirement.<sup>218</sup>

104. MISO believes that the Presiding Judge properly rejected ATSI's arguments that ATSI's withdrawal notice should have precluded its cost responsibility for the Michigan Thumb Project.<sup>219</sup> MISO states that Article Five, Section II.B of the MISO Transmission Owners Agreement refers to financial obligations incurred prior to the effective date of withdrawal, and therefore the notice of withdrawal is irrelevant to the cost responsibility question.

#### **iv. Commission Determination**

105. Because we find, as discussed above,<sup>220</sup> that the MVP cost calculation methodology in Schedule 39 may not be applied to ATSI because Schedule 39 is inconsistent with the terms of the pre-withdrawal Tariff, ATSI is not responsible for the costs of the Michigan Thumb Project. Therefore, we need not address arguments challenging the imposition on ATSI of costs related specifically to the Michigan Thumb Project.

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<sup>215</sup> MISO Brief Opposing Exceptions at 79-80 (citing MVP Order, 133 FERC ¶ 61,221 at P 95).

<sup>216</sup> *Id.* at 81.

<sup>217</sup> MISO Transmission Owners Brief Opposing Exceptions at 58.

<sup>218</sup> *Id.* at 58-60.

<sup>219</sup> MISO Brief Opposing Exceptions at 78.

<sup>220</sup> *See supra* PP 69-78.

**f. Duquesne**

**i. Initial Decision**

106. The Presiding Judge did not discuss the Commission's finding in the Schedule 39 Order that *Midwest Indep. Transmission Sys. Operator, Inc. and Duquesne Light Company*<sup>221</sup> is not controlling precedent on the issue of whether MISO may assess MVP cost responsibility on withdrawing transmission owners.<sup>222</sup>

**ii. Briefs On Exceptions**

107. Duke suggests that the instant case closely parallels the Commission's decision in *Duquesne*, and the Commission should follow its holding in that case. Duke notes that the PJM Transmission Owners Agreement at issue in *Duquesne* contained a statement similar to the one in the MISO Transmission Owners Agreement that any withdrawing party "shall remain liable for any and all obligations under this Agreement that such Party incurred...prior to the date [of withdrawal.]"<sup>223</sup> In *Duquesne*, Duke notes that PJM argued that the withdrawing transmission owner remained responsible for high voltage transmission upgrade costs. Duke notes that the Commission found that, because the PJM tariff required a new allocation of the annual revenue requirement among transmission customers each year, the transmission owner could not be charged as if it was still a transmission-owning member of PJM for purposes of allocating cost responsibility with respect to future revenue requirements.<sup>224</sup> Duke argues that the allocation and usage-based rate design of MVPs are similar to the allocation and usage-based rate design of the PJM high voltage facilities at issue in *Duquesne*.

**iii. Briefs Opposing Exceptions**

108. MISO and MISO Transmission Owners challenge Duke's assertion that the Commission's decision in *Duquesne* is controlling in this case.<sup>225</sup> MISO Transmission

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<sup>221</sup> 124 FERC ¶ 61,219 (2008) (*Duquesne*).

<sup>222</sup> See Schedule 39 Order, 138 FERC ¶ 61,140 at P 63.

<sup>223</sup> Duke Brief on Exceptions at 87.

<sup>224</sup> *Id.* at 86-90 (citing *Duquesne*, 124 FERC ¶ 61,219 at PP 162-170).

<sup>225</sup> MISO Brief Opposing Exceptions at 42-44; MISO Transmission Owners Brief Opposing Exceptions at 45-48.

Owners note that arguments in this vein were already considered and rejected in the Schedule 39 Order, and so the Initial Decision had no obligation to consider *Duquesne*.<sup>226</sup> Even so, MISO and MISO Transmission Owners argue that *Duquesne* is distinguishable. MISO argues that the Commission in the *Duquesne* case ruled that neither the usage-based nature of the rate used to recover transmission project costs nor the regional scope of the cost allocation preclude a tariff from establishing a withdrawing transmission owner's responsibility for such costs.<sup>227</sup> MISO notes that the Commission already distinguished *Duquesne* in the Schedule 39 Order, where it ruled that although PJM's usage-based rate for high-voltage transmission facilities was similar to the MVP Usage Rate in MISO's Tariff, PJM's tariff did not explicitly obligate withdrawing transmission owners to pay costs incurred prior to withdrawal.<sup>228</sup> Therefore, MISO argues that the differences in tariff language distinguish *Duquesne* from the present case.

#### iv. Commission Determination

109. The question of whether the Commission's decision in *Duquesne* is controlling precedent for MVP cost allocation was not a matter set for hearing, as arguments in this vein were already considered and rejected in the Schedule 39 Order. We address *Duquesne* below in our determination on the requests for rehearing.<sup>229</sup>

#### 2. Hearing Issue 2: If MISO's Proposed Schedule 39 is Inconsistent with the MVP-Related Withdrawal Obligations in the Tariff at the Time That ATSI and Duke Withdrew from MISO, What Should Be the Amount of and Methodology for Calculating ATSI's and Duke's MVP Cost Responsibility?

##### a. Initial Decision

110. The Presiding Judge did not construe the Schedule 39 Order as precluding application of the Schedule 39 MVP cost calculation methodology to ATSI and Duke even if Schedule 39 is inconsistent with the pre-withdrawal Tariff. Rather, he concluded that a second-tier "as applied" analysis should be conducted to determine whether it

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<sup>226</sup> MISO Transmission Owners Brief Opposing Exceptions at 46.

<sup>227</sup> MISO Brief Opposing Exceptions at 42 (citing *Duquesne*, 124 FERC ¶ 61,219 at PP 167, 173).

<sup>228</sup> *Id.* at 43 (citing Schedule 39 Order, 138 FERC ¶ 61,140 at P 63).

<sup>229</sup> *See infra* P 172-173.

would be just and reasonable to apply Schedule 39 to Duke and ATSI.<sup>230</sup> If it would be just and reasonable to apply Schedule 39 despite an inconsistency with the pre-withdrawal Tariff, the Presiding Judge concluded that the “Schedule 39-derived MVP cost responsibilities legitimately still might be imposed on Duke and ATSI . . . because the Schedule 39 methodology independently would have been determined to be just and reasonable . . . .”<sup>231</sup> If, however, it would not be just and reasonable to apply Schedule 39 to Duke and ATSI, the Presiding Judge held that the methodology for calculating Duke’s and ATSI’s MVP cost responsibility would remain to be determined.

111. Despite finding no inconsistency between Schedule 39 and the pre-withdrawal Tariff, the Presiding Judge explained that it would be just and reasonable to apply the Schedule 39 methodology to Duke and ATSI even if there were an inconsistency.<sup>232</sup> The Presiding Judge stated that the balance of the analyses conducted under Hearing Issue 1 would support a finding that Schedule 39 could be applied despite any inconsistency. He also noted that the Commission has found that Schedule 39 is generally just and reasonable and consistent with how MISO will recover RECB costs from ATSI and Duke under Schedule 37 and 38.<sup>233</sup> The Presiding Judge further suggested that the Schedule 39 approach is consistent with how MISO will recover various other cost categories from ATSI and Duke, post-withdrawal, under Schedules 10, 16, and 17.

112. The Presiding Judge considered an alternative cost allocation methodology proposed by MISO and MISO Transmission Owners,<sup>234</sup> which he described as a variation on the Schedule 39 methodology. Although the Presiding Judge found that the proposed

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<sup>230</sup> Initial Decision, 144 FERC ¶ 63,007 at PP 12, 75.

<sup>231</sup> *Id.* P 75.

<sup>232</sup> *Id.* P 77.

<sup>233</sup> *Id.* (citing Schedule 39 Order, 138 FERC ¶ 61,140 at P 61 n.112).

<sup>234</sup> The proposed alternative methodology would require ATSI and Duke to pay monthly a portion of the actual annual revenue requirement (as determined by Attachment MM) of each MVP that is assigned to ATSI and Duke pursuant to Appendices A and B to Schedule 39 for a period of 40 years from the date the costs of these MVPs are first included in the transmission rates of a MISO Transmission Owner. *See* Ex. MTO-1 at 34-42.

solution was workable, he concluded that its proponents did not satisfy their affirmative burden to prove that the proposal was just and reasonable.<sup>235</sup>

**b. Briefs on Exceptions**

**i. Filed Rate Doctrine and Independent Application**

113. Trial Staff, Duke, and ATSI state that any effort to apply the Schedule 39 methodology to ATSI and Duke is barred by the filed rate doctrine and the rule against retroactive ratemaking if Schedule 39 is inconsistent with the pre-withdrawal Tariff.<sup>236</sup> They point out that the Commission found that the Schedule 39 methodology can be applied to Duke only if it is consistent with the pre-withdrawal Tariff.<sup>237</sup> Duke takes issue with the Presiding Judge's determination that the similarity between MVPs and other MTEP categories supports a uniform cost recovery approach, because Duke argues that there is no such similarity. Duke also argues that Schedule 39 is not consistent with Schedules 10, 16, and 17, because in those schedules, "financial obligations incurred" are clearly defined as the liabilities on MISO's balance sheet of its financial statements the day before the withdrawal date.<sup>238</sup> Duke argues that if the Presiding Judge had applied the Schedule 10, 16, and 17 standard here, its cost responsibility would have been a *pro rata* share of \$6 million instead of \$3 billion.

114. Duke and ATSI argue that the record does not support a finding that Schedule 39 is independently just and reasonable.<sup>239</sup> Duke highlights the fact that the Commission rejected the only testimony offered by MISO regarding the benefits that MVPs would provide to Duke and notes that no party introduced evidence at hearing that Schedule 39 is independently just and reasonable. In addition, Duke and ATSI assert that the Initial Decision is deficient because they were prevented from raising various arguments concerning the justness and reasonableness of Schedule 39 and MISO's lack of authorization to charge for services provided by a different transmission provider. Duke

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<sup>235</sup> Initial Decision, 144 FERC ¶ 63,007 at P 79.

<sup>236</sup> Trial Staff Brief on Exceptions at 35-39; Duke Brief on Exceptions at 96-97; ATSI Brief on Exceptions at 54.

<sup>237</sup> Duke Brief on Exceptions at 95; ATSI Brief on Exceptions at 54-55; Trial Staff Brief on Exceptions at 36.

<sup>238</sup> Duke Brief on Exceptions at 96.

<sup>239</sup> *Id.* at 95-100; ATSI Brief on Exceptions at 54-57.

also states that even if MISO could set a rate for service provided by PJM, there is no evidence to support a conclusion that such a rate would meet cost causation requirements.<sup>240</sup> Similarly, ATSI contends that it was denied the opportunity to address the justness and reasonableness of charging ATSI for MVP costs outside of the issue of whether Schedule 39 is consistent with the pre-withdrawal Tariff.<sup>241</sup>

**ii. Alternative Methodology**

115. ATSI refutes the Initial Decision's suggestion that the "alternative methodology"<sup>242</sup> presented by MISO and the MISO Transmission Owners fulfilled a *prima facie* case that it was just and reasonable.<sup>243</sup> In addition, ATSI contends that the alternative methodology proposed is deeply flawed and should be rejected. Trial Staff argues that the alternative methodology need not be considered because, on its face, it is inconsistent with the Tariff in effect at the time that Duke and ATSI withdrew from MISO.<sup>244</sup>

**c. Briefs Opposing Exceptions**

116. MISO and MISO Transmission Owners argue that because the Initial Decision found Schedule 39 to be consistent with the Tariff in effect at the time of ATSI's and Duke's withdrawals, the Commission does not need to resolve issues concerning the alternative methodology.<sup>245</sup>

**d. Commission Determination**

117. We find that the Presiding Judge erred in holding that it would be just and reasonable to apply the MVP cost calculation methodology in Schedule 39 to Duke and ATSI if Schedule 39 is inconsistent with the terms of the pre-withdrawal Tariff. In paragraph 74 of the Schedule 39 Order, the Commission stated that MISO could not

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<sup>240</sup> Duke Brief on Exceptions at 99.

<sup>241</sup> ATSI Brief on Exceptions at 56-57.

<sup>242</sup> *See supra* n.234.

<sup>243</sup> ATSI Brief on Exceptions at 57.

<sup>244</sup> Trial Staff Brief on Exceptions at 40-42.

<sup>245</sup> MISO Brief Opposing Exceptions at 82-83; MISO Transmission Owners Brief Opposing Exceptions at 62-63.

“automatically” apply Schedule 39 to ATSI and Duke “unless those provisions are consistent with the MVP-related withdrawal obligations in the Tariff at the time that ATSI and Duke withdrew from MISO.” In paragraph 74, the Commission set for hearing and settlement judge procedures:

whether MISO’s proposal to use the methodology in Schedule 39 to calculate ATSI’s and Duke’s obligation to pay for MVP costs is consistent with the MVP-related withdrawal obligations in the Tariff at the time that ATSI and Duke withdrew from MISO, and if not, what the amount of, and methodology for calculating, ATSI’s and Duke’s MVP cost responsibility should be.

The Presiding Judge interpreted paragraph 74 of the Schedule 39 Order and its use of the term “automatically” to conclude that Schedule 39’s inconsistency with the pre-withdrawal Tariff does not bar it from application, but merely triggers another “second-tier as-applied analysis” to determine “whether it would be just and reasonable to apply Schedule 39 to Duke and ATSI despite the identified Tariff inconsistency.”<sup>246</sup> The Presiding Judge stated that paragraph 74 did not contemplate an immediate default to the pre-withdrawal Tariff in the event an inconsistency is identified, because the Commission directed him to determine the amount of, *and methodology for calculating*, ATSI’s and Duke’s MVP cost responsibility if some inconsistency with the pre-withdrawal Tariff is confirmed.

118. We find that the Presiding Judge’s creation of a second-tier as-applied analysis that would apply the Schedule 39 methodology to Duke and ATSI, despite its inconsistency with the pre-withdrawal Tariff, goes beyond the scope of the Commission’s directive. The Commission stated in paragraph 78 of the Schedule 39 Order that “ATSI and Duke should only be subject to proposed Schedule 39 to the extent it is consistent with the MVP-related withdrawal obligations in the Tariff at the time that they withdrew from MISO.” The directive to determine the methodology for calculating ATSI’s and Duke’s cost responsibility did not already assume that there was some responsibility - only that if some responsibility was established, the Presiding Judge should determine how to calculate it.<sup>247</sup>

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<sup>246</sup> Initial Decision, 144 FERC ¶ 63,007 at PP 12, 75, 77.

<sup>247</sup> This is illustrated by the fact that, earlier in the Schedule 39 Order, the Commission phrased the issues to be set for hearing slightly differently. There, the Commission set for hearing “whether ATSI and Duke are responsible for MVP costs and,

(continued...)

119. We agree with ATSI and Duke that the filed rate doctrine would prohibit independent assessment of MVP costs under the Schedule 39 methodology if Schedule 39 is determined to be inconsistent with the pre-withdrawal Tariff. The filed rate doctrine requires that Duke and ATSI be charged for MVPs only to the extent provided for in the filed rates in existence at the time – namely, the MISO Transmission Owners Agreement and the pre-withdrawal Tariff.<sup>248</sup> We find that the Presiding Judge erred in dismissing arguments on the filed rate doctrine and the prohibition against retroactive ratemaking because he found that “the paragraph 74 directive [is] confirmation that the Commission did not consider establishing some alternate methodology to calculate ATSI’s and [Duke’s] MVP cost responsibility to constitute retroactive ratemaking/violate the filed rate doctrine.”<sup>249</sup>

120. As to the alternative methodology proposed by MISO and MISO Transmission Owners,<sup>250</sup> we will affirm the Presiding Judge’s conclusion that MISO and MISO Transmission Owners did not satisfy their affirmative burden to prove that the alternative proposal was just and reasonable.<sup>251</sup> Nonetheless, consistent with our findings above in the discussion of Hearing Issue 1, we find that MISO and MISO Transmission Owners’ alternative proposal would also not be consistent with the MISO Transmission Owners Agreement and the pre-withdrawal Tariff because the pre-withdrawal Tariff did not establish that Duke and ATSI incurred MVP-related financial obligations before they withdrew from MISO.<sup>252</sup>

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if so, the amount of, and methodology for calculating, ATSI’s and Duke’s MVP cost responsibility.” Schedule 39 Order, 138 FERC ¶ 61,140 at P 3.

<sup>248</sup> *See Western Resources*, 72 F.3d at 147, 149.

<sup>249</sup> Initial Decision, 144 FERC ¶ 63,007 at P 12 n.132.

<sup>250</sup> *See supra* n.234.

<sup>251</sup> Initial Decision, 144 FERC ¶ 63,007 at P 79.

<sup>252</sup> *See supra* PP 69-78.

3. **Hearing Issue 3: Whether ATSI Retains Any Cost Responsibility for MVP Costs Under the Terms of the ATSI-MISO Exit Fee Agreement, and if so, what is the Amount of That Cost Responsibility**

a. **Initial Decision**

i. **ATSI-MISO Exit Fee Agreement**

121. The Presiding Judge found that the ATSI-MISO Exit Fee Agreement is clear and unambiguous on its face, and that extrinsic record evidence must be disregarded in interpreting the terms of the agreement.<sup>253</sup> The Presiding Judge stated that the preamble to the agreement indicates that “the Parties seek to memorialize the terms and conditions of ATSI’s satisfaction of its exit fee obligations under Article Five, Section II.B of the [MISO Transmission Owners Agreement.]”<sup>254</sup> After reviewing the operative terms of the agreement, the Presiding Judge found that its plain language does not absolve ATSI of MVP cost responsibility under Article Five, Section II.B.<sup>255</sup>

122. First, the Presiding Judge reviewed section 3.1(a) of the ATSI-MISO Exit Fee Agreement, which provides:

On the Withdrawal Date, [MISO] shall deliver to ATSI a written statement setting forth a good faith estimate of the exit fee . . . calculated in accordance with a methodology accepted by the Commission . . . . The parties acknowledge and agree that the Exit Fee Methodology attached hereto as Attachment A is complete and satisfies Article Five, Section II.B of the [MISO Transmission Owners] Agreement. The [e]xit [f]ee will allocate specific amounts relating to . . . Schedules 10, 16, and 17 [of the Tariff].

The Presiding Judge stated that under this language, Attachment A specifies the applicable exit fee methodology, not any complete satisfaction of the underlying Article Five, Section II.B financial obligations themselves.<sup>256</sup> Moreover, he noted that the exit

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<sup>253</sup> Initial Decision, 144 FERC ¶ 63,007 at P 84.

<sup>254</sup> *Id.* P 85.

<sup>255</sup> *Id.* P 86.

<sup>256</sup> *Id.*

fee to be calculated allocates specific amounts related to Schedules 10, 16, and 17. The Presiding Judge found that the only reasonable interpretation of section 3.1(a) is that the referenced exit fee only covers ATSI's Article Five financial obligations under Tariff Schedules 10, 16, and 17.

123. The Presiding Judge also considered section 3.2 of the ATSI-MISO Exit Fee Agreement, which provides:

In satisfaction of the requirements under Article Five, Section II.B of the [MISO Transmission Owners] Agreement, ATSI shall pay to [MISO] the Exit Fee and the True Up Fee in accordance with Section 3.1. Payment of the fees called for in Section 3.1 shall satisfy ATSI's financial obligations to [MISO] under Article Five, Section II.B of the [MISO Transmission Owners] Agreement.

The Presiding Judge found that section 3.2 does not absolve ATSI of MVP cost responsibility because it is "entirely contingent on [s]ection 3.1," which the Presiding Judge viewed as being limited to ATSI's cost responsibilities under Schedules 10, 16, and 17.<sup>257</sup>

124. The Presiding Judge next reviewed section 2.2 of the ATSI-MISO Exit Fee Agreement, which provides:

Notwithstanding anything to the contrary in this Section 2.2, a Party's participation as to any matter at issue in [any] proceeding before the Commission regarding matters covered in Article Five, Section II of the [MISO Transmission Owners] Agreement, will not constitute a violation of this Section 2.2. The Parties acknowledge that ATSI disputes the scope of ATSI's obligations under Article Five, Section II of the [MISO Transmission Owners] Agreement. By signing this Agreement, ATSI does not waive and expressly reserves the right to participate as to all matters at issue in [proceedings regarding matters covered in Article Five, Section II of the MISO Transmission Owners Agreement], to pursue complaints, rehearings and appeals of any Commission orders related thereto and to pursue other legal

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<sup>257</sup> *Id.* P 88.

remedies regarding matters covered in Article Five, Section II of the [MISO Transmission Owners] Agreement.

The Presiding Judge found that there would be no reason to specify that ATSI disputes its financial obligations if the parties intended to completely satisfy those obligations under section 2.2.<sup>258</sup> He similarly found that there would have been no reason for the parties to preserve their rights to participate in other pending or future Commission proceedings involving Article Five, Section II.B of the MISO Transmission Owners Agreement if they were comprehensively resolving the financial obligations incurred under that section in the ATSI-MISO Exit Fee Agreement.

125. Although the Presiding Judge ruled that extrinsic evidence must be disregarded for use in interpreting the ATSI-MISO Exit Fee Agreement, he stated that Exhibit MTO-13 could also be used to confirm the soundness of his textual analysis.<sup>259</sup> That exhibit was an e-mail from ATSI witness Richard Ziegler containing the following statement:

ATSI confirmed the purpose of the [ATSI-MISO Exit Fee Agreement] is to settle the ‘classic’ exit fee amount and related prepayments. Issues related to other matters (e.g., LTTR and MTEP would be covered under the related dockets)[.]

The Presiding Judge considered this statement an admission by party opponent under Fed. R. Evid. 801(d)(2)(C) and found that it expressly confirmed that MTEP projects—which include MVPs—are not covered by the ATSI-MISO Exit Fee Agreement. In addition, he noted that a follow-on statement in the e-mail indicated that the referenced “‘classic’ exit fee amount” consisted of “exit fees related to Schedules 10, 16, and 17...”<sup>260</sup> The Presiding Judge found that these statements directly contradict ATSI’s underlying claim that the agreement was intended to absolve ATSI of its entire Article Five, Section II.B financial obligation.

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<sup>258</sup> *Id.* P 89.

<sup>259</sup> *Id.* P 87 n.185.

<sup>260</sup> *Id.*

**ii. ATSI-MISO Exit Fee Order**

126. According to the Presiding Judge, the Commission order approving the ATSI-MISO Exit Fee Agreement lent additional support for his interpretation.<sup>261</sup> As the Presiding Judge explains, the Commission stated that ATSI's financial obligation under Article Five, Section II.B of the MISO Transmission Owners Agreement consists of multiple components, "one of which is at issue in this proceeding; ATSI's payment of MISO Schedule 10, 16, and 17-related financial obligations...."<sup>262</sup> The Presiding Judge states that this language shows that the Commission understood the ATSI-MISO Exit Fee Agreement to cover only ATSI's Schedule 10, 16, and 17-related financial obligations.

**b. Briefs on Exceptions**

**i. ATSI-MISO Exit Fee Agreement**

127. ATSI argues that the ATSI-MISO Exit Fee Agreement absolves ATSI of any liability for MVP charges by discharging ATSI's financial obligations under the withdrawal provisions of the MISO Transmission Owners Agreement.<sup>263</sup> ATSI asserts that the ATSI-MISO Exit Fee Agreement explicitly states that the exit fee fully satisfies ATSI's withdrawal obligations under Article Five, Section II.B of the MISO Transmission Owners Agreement. ATSI states that sections 3.1(a) and 3.2 of the ATSI-MISO Exit Fee Agreement reflect the parties' agreement that amounts relating to Tariff Schedules 10, 16, and 17 would be the "inputs" for the exit fee methodology.<sup>264</sup> ATSI further argues that the Initial Decision erred in concluding that, because the ATSI-MISO Exit Fee Agreement specifically includes certain costs, the agreement's broader release provisions must be construed as being limited to the enumerated costs. ATSI argues that the issue of what costs are covered by the exit fee is different than the significance of ATSI's payment of the exit fee.

128. ATSI additionally argues that section 2.2 of the ATSI-MISO Exit Fee Agreement is a "no-contest" clause, requiring the contracting parties to commit not to challenge the

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<sup>261</sup> The Presiding Judge stated that the order does not fall within the parameters of extrinsic evidence that must be disregarded in interpreting the ATSI-MISO Exit Fee Agreement. *Id.* P 87 n.185.

<sup>262</sup> *Id.* P 88 (citing ATSI-MISO Exit Fee Order, 135 FERC ¶ 61,255 at P 2 n.3).

<sup>263</sup> ATSI Brief on Exceptions at 58-62.

<sup>264</sup> *Id.* at 61.

enforceability of the agreement, and recognizing that certain actions are mutually agreed not to violate that commitment.<sup>265</sup> ATSI states that section 2.2 cannot reasonably be read as limiting the express statements in sections 3.1 and 3.2 regarding the satisfaction of ATSI's Article Five, Section II.B obligations. ATSI claims that its attempt to settle its withdrawal obligations is not inconsistent with its effort to preserve its right to secure a legal determination that would protect ATSI in the event that the agreement is not observed.<sup>266</sup>

129. Although ATSI maintains that the ATSI-MISO Exit Fee Agreement is unambiguous, ATSI asserts that the Presiding Judge improperly relied on Exhibit MTO-13 in his analysis and incorrectly interpreted the intent of the e-mail. First, ATSI states that the email message is fully in line with ATSI's position that it cannot be made responsible for MVP charges as financial obligations under Article Five, Section II.B of the MISO Transmission Owners Agreement because MISO agreed that ATSI's payment of the Exit Fee would fully satisfy such obligations.<sup>267</sup> Second, ATSI states that the Presiding Judge ignored Mr. Ziegler's explanation of Exhibit MTO-13 in his answering testimony.<sup>268</sup> ATSI states that the answering testimony explained the reference to MTEP issues being "covered in other dockets." Specifically, the answering testimony stated that, at the time when the ATSI-MISO Exit Fee Agreement was being negotiated, it was contemplated that MISO, MISO Transmission Owners, and ATSI would make a joint filing to resolve cost recovery obligations related to certain MTEP projects approved by the MISO Board prior to ATSI's departure. The testimony stated that at the time discussions were initiated by ATSI in preparation for its PJM integration and related rate filing to establish ATSI zonal rates, MVPs and their cost recovery mechanism did not exist.

130. ATSI further argues that, if the contract language is ambiguous, the only probative extrinsic evidence regarding the parties' intent confirms that the agreement absolves ATSI of MVP cost responsibility.<sup>269</sup> Specifically, ATSI references Mr. Zeigler's testimony asserting that the purpose of the ATSI-MISO Exit Fee Agreement was to resolve all disputes regarding ATSI's financial obligations under Article Five,

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<sup>265</sup> *Id.* at 62-65.

<sup>266</sup> *Id.* at 64-65.

<sup>267</sup> *Id.* at 67.

<sup>268</sup> *Id.* at 68-69.

<sup>269</sup> *Id.* at 69-72.

Section II.B of the MISO Transmission Owner's Agreement. ATSI states that this testimony is based on the witness' extensive personal knowledge regarding the development and negotiation of the agreement. ATSI states that MISO's witness' testimony on this issue is not illustrative, because MISO's witness had no comparable firsthand knowledge that is probative for purposes of construing the ATSI-MISO Exit Fee Agreement.<sup>270</sup>

**ii. ATSI-MISO Exit Fee Order**

131. ATSI argues that the Presiding Judge misinterpreted and inappropriately relied on the ATSI-MISO Exit Fee Order.<sup>271</sup> ATSI argues that the Presiding Judge erroneously took the ATSI-MISO Exit Fee Order into consideration despite concluding that extrinsic record evidence must be disregarded because the ATSI-MISO Exit Fee Agreement is unambiguous.<sup>272</sup> Nevertheless, ATSI contends that nothing in the ATSI-MISO Exit Fee Order suggests that the Commission was purporting to define the scope of the agreement or even address the legal effect of ATSI's payment of the exit fee. ATSI states that in the ATSI-MISO Exit Fee Order, the Commission stated that ATSI and MISO had submitted an executed agreement to address "the exit fees required of ATSI upon its withdrawal from MISO as directed by the Commission in [the Realignment Order]."<sup>273</sup> The Commission then referenced the Realignment Order's requirement that ATSI satisfy its financial obligations under Article Five, Section II.B of the MISO Transmission Owner's Agreement, and stated the following in a footnote:

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<sup>270</sup> *Id.* at 69 n.213.

<sup>271</sup> *Id.* at 65-67.

<sup>272</sup> *Id.* at 65.

<sup>273</sup> *Id.* (citing ATSI-MISO Exit Fee Order, 135 FERC ¶ 61,255 at P 1). In the Realignment Order, the Commission conditionally accepted proposed revisions to PJM's Open Access Transmission Tariff in connection with ATSI's integration into PJM. The order conditioned its approval on, among other things, the submission of a separate filing addressing ATSI's remaining financial obligations required under Article Five, Section II.B of the MISO Transmission Owners Agreement.

Article Five, Section II.B of the MISO [Transmission Owners] Agreement states: “[a]ll financial obligations incurred and payments applicable to time periods prior to the effective date of such withdrawal shall be honored by [MISO] and the withdrawing [transmission owner].” This financial obligation consists of multiple components, one of which is at issue in this proceeding; ATSI’s payment of MISO Schedule 10, 16, and 17-related financial obligations incurred and payments applicable to time periods prior to the effective date of its withdrawal.<sup>[274]</sup>

ATSI states that this footnote does not indicate any intention to limit the scope of the ATSI-MISO Exit Fee Agreement to absolve ATSI only of cost responsibility under Schedules 10, 16, and 17. ATSI argues that this footnote cannot be said to give meaning to the ATSI-MISO Exit Fee Agreement above and beyond what the plain language of the agreement indicates.

**c. Briefs Opposing Exceptions**

**i. ATSI-MISO Exit Fee Agreement**

132. MISO and MISO Transmission Owners agree with the Presiding Judge that the ATSI-MISO Exit Fee Agreement is unambiguous and that section 3.1 only addresses exit fee costs covered under Schedules 10, 16, and 17.<sup>275</sup> They further agree that section 3.2 is entirely contingent upon section 3.1, and therefore the scope of language regarding satisfaction of ATSI’s financial obligation under Article Five, Section II.B of the MISO Transmission Owners Agreement is limited to obligations under Schedules 10, 16, and 17.

133. MISO, MISO Transmission Owners and Midwest TDUs claim that section 2.2 expressly reserves the issue of MVP cost responsibility for resolution in separate proceedings, which undercuts ATSI’s absolute interpretation of sections 3.1 and 3.2.<sup>276</sup> MISO argues that, since sections 3.1(a) and 3.2 are limited to the resolution of Schedules

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<sup>274</sup> ATSI-MISO Exit Fee Order, 135 FERC ¶ 61,255 at P 2 n.3.

<sup>275</sup> MISO Brief Opposing Exceptions at 84-85; MISO Transmission Owners Brief Opposing Exceptions at 63-68.

<sup>276</sup> MISO Brief Opposing Exceptions at 83-90; MISO Transmission Owners Brief Opposing Exceptions at 69-72; Midwest TDUs Brief Opposing Exceptions at 22-24.

10, 16, and 17-related obligations, section 2.2 is needed to reserve MISO's right to continue participating in proceedings involving other types of financial obligations for which withdrawing transmission owners remain potentially responsible, including the calculation of ATSI's cost responsibility in this proceeding.<sup>277</sup> MISO argues that ATSI's reliance on its witness' testimony about a different intent is unavailing, because the language is unambiguous and is thus unaffected by contentions that it meant something other than its plain meaning.<sup>278</sup>

134. MISO Transmission Owners state that the ATSI-MISO Exit Fee Agreement is a bilateral agreement that cannot absolve ATSI's liability to other transmission owners for MVP costs.<sup>279</sup> They state that the financial obligations of withdrawing transmission owners under Article Five, Section II.B of the MISO Transmission Owners Agreement include those obligations associated with revenue requirements for transmission facilities that are due from ATSI to other transmission owners. Specifically, MISO Transmission Owners note that MISO recovers the costs associated with MVPs under Schedule 26-A and remits those revenues to transmission owners.<sup>280</sup> They assert that MISO has no legal authority to contract away the rights of other transmission owners to recover from ATSI the withdrawal-related financial obligations under the MISO Transmission Owners Agreement.

135. MISO Transmission Owners argue that, even if the ATSI-MISO Exit Fee Agreement is deemed to be ambiguous, the record establishes that it does not absolve ATSI of MVP cost responsibility. MISO Transmission Owners state that ATSI understood that MTEP (including MVP) costs were part of its withdrawal obligations and would be addressed outside the ATSI-MISO Exit Fee Agreement, as evidenced by ATSI's statement in its August 17, 2009 RTO realignment application that "ATSI is obligated to pay an exit fee to [MISO]...and to live up to its connection and payment obligations under the [MTEP]."<sup>281</sup>

136. MISO and MISO Transmission Owners argue that the Presiding Judge properly considered and interpreted Exhibit MTO-13 as an admission that directly contradicted

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<sup>277</sup> MISO Brief Opposing Exceptions at 88.

<sup>278</sup> *Id.* at 89.

<sup>279</sup> MISO Transmission Owners Brief Opposing Exceptions at 75-77.

<sup>280</sup> *Id.* at 76-77.

<sup>281</sup> *Id.* at 84 (citing Ex. FE-7 at 5).

ATSI's position in this proceeding.<sup>282</sup> According to MISO and MISO Transmission Owners, the Presiding Judge appropriately recognized that Mr. Ziegler's email makes clear that MTEP issues are not to be resolved by the ATSI-MISO Exit Fee Agreement. MISO Transmission Owners contend that the Ziegler testimony relates only to ATSI's intentions in drafting the agreement, and does not purport to state either MISO's views or the parties' intentions.<sup>283</sup> MISO argues that the Presiding Judge correctly found that the plain meaning of the language contained in the exhibit undermines ATSI's proffered interpretation of that language.<sup>284</sup> MISO Transmission Owners argue that the MISO witness' personal lack of knowledge of the negotiations is overcome by her review of extrinsic evidence that gave meaning to the plain language of the agreement, such as e-mails (including Ziegler's e-mail), notes, and various filings with the Commission.<sup>285</sup>

**ii. ATSI-MISO Exit Fee Order**

137. MISO and MISO Transmission Owners state that the Presiding Judge appropriately relied on the ATSI-MISO Exit Fee Order to show that the ATSI-MISO Exit Fee Agreement only resolves ATSI's withdrawal obligation with respect to Schedules 10, 16, and 17.<sup>286</sup> MISO states that the ATSI-MISO Exit Fee Order construed the ATSI-MISO Exit Fee Agreement to mean anything not addressed therein was excluded from its scope, and stated that "ATSI's payment of MISO Schedule 10, 16, and 17-related financial obligations" were at issue.<sup>287</sup> MISO Transmission Owners assert that in the Schedule 39 Order, the Commission reiterated that the ATSI-MISO Exit Fee Order "conditionally accepted the ATSI-MISO Exit Fee Agreement, which provided the methodology for calculating ATSI's Schedule 10, 16, and 17 obligations."<sup>288</sup>

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<sup>282</sup> *Id.* at 81-82; MISO Brief Opposing Exceptions at 92-94.

<sup>283</sup> MISO Transmission Owners Brief Opposing Exceptions at 83.

<sup>284</sup> MISO Brief Opposing Exceptions at 93.

<sup>285</sup> MISO Transmission Owners Brief Opposing Exceptions at 83.

<sup>286</sup> *Id.* at 78-81; MISO Brief Opposing Exceptions at 90-92.

<sup>287</sup> MISO Brief Opposing Exceptions at 90-91.

<sup>288</sup> MISO Transmission Owners Brief Opposing Exceptions at 79-80 (citing Schedule 39 Order, 138 FERC ¶ 61,140 at P 10).

**d. Commission Determination**

138. Because we find, as discussed above,<sup>289</sup> that the MVP cost calculation methodology in Schedule 39 may not be applied to ATSI because Schedule 39 is inconsistent with the terms of the pre-withdrawal Tariff in effect when ATSI was a member of MISO, ATSI is not responsible for the costs of the Michigan Thumb Project. Therefore, we need not address arguments related to whether ATSI retains any MVP cost responsibility under the terms of the ATSI-MISO Exit Fee Agreement or the holding in the ATSI-MISO Exit Fee Order.

**B. Requests for Rehearing of the Schedule 39 Order**

**1. Schedule 39 Order**

**a. Schedule 39 as Applied Prospectively**

139. In the Schedule 39 Order, the Commission conditionally accepted Schedule 39 and the related revisions to Attachment MM in part, to become effective January 1, 2012, as a just and reasonable basis for MISO to charge a transmission owner that withdraws from MISO for the costs of MVPs approved by the MISO Board prior to the effective date of withdrawal. The Commission found that, under proposed Schedule 39, the MVP cost responsibility for transmission owners withdrawing from MISO that previously would have been subject to a negotiated or contested exit fee agreement will now be calculated pursuant to the formula set forth in Schedule 39.<sup>290</sup> The Commission also found that Schedule 39 was an appropriate mechanism to make clear which MVP costs are a part of a withdrawing transmission owner's exit fee obligation under Section III.A.2.j of Attachment FF to the pre-withdrawal Tariff, and that Schedule 39 and the associated revisions to Attachment MM provide a mechanism by which a withdrawing transmission owner's remaining financial obligations for MVPs costs will be determined and billed.<sup>291</sup>

140. The Commission found the withdrawing transmission owner's proposed monthly MVP Usage Charge under Schedule 39 to be just and reasonable, because MISO will calculate the MVP Usage Charge using the same Commission-approved methodology for determining the rate applicable to others who are assessed costs of MVPs under Schedule 26-A and apply the MVP Usage Charge to the withdrawing transmission

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<sup>289</sup> *See supra* PP 69-78.

<sup>290</sup> Schedule 39 Order, 138 FERC ¶ 61,140 at P 59.

<sup>291</sup> *Id.* P 60.

owner's monthly energy withdrawals.<sup>292</sup> The Commission also found it just and reasonable for MISO to use a monthly estimate by applying a five percent annual growth factor to historical data to calculate a Schedule 39 charge for a withdrawing transmission owner that does not provide its energy withdrawal information to MISO.<sup>293</sup> The Commission reasoned that, if MISO did not have a default mechanism to estimate the energy withdrawals it uses to calculate the Schedule 39 MVP Usage Charges for a withdrawing transmission owner that does not provide its data to MISO, a withdrawing transmission owner would have an incentive to not provide MISO with the actual data MISO needs to calculate MVP Usage Charges. The Commission noted that a withdrawing transmission owner could simply provide MISO with actual energy withdrawal information if it disagreed with the application of the default mechanism. The Commission also found it appropriate that Schedule 39 charges will be assessed to a withdrawing transmission owner, not the transmission owner's wholesale transmission customers, because the transmission owner, not its transmission customers, makes the decision to withdraw from MISO.<sup>294</sup> The Commission stated that it would be inappropriate to automatically shift costs related to a transmission owner's decision to withdraw from MISO to its wholesale transmission customers.<sup>295</sup>

141. The Commission did not address arguments related to cost causation because it found that the issues presented related to the contractual and tariff obligation to pay for already planned transmission facilities that is placed on withdrawing transmission owners by the MISO Transmission Owners Agreement and the pre-withdrawal Tariff.<sup>296</sup> The

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<sup>292</sup> *Id.* P 61. The Commission noted that this approach effectively recovered the applicable MVP costs from withdrawing transmission owners in the same manner that such costs are recovered from existing MISO transmission owners, and in the same manner that such costs would have been recovered from the withdrawing transmission owners had they remained members of MISO. The Commission also noted that MISO's approach was consistent with how MISO will recover RECB costs from ATSI and Duke under Schedules 37 and 38.

<sup>293</sup> *Id.* P 62.

<sup>294</sup> *Id.* P 65.

<sup>295</sup> The Commission stated that if a transmission owner wants to recover from wholesale transmission customers costs related to the transmission owner's decision to withdraw from MISO (such as Schedule 39 charges), it must submit a new filing under section 205 of the Federal Power Act (FPA) seeking recovery of those costs. *Id.* P 67.

<sup>296</sup> *Id.* P 63.

Commission found that Schedule 39 appropriately clarified, on a prospective basis, the calculation of the financial obligations flowing from the language of Attachment FF, which provided that a withdrawing transmission owner “shall remain responsible for all financial obligations incurred pursuant to . . . Attachment FF while a member of [MISO].” The Commission found that determining the “financial obligations incurred pursuant to . . . Attachment FF” is a tariff and contract interpretation matter, not a cost causation matter.

142. The Commission noted that several parties contended that *Duquesne* was controlling precedent against allowing MISO to assess MVP cost responsibility on withdrawing transmission owners.<sup>297</sup> Although the Commission agreed that the allocation and usage-based rate design of MISO’s MVPs are similar to the allocation and usage-based rate design of PJM’s 500 kV facilities at issue in *Duquesne*, which the Commission rejected as part of a PJM exit fee, the Commission found that MISO’s Tariff language is different than PJM’s. The Commission stated that Section III.A.2.j of Attachment FF of MISO’s Tariff explicitly obligates transmission owners withdrawing from MISO to pay costs incurred under Attachment FF, including MVP costs, whereas, in *Duquesne*, the Commission found that Schedule 12 of the PJM tariff lacked any language to obligate transmission owners that withdraw from PJM to continue to pay for transmission facility additions rated 500 kV and above. Because Attachment FF specified that transmission owners withdrawing from MISO are obligated to honor financial obligations associated with transmission facility additions incurred under Attachment FF prior to withdrawal, the Commission found that the *Duquesne* precedent was distinguishable.

143. The Commission also found that with regard to the language in Article Two, Section IX.C.8 of the MISO Transmission Owners Agreement, relied on by Duke and ATSI to argue that unanimous consent is required to amend the withdrawal rights provisions in the MISO Transmission Owners Agreement, Duke and ATSI wrongly assumed that Schedule 39 amends the MISO Transmission Owners Agreement.<sup>298</sup> The Commission found that with regard to Article Five, Section II.B of the MISO Transmission Owners Agreement specifies that transmission owners withdrawing from MISO must honor financial obligations incurred prior to the effective date of withdrawal, but does not specify what financial obligations consist of. Therefore, the Commission found that Schedule 39 does not amend the MISO Transmission Owners Agreement to

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<sup>297</sup> *Id.*

<sup>298</sup> *Id.* P 64.

include new financial obligations, but instead specifies under the Tariff what financial obligations, in part, are to be honored upon withdrawal.<sup>299</sup> The Commission added that:

Schedules 16 and 17 did not exist at the time the MISO Transmission Owners Agreement became effective. The Commission later accepted MISO's proposal to modify the Tariff to include the cost allocations created by Schedules 16 and 17 in the obligations incurred by a transmission owner prior to withdrawal. The Commission found that Article Five, Section II.B of the MISO Transmission Owners Agreement requires transmission owners withdrawing from MISO to settle their financial obligations and interpreted this obligation to include new obligations created under Schedules 16 and 17 of the Tariff. In light of this interpretation, the Commission found that the transmission owners' rights were unchanged with new obligations created under Schedules 16 and 17.<sup>[300]</sup>

**b. Schedule 39 as Applied to ATSI and Duke**

144. Noting that ATSI and Duke withdrew from MISO prior to the proposed January 1, 2012 effective date for Schedule 39, the Commission concluded that MISO could not automatically apply the Schedule 39 Tariff provisions to ATSI and Duke unless those provisions "are consistent with the MVP-related withdrawal obligations in the Tariff at the time that ATSI and Duke withdrew from MISO."<sup>301</sup> The Commission set for hearing and settlement judge procedures the issues of: (1) whether MISO's proposal to use the methodology in Schedule 39 to calculate ATSI's and Duke's obligations under the Tariff at the time that ATSI and Duke withdrew from MISO was consistent with the MVP-related withdrawal obligations in the Tariff at the time that ATSI and Duke withdrew from MISO; and (2) if not, what the amount of, and methodology for calculating, ATSI's and Duke's MVP cost responsibility should be.<sup>302</sup> The Commission also set for hearing

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<sup>299</sup> *Id.* (referencing *Midwest Indep. Transmission Sys. Operator, Inc.*, 101 FERC ¶ 61,221, at P 53 (2002), *reh'g denied*, 103 FERC ¶ 61,035, at P 9 (2003)).

<sup>300</sup> *Id.* P 64 n.118.

<sup>301</sup> *Id.* P 74.

<sup>302</sup> *Id.*

the issue of whether ATSI retains any responsibility for MVP costs under the terms of the ATSI-MISO Exit Fee Agreement, and if so, the amount of that cost responsibility.<sup>303</sup>

**c. ATSI's Petition and Complaint, Docket No. EL11-56-000**

145. The Commission found that the concerns addressed in ATSI's petition would be addressed in Docket No. ER12-715-000 and, thus, dismissed the petition.<sup>304</sup> The Commission also found that, to the extent ATSI argued that MISO's existing Tariff provisions are unjust and unreasonable and sought to modify the existing Tariff, the complaint was denied. The Commission stated that, by waiting until after it withdrew from MISO to file its complaint, ATSI filed too late to modify the Tariff provisions in effect at the time of its withdrawal.<sup>305</sup> To the extent that ATSI claimed that the Tariff provisions in effect at the time were unjust and unreasonable as applied to ATSI, the Commission noted that the Tariff did "not specify the amount or method of [calculating] MVP exit fee responsibility . . . but instead left that to be determined on a case-by-case basis."<sup>306</sup> The Commission further stated that ATSI would have an opportunity in the hearing on Schedule 39 to present arguments about the just and reasonable level of MVP cost responsibility for it to bear and whether the terms of the ATSI-MISO Exit Fee Agreement absolved ATSI of MVP cost responsibility.

**2. Requests for Rehearing**

**a. Withdrawal Obligations of Transmission Owners**

146. Duke and ATSI generally argue that Schedule 39 conflicts with the financial obligations of withdrawing transmission owners in Attachment FF to the pre-withdrawal Tariff and the MISO Transmission Owners Agreement.<sup>307</sup> According to Duke and ATSI, both Attachment FF and the MISO Transmission Owners Agreement require withdrawing transmission owners to satisfy only those financial obligations incurred prior to their withdrawal.<sup>308</sup> Duke posits that those prior obligations are limited to costs

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<sup>303</sup> *Id.* P 75.

<sup>304</sup> *Id.* P 100.

<sup>305</sup> *Id.* P 101.

<sup>306</sup> *Id.*

<sup>307</sup> Duke Rehearing Request at 10-18; ATSI Rehearing Request at 13-26.

<sup>308</sup> Duke Rehearing Request at 9-10; ATSI Rehearing Request at 13.

“previously allocated” to the withdrawing transmission owners.<sup>309</sup> Duke argues that Schedule 39 constitutes an imposition of new costs, rather than the recovery of previously incurred costs.<sup>310</sup> ATSI states that MVP charges are assessed on a usage basis and therefore cannot be incurred until the project is constructed (and not at MISO Board approval as stated under Schedule 39).<sup>311</sup> Duke asserts that, prior to MISO’s filing of Schedule 39, no Tariff provisions were in place to recover MVP costs from transmission owners that have already withdrawn from MISO.<sup>312</sup> Duke argues that no party has made the argument that there is any MVP cost allocation performed immediately upon MISO Board approval of an MVP.<sup>313</sup> Duke and ATSI additionally claim that the Commission failed to provide a rational explanation of how the withdrawal provisions can be interpreted to permit MISO to create a new financial obligation after a transmission owner’s withdrawal.<sup>314</sup>

147. In this respect, ATSI argues that the Commission’s finding that Schedule 39 does not enlarge a transmission owner’s withdrawal obligations violates the filed rate doctrine and the corresponding prohibition against retroactive ratemaking.<sup>315</sup> ATSI asserts that the MVP Orders did not provide notice to ATSI that it would be forced to pay MVP costs, nor did they provide notice that MISO would file new cost allocation rules such as those under Schedule 39.<sup>316</sup> ATSI argues that, although the Commission acknowledged ATSI’s filed-rate-doctrine arguments in the Schedule 39 Order, the Commission did not offer an adequate response. ATSI posits that there is no rational basis for the Commission’s simultaneous conclusions that the withdrawal language of Attachment FF puts parties on notice of their cost responsibilities and that Attachment FF does not specify what costs would be included or how such costs would be allocated.

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<sup>309</sup> Duke Rehearing Request at 15-17.

<sup>310</sup> *Id.* at 10-11, 17-18.

<sup>311</sup> ATSI Rehearing Request at 17.

<sup>312</sup> Duke Rehearing Request at 11-12.

<sup>313</sup> *Id.* at 17-18.

<sup>314</sup> *Id.* at 13-14; ATSI Rehearing Request at 24-26.

<sup>315</sup> ATSI Rehearing Request at 26-28.

<sup>316</sup> *Id.* at 28 (citing Schedule 39 Order, 138 FERC ¶ 61,140 at PP 41, 50).

148. Duke and ATSI argue that MISO's adoption of Schedule 39 violated Article II, Section IX.C.8 of the MISO Transmission Owners Agreement, which provides that the "withdrawal rights set forth in Articles Five and Seven of this Agreement shall not be changed except by unanimous vote by the Owners."<sup>317</sup> ATSI argues that this language is unambiguous, and prohibits modification of the MISO Transmission Owners Agreement's withdrawal requirements, including the financial obligations of a withdrawing transmission owner, over the objection of any transmission owner. ATSI argues that MISO never had ATSI's consent to impose MVP cost allocations on ATSI or the ATSI Zone. To the extent the current MISO transmission owners may have approved Schedule 39 after ATSI's departure, ATSI asserts that their consensus to impose MVP costs on *others* only underscores the inequity of MISO's proposal and illuminates the manner in which Schedule 39 violates the filed rate doctrine and rule against retroactive ratemaking.<sup>318</sup>

**b. Schedule 39 is Inconsistent with MVP Tariff Provisions**

149. Duke argues that Schedule 39 inherently conflicts with the pre-withdrawal Tariff provisions governing MVPs.<sup>319</sup> Duke explains that MVP costs are allocated to transmission owners based on their actual usage and, therefore, reflect the benefits that transmission owners receive. Duke states that the Commission's original rationale in approving MVP cost allocation was that such allocation would change over time as usage of MVPs changed. Duke states that the Commission found that the MVP system would therefore directly track both the usage and beneficiaries of the MVP-enhanced MISO transmission system over time.<sup>320</sup> In comparison, Duke states that Schedule 39 would assess charges based on withdrawing transmission owners' use of a different transmission system or the transmission owners' historic usage of the MISO transmission system, neither of which correlates usage of the MVP system with its benefits.<sup>321</sup> Duke states that the Commission did not engage in reasoned decision-making when it dismissed arguments in this vein in the Schedule 39 Order, relying on its statements in the MVP Orders. Duke argues that the MVP Orders do not discuss why it is just and reasonable to hold withdrawing transmission owners liable for MVP costs allocated long after their

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<sup>317</sup> *Id.*; Duke Rehearing Request at 43-45.

<sup>318</sup> ATSI Rehearing Request at 28-29.

<sup>319</sup> Duke Rehearing Request at 24-31.

<sup>320</sup> *Id.* at 25 (citing MVP Order, 133 FERC ¶ 61,221 at P 383).

<sup>321</sup> *Id.* at 26.

usage of the MISO system has ended, nor is there any justification of either non-MISO usage or historical MISO usage as a basis for MVP allocations.<sup>322</sup>

150. Duke and ATSI add that MVP charges differ from non-MVP charges in that MVP charges are assessed on a usage basis and are therefore not “incurred” until the transmission project is constructed, which is long after withdrawal from MISO.<sup>323</sup> Duke and ATSI argue that MVPs are billed on a usage basis, while non-MVP transmission projects are allocated to specific transmission zones on an up-front, one-time basis at the time the transmission project is approved by the MISO Board; thus, Duke and ATSI state that the non-MVP “financial obligation” is “incurred” at the time the transmission project is approved by the MISO Board.<sup>324</sup> Further, ATSI states that because Schedule 39 would not assess charges that reflect a transmission owner’s changing use of the MISO system, those charges would not reflect the fact that withdrawing transmission owners do not benefit from the MISO system.

**c. Undue Discrimination and Cost Causation**

151. Duke and ATSI generally argue that Schedule 39 is unduly discriminatory because MISO’s proposal would allocate MVP costs to withdrawing transmission owners based on their usage of another transmission system or their historic usage of the MISO system.<sup>325</sup> ATSI states that Schedule 39 discriminates among current and former members of MISO because it imposes MVP costs on ATSI merely because an MVP was approved before ATSI’s withdrawal date, and no other MISO transmission owner is allocated MVP costs based solely on its membership in MISO when an MVP was approved.<sup>326</sup> Duke argues that under the FPA, MISO can only charge for services that it provides over facilities that it owns or operates and cannot impose charges for service provided over transmission facilities operated by another transmission provider.<sup>327</sup> ATSI

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<sup>322</sup> *Id.* at 28.

<sup>323</sup> *Id.* at 29-31; ATSI Rehearing Request at 17.

<sup>324</sup> Duke Rehearing Request at 29-31; ATSI Rehearing Request at 17.

<sup>325</sup> Duke Rehearing Request at 35-37; ATSI Rehearing Request at 35.

<sup>326</sup> ATSI Rehearing Request at 32-33.

<sup>327</sup> Duke Rehearing Request at 40-42.

argues that Schedule 39 violates the prohibition in the MVP Order on MVP charges for export or wheel-through transactions that sink in PJM.<sup>328</sup>

152. ATSI and Duke claim that the Commission failed to adequately respond to these arguments in the Schedule 39 Order.<sup>329</sup> ATSI explains that the Commission only responded that discrimination is not undue because withdrawing transmission owners choose to withdraw and thereby subject themselves to Schedule 39 charges. ATSI characterizes the Commission's response in the Schedule 39 Order as a non sequitur because ATSI did not know about the MVP rate proposal or the Michigan Thumb Project when it committed to withdraw from MISO.<sup>330</sup> Duke adds that Schedule 39 would shift costs from future users of the MISO transmission system to withdrawing transmission owners, creating the same volatility and uncertainty in the ratemaking process that was prohibited by not allowing withdrawing transmission owners to not pay non-MVP costs and shift the burden to remaining transmission owners.<sup>331</sup>

153. ATSI adds that the Commission's holding that withdrawing transmission owners must pay MVP costs and, absent further "cost/benefit" justification, cannot pass those costs onto their customers, imposes an impermissible penalty on the departed transmission owners and is unduly discriminatory.<sup>332</sup> ATSI states that the Commission explained, "[t]he transmission owner, not its transmission customers, makes the decision to withdraw from MISO and, therefore, Attachment FF neither contemplates nor prescribes any financial obligations for the transmission customers in the Withdrawing Transmission Owner's zone."<sup>333</sup> ATSI argues that if an MVP is planned to benefit a transmission owner's zone, then Attachment FF clearly contemplates that customers in that zone will help pay for the MVP as part of their rate.<sup>334</sup> In addition, ATSI argues that

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<sup>328</sup> ATSI Rehearing Request at 34 (citing MVP Order, 133 FERC ¶ 61,221 at P 440).

<sup>329</sup> *Id.* at 32-34; Duke Rehearing Request at 35-36.

<sup>330</sup> ATSI Rehearing Request at 32.

<sup>331</sup> Duke Rehearing Request at 40.

<sup>332</sup> ATSI Rehearing Request at 38 (citing Schedule 39 Order, 138 FERC ¶ 61,140 at P 65).

<sup>333</sup> *Id.* (citing Schedule 39 Order, 138 FERC ¶ 61,140 at P 65).

<sup>334</sup> *Id.* at 38-39.

the Commission may not lawfully interpret MISO's Tariff in a way that sanctions ATSI for its legitimate business decision. ATSI states that the Commission's position here is not only arbitrary and capricious, but it also creates an unjust and unreasonable result: a withdrawing transmission owner must justify charges for transmission projects that are planned by MISO and that, absent the decision to leave, would have been passed through to customers but now must be subjected to a second level of regulatory review—only those transmission owners who remain are permitted to pass on their MVP costs to their customers.<sup>335</sup> ATSI states that the Commission has therefore imposed a rate scheme that, if ultimately imposed on the departed transmission owner, will violate sections 205(a) and (b) of the FPA.<sup>336</sup>

154. ATSI and Duke each argue that Schedule 39 is inconsistent with cost causation principles.<sup>337</sup> Duke points out that the Seventh Circuit required costs to be allocated in a manner at least roughly commensurate with estimated benefits. Duke contends that Schedule 39 violates this principle because it is not based on usage of the MISO system and does not change as usage changes. Duke and ATSI assert that Schedule 39 charges paid by withdrawing transmission owners will not be commensurate with the benefits that they receive. ATSI asserts that the Commission erred in rejecting cost causation arguments on the ground that they are irrelevant to a dispute over contract and tariff obligations, stating that this determination violated the Commission's statutory duty under section 206 of the FPA.<sup>338</sup>

**d. Duquesne**

155. ATSI and Duke assert that the Commission erroneously held that *Duquesne* does not preclude MISO's assessment of Schedule 39 charges because the PJM Transmission

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<sup>335</sup> *Id.* at 39.

<sup>336</sup> *Id.* (referencing 16 U.S.C. § 824d(a)-(b) (2012)).

<sup>337</sup> *Id.* at 36-38; Duke Rehearing Request at 32-34 (citing *Ill. Commerce Comm'n v. FERC*, 576 F.3d 470, 477 (7th Cir. 2009); *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000 at PP 622-623, 637, 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)).

<sup>338</sup> ATSI Rehearing Request at 37.

Owner Agreement<sup>339</sup> and the PJM Operating Agreement<sup>340</sup> are distinguishable from the withdrawal language in Article Five, Section II.B of the MISO Transmission Owners Agreement or Attachment FF of the pre-withdrawal Tariff.<sup>341</sup> In particular, Duke and ATSI argue that there is no material difference between the relevant agreements' withdrawal provisions.<sup>342</sup> ATSI notes that in *Duquesne*, the Commission found that “given the language of [PJM’s] tariff, PJM is not permitted to allocate future-period project costs to a former transmission owner based on the fictional assumption that this former transmission owner’s zone can or should remain a part of PJM for future year [cost allocation] purposes.”<sup>343</sup> ATSI states that, because the language of MISO’s pre-withdrawal Tariff is not distinguishable in any meaningful way from PJM’s tariff, the Commission’s reading of Attachment FF arbitrarily and capriciously breaks from this binding precedent, and the Commission should deny recovery of an MVP Usage Charge as an exit fee here.

156. Duke and ATSI also argue that there was no meaningful difference between the substantive MVP provisions in MISO’s pre-withdrawal Tariff and PJM’s Regional Transmission Expansion Plan (RTEP) provisions.<sup>344</sup> Duke states that RTEP costs for high-voltage facilities were reallocated yearly based on usage in the prior year; similarly, Duke states that the MVP provisions of the pre-withdrawal Tariff call for a Monthly Usage Rate, which is a charge based on monthly net actual energy withdrawals. Duke states that the Commission acknowledged that the “allocation and usage-based rate design of MISO’s MVPs are similar to the allocation and usage-based rate design of

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<sup>339</sup> ATSI notes that section 3.4 of the PJM Transmission Owners Agreement states that “[a]ny Party that withdraws from, transfers, or assigns this Agreement...shall remain liable for any and all obligations under this Agreement that such Party incurred, that were incurred on behalf such Party, or that arose hereunder prior to the date upon which such Party’s withdrawal, transfer, or assignment became effective.” *Id.* at 30.

<sup>340</sup> ATSI notes that Schedule 1, sections 1.4.6(c) and 1.5.2(a) of the PJM Operating Agreement similarly state that a departing member must “pay its share of any fees and charges incurred . . . prior to the date of . . . withdrawal.” *Id.*

<sup>341</sup> *Id.* at 29-32; Duke Rehearing Request at 18-23.

<sup>342</sup> ATSI Rehearing Request at 30; Duke Rehearing Request at 20.

<sup>343</sup> ATSI Rehearing Request at 31 (citing *Duquesne*, 124 FERC ¶ 61,219 at P 167.)

<sup>344</sup> *Id.* at 30; Duke Rehearing Request at 21-22.

PJM's 500kV facilities."<sup>345</sup> ATSI argues that the PJM RTEP costs could not be allocated to Duquesne because they were usage based, and that is the same reason why the MVP usage-based charges cannot be allocated to departing MISO transmission owners here. Further, Duke states that whereas in *Duquesne*, the Commission held that existing PJM tariff provisions were insufficient to reach withdrawing transmission owners after withdrawal and that new tariff provisions were required to create a new obligation, the Commission suddenly departed from this precedent by its holding in the Schedule 39 Order that new MISO Tariff language was not required to establish withdrawing transmission owners' MVP cost responsibilities.

**e. Schedule 39 is Inequitable**

157. ATSI claims that the Commission acknowledged, but did not address, ATSI's arguments that Schedule 39 is inequitable as applied to ATSI, and thus not just and reasonable. ATSI argues that long before the Michigan Thumb Project was announced, ATSI gave written notice of its intent to withdraw from MISO, the Commission approved the withdrawal, and ATSI committed its loads into the PJM Base Residual Auction parameters for the 2013-2014 Delivery Year.<sup>346</sup> According to ATSI, the Commission has previously found that, once a utility receives notice of cancellation from its customer, the utility can stop planning for the customer. Further, ATSI contends that the utility may not begin imposing new conditions on service.<sup>347</sup> ATSI states that under contract law, companies have an obligation to mitigate or avoid damages. Thus, ATSI concludes that MISO was not permitted to increase ATSI's liabilities after ATSI indicated its intent to withdraw.

**f. ATSI Complaint**

158. ATSI argues that the Commission's decision to deny its complaint was arbitrary and capricious.<sup>348</sup> ATSI states that the Commission may not dismiss a complaint under section 206 of the FPA merely on the ground that the subject of a complaint is governed by the provisions of a contract or tariff. ATSI also argues that the Commission's

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<sup>345</sup> Duke Rehearing Request at 21 (citing Schedule 39 Order, 138 FERC ¶ 61,140 at P 63).

<sup>346</sup> ATSI Rehearing Request at 39.

<sup>347</sup> *Id.* at 39-40 (citing *Ky. Utils.*, 23 FERC ¶ 61,317 (1983); *Pub. Serv. Co. of N.H.*, 32 FERC ¶ 61,251 (1985)).

<sup>348</sup> *Id.* at 21-24.

dismissal of the complaint on the grounds that it was filed too late was arbitrary and capricious. ATSI contends that, if it was not too late for the Commission to interpret the MISO Transmission Owners Agreement or Attachment FF of the pre-withdrawal Tariff, it was not too late for ATSI to file its complaint. According to ATSI, the Commission cannot deny a party the opportunity to challenge a new or threatened interpretation or application of MISO's pre-withdrawal Tariff simply because the challenge was not filed before withdrawal.<sup>349</sup> ATSI contends that, if MISO asserts a purported right to impose new obligations seven months after ATSI's departure, then ATSI's complaint, which was filed four months before Schedule 39 was filed, cannot have been too late to challenge the underlying MVP structure. ATSI claims that to hold otherwise would be a denial of due process.

**g. ATSI-MISO Exit Fee Agreement**

159. ATSI argues that the Schedule 39 Order fails to recognize that the ATSI-MISO Exit Fee Agreement absolves ATSI of its financial obligations under Article Five, Section II.B of the MISO Transmission Owners Agreement.<sup>350</sup> According to ATSI, the plain terms of section 3.1(a) and 3.2 of the ATSI-MISO Exit Fee Agreement indicate that ATSI's payment of the exit fee satisfies ATSI's withdrawal obligations and that ATSI's liability is limited to financial obligations incurred prior to May 31, 2011.<sup>351</sup> Thus, according to ATSI, Schedule 39 expands the scope of ATSI's liability in conflict with the Mobile-Sierra public interest presumption.<sup>352</sup> In addition, ATSI argues that a comparison between the ATSI-MISO Exit Fee Agreement and the Duke-MISO Exit Fee Agreement establishes that sections 3.1(a) and 3.2 of the ATSI-MISO Exit Fee Agreement absolves ATSI of all liability under Article Five, Section II.B of the MISO Transmission Owners Agreement. Specifically, ATSI states that section 3.2 of the Duke-MISO Exit Fee Agreement states that Duke satisfies its financial obligations to MISO under Article Five, Section II.B of the MISO Transmission Owners Agreement *with respect to Schedules 10, 16, and 17*; ATSI states that section 3.2 of the ATSI-MISO Exit Fee Agreement satisfies its financial obligations to MISO under Article Five, Section II.B of the MISO Transmission Owners Agreement, with no reference to Schedule 10, 16, and 17.<sup>353</sup>

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<sup>349</sup> *Id.* at 24.

<sup>350</sup> *Id.* at 41.

<sup>351</sup> *Id.*

<sup>352</sup> *Id.* at 41-42.

<sup>353</sup> *Id.* at 44-45 (emphasis added by ATSI).

160. ATSI also argues that MISO incorrectly asserts that the preservation of ATSI's rights in section 2.2 of the ATSI-MISO Exit Fee Agreement somehow changes the express meaning of sections 3.1(a) and 3.2. Section 2.2 states:

By signing this Agreement, ATSI does not waive and expressly reserves the right to participate as to all matters at issue in Docket No. ER09-1589, Docket No. EL10-6, Docket No. ER10-1791 and Docket No. ER11-2059, to pursue complaints, rehearings and appeals of any Commission orders related thereto and to pursue other legal remedies regarding matters covered in Article Five, Section II[.]<sup>[354]</sup>

161. First, ATSI argues that section 2.2 only protects ATSI, because it specifies only that ATSI reserves its rights; it offers absolutely no protection to MISO.<sup>355</sup> As such, ATSI states that MISO may not rely on this language in section 2.2 for any purpose, including an attempt to circumvent its explicit agreement to absolve ATSI of Article Five, Section II.B liability. Second, ATSI argues that the language specifically enumerates the proceedings in which rights are reserved, all of which were proceedings where ATSI had requests for rehearing pending before the Commission or in active settlement proceedings at the time the ATSI-MISO Exit Fee Agreement was entered into. For example, ATSI states that one enumerated proceeding was the MVP proceeding, in Docket No. ER10-1791, in which ATSI was awaiting a response to its request for rehearing. ATSI states that section 2.2 of the ATSI-MISO Exit Fee Agreement merely reserves ATSI's right to continue to participate in these proceedings and thus continue to represent its interests in them. Third, ATSI notes that section 2.2 refers only to "Article Five, Section II"—it does not specifically refer to Article Five, Section II.B of the MISO Transmission Owners Agreement.<sup>356</sup> Thus, ATSI argues that a general reference to Article Five, Section II of the MISO Transmission Owners Agreement in section 2.2 of the ATSI-MISO Exit Fee Agreement cannot change the specific reference to Article Five, Section II.B in sections 3.1(a) and 3.2 of the ATSI-MISO Exit Fee Agreement.<sup>357</sup>

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<sup>354</sup> *Id.* at 42 (citing ATSI-MISO Exit Fee Agreement at section 2.2).

<sup>355</sup> *Id.*

<sup>356</sup> *Id.* at 42-43.

<sup>357</sup> *Id.* at 43.

162. Finally, ATSI states that the Commission has twice explained that it expected a withdrawing transmission owner's MVP obligation, if any, to be settled through an exit fee agreement.<sup>358</sup>

### **3. Commission Determination**

163. To the extent ATSI and Duke argue that Schedule 39 is inequitable as applied to them specifically, we will dismiss their requests for rehearing as moot. For the reasons discussed above, we will reverse the Presiding Judge's finding in the Initial Decision that Schedule 39 is consistent with the terms of the Tariff in effect at the time that ATSI and Duke withdrew from the MISO region (i.e., the pre-withdrawal Tariff), and that the cost calculation methodology in Schedule 39 may therefore be applied to ATSI and Duke. In addition, our reversal of the Presiding Judge's determination that Schedule 39 is consistent with the pre-withdrawal Tariff addresses arguments that Schedule 39 is inconsistent with MISO's MVP Tariff provisions or that Schedule 39 violates the filed rate doctrine. We also will dismiss as moot rehearing as to ATSI's argument that the ATSI-MISO Exit Fee Agreement absolves ATSI of cost responsibility for MVPs approved by the MISO Board prior to ATSI's withdrawal, for the reasons discussed above in reversing the Presiding Judge's findings on this issue. However, ATSI and Duke request rehearing on issues not necessarily specific to ATSI and Duke (i.e., the prospective application of Schedule 39 generally). We address those limited issues here on rehearing of the Schedule 39 Order.

164. As a threshold issue, we will deny rehearing of the Schedule 39 Order and affirm the finding that Schedule 39 and the related revisions to Attachment MM are a just and reasonable basis for MISO to charge a transmission owner that withdraws from MISO after January 1, 2012. We find that Schedule 39 specifies, on a prospective basis (i.e., for future withdrawals), the MVP-related financial obligations of a withdrawing transmission owner by specifying how MVP cost responsibility for withdrawing transmission owners is calculated and billed under the terms of the MISO Transmission Owners Agreement and the Tariff. We find that, by specifying the MVP-related withdrawal obligation, Schedule 39 prevents MISO from being required to file exit fee agreements to establish MVP cost responsibility, calculation, and recovery provisions for each withdrawing transmission owner on a case-by-case basis. We affirm our finding that Schedule 39 is consistent with how MISO recovers costs associated with the withdrawal obligation for non-MVPs under Schedules 37 and 38.<sup>359</sup> Moreover, we find that Schedule 39 is just and

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<sup>358</sup> *Id.* at 44-45 (citing MVP Order, 133 FERC ¶ 61,221 at P 471; MVP Rehearing Order, 137 FERC ¶ 61,074 at P 321).

<sup>359</sup> *See* Schedule 39 Order, 138 FERC ¶ 61,140 at P 61 n.112 (referencing Schedule 37 Order, 135 FERC ¶ 61,204; Schedule 38 Order, 137 FERC ¶ 61,254).

reasonable for the same reasons that the Commission gave when accepting MISO's proposal to assign cost responsibility for non-MVPs at the time that MISO's Board approves the project.<sup>360</sup> In those proceedings, the Commission required MISO to modify Attachment FF to clarify that withdrawal does not absolve a transmission owner of its responsibility for the costs of upgrades previously allocated to it, explaining that "[i]n principle, a transmission owner should not be able to avoid previously allocated costs by withdrawing from [MISO]."<sup>361</sup> The Commission further explained that:

cost allocations made under Attachment FF are rightfully included in the 'all financial obligations' contemplated by the [MISO Transmission Owners] Agreement...Furthermore, the Commission finds that failing to include the costs allocated to a member under Attachment FF would create volatility and uncertainty in the ratemaking process by transferring costs assigned to a [transmission owner withdrawing from MISO] to the remaining members.<sup>[362]</sup>

165. We will affirm the finding in the Schedule 39 Order that Duke and ATSI wrongly contend that Schedule 39 improperly amends the MISO Transmission Owners Agreement without the unanimous consent of the MISO Transmission Owners.<sup>363</sup> We continue to find that Article Five, Section II.B of the MISO Transmission Owners Agreement specifies that transmission owners withdrawing from MISO must honor financial obligations incurred prior to the effective date of withdrawal, but does not specify what those financial obligations consist of, instead leaving those to be established through the Tariff. Consistent with the findings in the Schedule 39 Order, we find that the MISO Transmission Owners Agreement is not amended to include new financial obligations, but that Schedule 39 specifies prospectively under the Tariff what financial obligations, in part, are to be honored upon withdrawal.<sup>364</sup>

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<sup>360</sup> See RECB I Order, 114 FERC ¶ 61,106 at PP 124, 130; RECB I Rehearing Order, 117 FERC ¶ 61,241 at PP 62, 108; RECB II Order, 118 FERC ¶ 61,209 at P 193; RECB II Rehearing Order, 120 FERC ¶ 61,080 at P 83.

<sup>361</sup> RECB II Order, 118 FERC ¶ 61,209 at P 193.

<sup>362</sup> RECB II Rehearing Order, 120 FERC ¶ 61,080 at P 83.

<sup>363</sup> Schedule 39 Order, 138 FERC ¶ 61,140 at P 64.

<sup>364</sup> *Id.* P 64 n.118.

166. With respect to ATSI and Duke's arguments that Schedule 39 is inconsistent with cost causation and cost allocation principles, we deny rehearing. As we found in the Schedule 39 Order,<sup>365</sup> the MVP withdrawal obligations of withdrawing transmission owners is an issue of interpretation of the contractual commitment pursuant to the MISO Transmission Owners Agreement and the Tariff obligations imposed under Attachment FF. The determining factor is whether the cost responsibility has been assigned before the withdrawal date, and if it has, the withdrawing transmission owner will be responsible for those costs. Although the withdrawing transmission owner may not benefit from MISO's system upgrades after withdrawal to the same extent that it would have benefitted had it remained a member of MISO, that circumstance is a consequence of the transmission owner's business decision to withdraw. We find that the withdrawal obligation in Schedule 39 is just, reasonable, and not unduly discriminatory, and that it specifies, in part, what financial obligations under the Tariff will be honored upon withdrawal after January 1, 2012.

167. We also will deny arguments on rehearing that Schedule 39 is unduly discriminatory because Schedule 39 charges withdrawing transmission owners based on their usage of another transmission system or their historic usage of the MISO system. While we acknowledge that transmission owners that have departed MISO will pay MVP charges based on their historical use of the MISO system or their use of a system other than MISO's, which is a different charge than MISO transmission owners paying the MVP Usage Rate based on their usage of the MISO system, the Commission has determined that discrimination is undue only when there is a difference in rates or services among similarly situated customers that is not justified by some legitimate factor.<sup>366</sup> Prior Commission precedent has recognized that dissimilar treatment of dissimilar resources does not constitute undue discrimination.<sup>367</sup> We find that a

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<sup>365</sup> *Id.* P 63.

<sup>366</sup> *El Paso Natural Gas Co.*, 104 FERC ¶ 61,045, at P 115 (2003) (citing *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 436, FERC Stats. & Regs. ¶ 30,665, at 31,541 (1985)).

<sup>367</sup> *See Cal. Indep. Sys. Operator Corp.*, 131 FERC ¶ 61,087, at P 43 (2010) (allowing the independent system operator to apply more stringent outage reporting requirements to intermittent resources); *Westar Energy Inc.*, 130 FERC ¶ 61,215, at PP 35-36 (2010) (allowing Westar to assess different generator regulation charges for intermittent resources); *Southwest Power Pool, Inc.*, 127 FERC ¶ 61,283, at P 29 (2009) (allowing the Southwest Power Pool to modify its eligibility requirements and corresponding cost allocation methodology in order to designate wind resources as network resources); *Cal. Indep. Sys. Operator Corp.*, 119 FERC ¶ 61,061, at P 69 (2007),

(continued...)

withdrawing transmission owner is not similarly situated to a transmission owner that did not withdraw from MISO, or to other members of the system to which the withdrawing transmission owner now belongs, because the transmission owner made a decision to withdraw from MISO and subjected itself to Schedule 39 charges.<sup>368</sup>

168. We find it reasonable for Schedule 39 to charge withdrawn transmission owners for MVP costs on a slightly different basis than those costs will be assessed to current MISO members. Although withdrawn and current MISO members may share the financial obligations for MVPs, withdrawn members no longer use the MISO system to the extent that they would have had they remained members of MISO and, therefore, charging them for the MVPs strictly according to their use of the MISO system would not effectuate system-wide allocation of MVP costs incurred prior to their withdrawal. Schedule 39 reasonably addresses this problem by charging the withdrawing transmission owner the Schedule 39 MVP Usage Rate based on either: (1) its monthly net energy withdrawal transactions (based on the sum total of the actual energy of customers taking service for delivery in the withdrawing transmission owner's zone in the period for which charges are applicable); or (2) if the energy usage of the withdrawn transmission owner is not provided to MISO, the estimated historical monthly net energy withdrawal values associated with the withdrawing transmission owner from the last calendar year prior to withdrawal, adjusted each year assuming a five percent annual growth rate.

169. We are not persuaded by ATSI's argument that the Schedule 39 rate methodology violates the prohibition in the MVP Order on MVP charges for export or wheel-through transactions that sink in PJM.<sup>369</sup> Schedule 39 does not subject a withdrawing transmission owner to an MVP Usage Charge for subsequent exports from MISO to serve its load in PJM. Rather, Schedule 39 charges a withdrawing transmission owner for MVP costs allocated to its zonal load, regardless of where power is sourced to serve that load. We find that Schedule 39 provides certainty because withdrawing transmission owners will have clearly established procedures for calculation and recovery of their MVP cost responsibility for projects approved by the MISO Board prior to their withdrawal.

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*order on reh'g*, 120 FERC ¶ 61,244 (2007) (accepting a proposal with special rate treatment for the costs of interconnection facilities for location-constrained resources).

<sup>368</sup> See Schedule 39 Order, 138 FERC ¶ 61,140 at P 69.

<sup>369</sup> ATSI Rehearing Request at 34 (citing MVP Order, 133 FERC ¶ 61,221 at P 440)).

170. Nor are we persuaded by arguments that Schedule 39 inappropriately shifts costs. We will affirm the finding in the Schedule 39 Order that withdrawing transmission owners cannot automatically pass Schedule 39 MVP costs onto their wholesale transmission customers.<sup>370</sup> We continue to find that ATSI and Duke, and not their transmission customers, decided to withdraw from MISO. Neither Section III.A.2.j of Attachment FF nor Article Five, Section II.B of the MISO Transmission Owners Agreement defines any financial obligations owed by the transmission customers of the withdrawing transmission owner. Instead, Article Five, Section II.B of the MISO Transmission Owners Agreement provides:

All financial obligations incurred and payments applicable to time periods prior to the effective date of such [transmission owner's] withdrawal shall be honored by [MISO] and the withdrawing [o]wner.

In addition, Section III.A.2.j of Attachment FF of MISO's Tariff describes the cost obligations of a transmission owner withdrawing from MISO as follows:

a [transmission owner] that withdraws from [MISO] shall remain responsible for all financial obligations incurred pursuant to this Attachment FF while a [m]ember of [MISO] and payments applicable to time periods prior to the effective date of such withdrawal shall be honored by [MISO] and the withdrawing [m]ember.

We find that these provisions clearly specify that the financial obligations of withdrawing transmission owners remains with the transmission owners and do not rest with their wholesale transmission customers. In addition, we find that ATSI and Duke have not demonstrated in this proceeding that wholesale transmission customers will realize net benefits from the realignment, nor do we have before us a proposal to recover ATSI's and Duke's shares of the MVP costs from their transmission customers through formula rates.

171. However, while we find that withdrawing transmission owners cannot automatically pass onto their customers Schedule 39 charges, we reiterate that a withdrawing transmission owner can seek to recover those costs in a separate filing under section 205.<sup>371</sup> As stated in the Schedule 39 Order, it is appropriate that the transmission

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<sup>370</sup> Schedule 39 Order, 138 FERC ¶ 61,140 at PP 65, 67 (citing *PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,198, at PP 59-61 (2011)).

<sup>371</sup> See, e.g., *PJM Interconnection, L.L.C.*, 139 FERC ¶ 61,068 (2012).

owner must demonstrate in that filing that the benefits to its wholesale transmission customers exceed the costs arising from the transmission owner's decision to withdraw from MISO in order to justify recovery of Schedule 39 charges from such customers.<sup>372</sup> Moreover, as the Commission has previously stated:

[w]hile we have held that companies are free to join and exit RTOs, we have applied the existing tariffs for each RTO in determining the costs to be allocated to the transmission owner seeking to exit and/or enter. We see no basis to modify the existing RTO rules simply because a particular cost allocation makes a transmission owner's business decision more expensive.<sup>[373]</sup>

172. With regard to ATSI's and Duke's assertions that the Commission erroneously held that *Duquesne* does not preclude MISO's assessment of Schedule 39 charges, we also will deny rehearing. We continue to find that the Commission's findings in *Duquesne* are distinguishable, and thus not applicable to the current proceeding, because the Commission's finding in *Duquesne* was based on the specific provisions found in the PJM tariff, and the provisions of MISO's Tariff require a different result. In *Duquesne*, the costs assigned to regional facilities of 500 kV or above were allocated annually under Schedule 12 of PJM's tariff "among [r]esponsible [c]ustomers . . . on an annual load-ratio share basis using . . . the applicable zonal loads at the time of each Zone's annual peak load" during the year.<sup>374</sup> The Commission said that a departing transmission owner leaving PJM would, pursuant to this language, no longer be subject to these charges because it would not have a zonal annual peak load as it would no longer be a zone in PJM. The Commission stated that Schedule 12 did not permit PJM to supplement the required calculation with load data from a nonexistent zone, i.e., by adding back in the non-existent Duquesne zone once Duquesne departed PJM.

173. Thus, while we acknowledge that the allocation and usage-based rate design of MISO's MVPs are similar to the allocation and usage-based rate design of PJM's 500 kV facilities, we continue to find that MISO's Tariff language is different than PJM's, and the Commission made clear in *Duquesne* that its findings were based on the language, or

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<sup>372</sup> Schedule 39 Order, 138 FERC ¶ 61,140 at P 67 (citing *PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,198 at PP 59-61).

<sup>373</sup> *Id.* P 68 (citing Realignment Order, 129 FERC ¶ 61,249 at P 113 (internal citations omitted)).

<sup>374</sup> *Duquesne*, 124 FERC ¶ 61,219 at P 164.

lack thereof, in the PJM tariff.<sup>375</sup> As the Commission found in the Hearing Order, Section III.A.2.j of Attachment FF of MISO's Tariff explicitly obligates transmission owners withdrawing from MISO to pay costs incurred under Attachment FF, including MVP costs; in contrast, as the Commission determined in *Duquesne*, Schedule 12 (Transmission Enhancement Charges) of the PJM tariff lacks any language to obligate transmission owners that withdraw from PJM to continue to pay for transmission facility additions rated 500 kV and above.<sup>376</sup> Therefore, we continue to find that, because Attachment FF specifies that transmission owners withdrawing from MISO are obligated to honor financial obligations associated with transmission facility additions incurred under Attachment FF prior to withdrawal, the *Duquesne* precedent does not apply to the instant proposal. MISO's Tariff provisions are distinguishable from the PJM tariff language at issue in *Duquesne*, and the Commission's interpretation of the PJM tariff language cannot be directly applied here.

174. Thus, we continue to find that Schedule 39 applied prospectively is a just and reasonable method that specifies the financial obligation incurred for MVPs, which was previously left to be established on a case-by-case basis upon the transmission owner's withdrawal.<sup>377</sup>

175. Finally, with respect to ATSI's request for rehearing of the Commission's decision to dismiss its petition for declaratory order and deny its complaint, we find this issue now moot. In its 2011 petition, ATSI asked for an order declaring that MVP costs could not be imposed upon departing transmission owners, and in the alternative, ATSI's complaint argued that MISO could not allocate the costs of the Michigan Thumb Project to ATSI or any other entities within the ATSI zone that have departed MISO under the terms of the pre-withdrawal Tariff. The Commission's acceptance of Schedule 39, as discussed in the Schedule 39 Order and affirmed here, addresses the issue of whether MVP costs can be allocated to transmission owners that withdraw from MISO. In addition, as discussed above, the issue of ATSI's MVP cost responsibility for the Michigan Thumb Project under the terms of the pre-withdrawal Tariff and the MISO Transmission Owners Agreement is addressed by the Commission's partial reversal of the Initial Decision.

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<sup>375</sup> Schedule 39 Order, 138 FERC ¶ 61,140 at P 63 (citing *Duquesne*, 124 FERC ¶ 61,219 at P 167).

<sup>376</sup> *Id.* (citing *Duquesne*, 124 FERC ¶ 61,219 at P 167).

<sup>377</sup> *Id.* PP 5-9.

The Commission orders:

(A) The findings on the issues addressed in the Initial Decision are affirmed in part and reversed in part, as discussed in the body of this order.

(B) The requests for rehearing of the Schedule 39 Order are denied, as discussed in the body of this order.

By the Commission. Commissioner Honorable is not participating.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.