

153 FERC ¶ 61,336
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Boston Energy Trading and Marketing LLC

v.

Docket No. EL15-89-000

Midcontinent Independent System Operator, Inc.

ORDER GRANTING COMPLAINT IN PART AND DENYING COMPLAINT IN
PART

(Issued December 22, 2015)

1. On August 6, 2015, pursuant to section 206 of the Federal Power Act (FPA)¹ and Rule 206 of the Commission's Rules of Practice and Procedure,² Boston Energy Trading and Marketing LLC (Boston Energy) filed a complaint against the Midcontinent Independent System Operator, Inc. (MISO). Boston Energy requests that the Commission: (1) overturn MISO's decision to require Boston Energy and a competitor, J. Aron & Company (J. Aron), to enter into a partnership to share a market participant funded transmission project; (2) direct MISO to develop tariff procedures for queuing market participant transmission funded projects that prohibit a market participant from submitting identical upgrades after an earlier in time market participant funded transmission project has been noticed publicly; and (3) in the interim, while these tariff sheets are being developed, prohibit MISO from relying on its Business Practice Manual to force an earlier in time market participant transmission project into a partnership with a competitor that files its transmission upgrade after MISO publicly announces the original upgrades.

¹ 16 U.S.C. § 824e (2012).

² 18 C.F.R. § 385.206 (2015).

2. As discussed below, we grant the complaint in part and deny the complaint in part. We also find that MISO's Open Access Transmission, Energy and Operating Reserve Markets Tariff (Tariff) is unjust, unreasonable, unduly discriminatory, or preferential and direct MISO to submit a filing within 180 days of the date of this order.

I. Background

3. Boston Energy is a wholly-owned subsidiary of NRG Energy Inc., specializing in development of market participant funded transmission projects, trading of financial transmission rights, and providing energy management services over all domestic power markets. Boston Energy develops (and pays for) transmission upgrades in various markets, including MISO, in exchange for, in the case of MISO, the incremental auction revenue rights generated by the upgrades.

4. Boston Energy explains that, over the past several years, each of the regional transmission organizations (RTOs) has put into place an innovative system whereby market participants can identify inefficiencies on the transmission system and then agree to fund the necessary costs to allow the transmission owner to build an upgrade to remedy that inefficiency. Boston Energy further explains that the developer takes the incremental transmission rights across the newly-created upgrades, and the system benefits from increased efficiency on the transmission system.

II. Complaint

5. Boston Energy submits that, on February 18, 2015, it proposed to MISO to fund the Ameren Illinois's (Ameren) Effingham to Effingham NW 138kV line in Illinois (Effingham Upgrade)³ and that, upon submission, MISO assigned the Effingham Upgrade as Project No. 8881. Boston Energy states that Project No. 8881 is estimated to cost \$1-2 million and that Boston Energy would pay Ameren to construct the project in exchange for Boston Energy receiving the incremental auction revenue rights generated by the upgrade.

6. Boston Energy states that, on or before April 15, 2015, MISO posted public notice of Project No. 8881, attributing Boston Energy solely with the cost responsibility and benefits of the project.⁴ Boston Energy claims that J. Aron submitted an identical upgrade proposal after the public disclosure of Boston Energy's upgrade proposal, and that, on May 29, 2015, MISO informed Boston Energy that MISO had a discussion on Project No. 8881 with another market participant. Boston Energy states that, on June 30,

³ The Effingham Upgrade is a MISO Transmission Expansion Planning (MTEP) 2015 project.

⁴ Boston Energy Complaint at 5.

2015, MISO held a conference call between MISO, Boston Energy, and J. Aron, to inform the involved parties that MISO was considering Project No. 8881 as one project with two submitting companies as partners sharing both the costs and benefits of the project.⁵

7. Boston Energy states that, on July 15, 2015, MISO published the quarterly report for active projects as of June 30, 2015, which listed both Boston Energy and J. Aron as submitting companies for Project No. 8881. Boston Energy claims that it informed MISO that it would not accept J. Aron as a partner in Project No. 8881 and that it wished to move forward with the project as the sole sponsor, but that MISO did not change its position, citing its Business Practice Manual⁶ as support.

8. Boston Energy argues that the Commission should find that MISO's decision to force a market participant to partner with a later in time competitor on a market participant funded transmission project is unjust and unreasonable, because, as Boston Energy claims, that decision was made without Tariff support and undermines the ability of companies to develop and fund transmission upgrade projects. Specifically, Boston Energy asserts that MISO cannot interpret its Tariff and Business Practice Manual in a manner that requires Boston Energy to share its market participant funded transmission project with a competitor after MISO publicly identifies the proposed upgrade, absent express Tariff authority.⁷

9. Boston Energy claims that MISO's interpretation of its Business Practice Manual has impacted Project No. 8881 in two ways. First, Boston Energy is no longer solely responsible for the costs of Project No. 8881, and thus cannot be the sole recipient of the benefits. Second, it has delayed the studies required to complete its submission of Project No. 8881.⁸

10. Boston Energy contends that MISO's Tariff has no provisions which explicitly require an earlier in time market participant funded project to partner with a later in time competitor, and that, without those provisions, MISO has no authority to impose that requirement upon market participants.⁹ Boston Energy argues that MISO's Tariff only

⁵ *Id.* at 7.

⁶ MISO Transmission Planning Business Practices Manual, BPM-020-r12 (dated Apr. 28, 2015) at § 4.3.4.1 (Process Steps).

⁷ Boston Energy Complaint at 9.

⁸ *Id.* at 8.

⁹ *Id.* at 11-12.

addresses market participant funding in its Attachment FF, Transmission Expansion Planning Protocol, which states:

Market Participant's Option to Fund: Notwithstanding the Transmission Provider's assignment of cost responsibility in the [MISO Transmission Expansion Plan], one or more Market Participants may elect to assume cost responsibility for any or all costs of a Network Upgrade that is included in the MTEP.^[10]

11. Boston Energy argues that merely because the Tariff does not address a requirement does not mean that MISO can impose that requirement. In other words, Boston Energy claims, any such requirement must be in the Tariff.¹¹ Boston Energy further argues that, because MISO has developed extensive Tariff provisions regarding the planning and processing of transmission projects as a result of Order No. 1000,¹² any provisions requiring an earlier in time market participant funded project to partner with a later in time competitor should be in the Tariff.

12. Boston Energy also asserts that, in the absence of Tariff provisions concerning first in time market participant funded projects, MISO is prohibited from relying on its Business Practice Manual to force a partnership between competitors.¹³ Boston Energy argues that a Business Practice Manual exists to provide the details of Tariff provisions¹⁴ and that a Business Practice Manual does not have the authority to impose, as Boston Energy claims, unjust and unreasonable rates and services that are not authorized by the

¹⁰ MISO, FERC Electric Tariff, Attachment FF, § III.A.2.a, Market Participant's Option to Fund (41.0.0).

¹¹ Boston Energy Complaint at 12 (citing *Shetek Wind Inc. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 138 FERC ¶ 61,250 (2012)).

¹² *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, FERC Stats. & Regs. ¶ 31,323 (2011), *order on reh'g*, Order No. 1000-A, 139 FERC ¶ 61,132, *order on reh'g and clarification*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012), *aff'd sub nom. S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014).

¹³ Boston Energy Complaint at 13 (citing *Quest Energy LLC v. The Detroit Edison Co.*, 106 FERC ¶ 61,227, at PP 19-20 (2004)).

¹⁴ *Id.* at 13-14 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 115 FERC ¶ 61,108, at P 30 (2006)).

Tariff itself.¹⁵ Boston Energy contends that the Commission has previously stated that a Business Practice Manual should not take precedence over a filed Tariff,¹⁶ and that the Commission applies a rule of reason,¹⁷ which requires that, when the provisions of a manual significantly affect rates and services, those provisions are readily susceptible of specification, and the provisions of the manual are not so generally understood as to render recitation of the provisions of the manual superfluous to be in the Tariff, the manual provisions must be included in the Tariff.¹⁸ According to Boston Energy, any manual provision which forces an earlier in time market participant transmission funded project to partner with a later in time competitor in order for the earlier in time market participant funded project to move forward does significantly affect rates and should therefore be included within the filed MISO Tariff.¹⁹

13. Boston Energy further claims that, even if MISO could rely on its Business Practice Manual, the Business Practice Manual itself does not directly address first in time market participant funded projects. According to Boston Energy, the passage MISO has cited to justify its decision to force Boston Energy into a joint partnership with J. Aron states, “[t]o the extent multiple Market Participants **propose** to fund the same network upgrade, MISO will **facilitate** joint funding negotiations with applicable Transmission Owners.”²⁰ Boston Energy argues that this provision solely addresses MISO’s role in facilitating joint funding of studies when both (or all, as necessary) Market Participants agree to jointly fund the same network upgrade. Boston Energy asserts that neither Boston Energy nor J. Aron intended to jointly submit the Effingham Upgrade and that MISO instead made a unilateral decision to force both Boston Energy and J. Aron into a joint partnership which is, as Boston Energy maintains, unjustified and unsupported by MISO’s Business Practice Manual.²¹ Boston Energy requests that the

¹⁵ *Id.* at 14 (citing *Demand Response Coalition v. PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,061, at P 17 (2013)).

¹⁶ *Id.* (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 108 FERC ¶ 61,163, at P 657 (2008)).

¹⁷ *Id.* (citing *City of Cleveland v. FERC*, 773 F.2d 1368, 1376 (D.C. Cir. 1985)).

¹⁸ *Id.* (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 140 FERC ¶ 61,171, at P 80 (2012)).

¹⁹ *Id.* at 15.

²⁰ *Id.* (citing MISO Transmission Planning Business Practices Manual, BPM-020-r12 (dated Apr. 28, 2015) at § 4.3.4.1. (Process Steps) (emphasis added by Boston Energy)).

²¹ *Id.* at 16.

Commission overturn MISO's July 15, 2015 posting which Boston Energy asserts required Boston Energy and J. Aron to partner on Project No. 8881 and is unjust, unreasonable, and lacking Tariff support.

14. Boston Energy also requests that the Commission direct MISO to organize a stakeholder process to develop Tariff provisions for queueing and processing market participant funded transmission projects. Boston Energy claims that its complaint arises from the lack of Tariff provisions which explicitly address market participant funded transmission projects and that other RTOs have developed approaches to address this issue.²²

15. Finally, Boston Energy asks the Commission to direct that, in the interim period while the Tariff provisions are being developed through a stakeholder process, MISO file tariff sheets to process market participant funded transmission projects on a first-come, first-processed basis. Boston Energy claims that it is anticipating filing additional market participant projects by MISO's September 15, 2015 deadline.²³

III. Notice of Filing and Responsive Pleadings

16. Notice of Boston Energy's complaint was published in the *Federal Register*, 80 Fed. Reg. 48,515 (2015), with interventions and protests due on or before August 24, 2015. On August 24, 2015, as amended on August 25, 2015, MISO filed an answer. The Illinois Commerce Commission filed a notice of intervention. Consumers Energy Company, Ameren Services Company, Northern Indiana Public Service Company (NIPSCO), Wisconsin Electric Power Company, and Wisconsin Public Service Corporation filed timely motions to intervene. J. Aron filed a timely motion to intervene and limited protest. On September 2, 2015, NIPSCO filed comments. On September 4, 2015, Boston Energy filed an answer. On September 11, 2015, Wabash Valley Power Association, Inc. (Wabash Valley) filed an out-of-time motion to intervene.

A. MISO's Answer

17. In its answer, MISO states that it is not requiring Boston Energy to partner with J. Aron on Project No. 8881.²⁴ MISO clarifies that it convened a discussion between Boston Energy and J. Aron based on Ameren's proposal to split the cost of required

²² *Id.* at 17 (citing Merchant Network Upgrade Proposed Solution, Jason Connell, PJM Interconnection, L.L.C. (PJM), Project Manager, Interconnection Projects Markets & Reliability Committee, July 23, 2015).

²³ *Id.*

²⁴ MISO Answer at 13.

studies for Project No. 8881, and was not itself imposing a partnership on the two market participants. Further, MISO states that it informed Boston Energy and J. Aron that without an agreement between them, Ameren would study each request separately and charge each party the full cost of each study. MISO also clarifies that it added J. Aron as a submitting company on the update to MISO's Active Projects List, which does not suggest a partnership and instead reflects that both entities have submitted participant funding proposals for Project No. 8881.²⁵

18. MISO clarifies that at the time Boston Energy submitted its proposal, there was already an Effingham Upgrade under consideration, Project No. 7860, which was submitted in September of 2014 by Ameren.²⁶ Further, MISO states that both Boston Energy and J. Aron benefitted from Ameren's Effingham Upgrade submittal because it allowed the Effingham Upgrade to advance to Appendix B.²⁷ MISO asserts that the J. Aron proposal obtained no advantage from Boston Energy's proposal as the J. Aron proposal was submitted prior to any public release of Boston Energy's proposal.

19. Additionally, MISO asserts that J. Aron's submittal has not delayed the Boston Energy proposal and that both proposals are being processed by Ameren and MISO on separate tracks in a timely fashion.²⁸ To support that no delays have occurred, MISO states that it provided Boston Energy with a Facility Study Agreement²⁹ on August 10, 2015, and that Boston Energy signed and returned the Facility Study Agreement on August 18, 2015. MISO explains that the Facility Study Agreement included a study schedule, with detailed milestones, providing for a the final draft of the Facility Study report on December 16, 2015, ninety days after the start of the study clock on August 10, 2015. MISO states that, among other things, the completed Facility Study report will include descriptions and exhibits required for a future Facilities Construction Agreement. MISO states that, under well-established procedures applicable to Facilities Construction

²⁵ *Id.* at 14.

²⁶ *Id.* at 11.

²⁷ *Id.* at 17 (MISO explains that under its procedures a transmission project proposal is moved to Appendix B from Appendix C once it has been "demonstrated to be a potential solution to an identified reliability, policy or other need, or to an identified cost savings or other benefit.").

²⁸ *Id.* at 14.

²⁹ According to MISO, the Facility Study Agreement describes the scope of work to be performed and the required deliverables, including an estimated cost and schedule for Ameren to perform the engineering, procurement, and construction work needed for the Effingham Upgrade.

Agreements, MISO, Ameren, and Boston Energy will negotiate appropriate modifications to the *pro forma* Facilities Construction Agreement in the Tariff, including the applicable cost responsibility. MISO further states that, to the extent Boston Energy is dissatisfied with any term of the Facilities Construction Agreement, it may request MISO to file it unexecuted.³⁰

20. MISO argues that it has followed its Tariff in the processing of Boston Energy's proposal. MISO argues that there are no queuing rights in its Tariff applicable to the participant funding requests in this complaint proceeding, and thus MISO could not have violated Boston Energy's "first mover" rights as they do not exist under the Tariff.³¹ MISO also clarifies that its generator interconnection queue procedures are not based on a "first come, first served" approach, but instead on a "first ready, first to proceed" approach.³²

21. MISO states that Boston Energy's claim, that MISO's process steps for participant funded projects, as set forth in the Business Practice Manual, violate the "rule of reason" applicable to non-filed business manuals as these procedures significantly affect rates, is erroneously based on the assumption that Boston Energy is subject to a forced partnership. MISO asserts that the "rule of reason" does not require it to file the process steps in the Business Practice Manual since they properly implement the Tariff rather than modify it.³³ Further, MISO argues that merely holding facilitation discussions between market participants does not significantly affect rates and that the cases that Boston Energy cites to support its "rule of reason" argument are plainly inapposite.³⁴

22. Additionally, MISO opposes Boston Energy's request for the Commission to direct MISO to organize a stakeholder process to develop Tariff provisions for queuing and processing market participant funded transmission projects, as the stakeholder review process is already occurring. MISO clarifies that it has heard feedback from stakeholders

³⁰ *Id.* at 14-15.

³¹ *Id.* at 16-17. MISO also argues that in any case, the Commission cannot undo the steps that MISO has taken under its currently effective procedures, as section 206 of the FPA only authorizes prospective relief and the complaint does not invoke the Commission's remedial authority under sections 306 and 309 of the FPA, 16 U.S.C. §§ 825e , 825h (2012). *Id.* n.18.

³² *Id.* at 17 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 124 FERC ¶ 61,183 (2008), *order on reh'g*, 127FERC ¶ 61,294 (2009)).

³³ *Id.* at 18 (citing *PJM Interconnection, L.L.C.*, 151 FERC ¶ 61,097 (2015)).

³⁴ *Id.* at 17-18.

about the need for a process to better handle multiple market participant proposals to fund the same project, and as a result MISO initiated, through the stakeholder process, revisions to the Business Practice Manual. MISO asserts that the current stakeholder-driven review is the most appropriate means for addressing Boston Energy's concerns and accordingly Boston Energy's request for relief is premature as any action by the Commission would circumvent the stakeholder-based process for review and improvement.³⁵

23. MISO argues that the complaint should be dismissed due to numerous procedural deficiencies. In particular, MISO claims that Boston Energy's failure to invoke MISO's dispute resolution procedures prior to initiating this proceeding precludes Boston Energy from seeking such relief.³⁶ Moreover, MISO submits that Boston Energy is required to explain why it did not follow the dispute resolution procedures in its complaint, which it failed to do.³⁷ Additionally, MISO argues that the complaint should be dismissed as it also failed to meet numerous requirements established under section 206 of the FPA and the Commission's regulations.³⁸

B. Comments

24. J. Aron claims that its Effingham Upgrade proposal was not identical to Boston Energy's Effingham Upgrade proposal, but rather that it had material differences. J. Aron states that Boston Energy's proposal was to increase the rating by 110 Megavolt Amperes (MVA) by January 1, 2016 while J. Aron's proposal was to increase the operating temperature to 110 degrees Celsius by June 1, 2016. J. Aron asserts that the

³⁵ *Id.* at 18-19.

³⁶ *Id.* at 19 (citing section I.C.14 of Attachment FF stating that the applicable dispute resolution rules provide that “[p]arties that are not satisfied with the dispute resolution procedures may only file a complaint with the Commission during the negotiation or mediation steps.”).

³⁷ *Id.* (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 115 FERC ¶ 61,177, at P 12 (2006); *Strategic Energy L.L.C. v. California Indep. Sys. Operator Corp.*, 95 FERC ¶ 61,312, at 62,069-70, *order on reh'g*, 96 FERC ¶ 61,146 (2001)).

³⁸ *Id.* at 20. MISO argues that Boston Energy failed to meet the following FPA section 206 requirements: (1) clearly identify the action or inaction which is alleged to violate applicable statutory standards or regulatory requirements; (2) explain how the action or inaction violates applicable statutory standards or regulatory requirements; (3) include all documents that support the facts in the complaint in possession of, or otherwise attainable by, the complainant, including, but not limited to, contracts and affidavits; and (4) identify relevant facts and the basis in fact and law. *Id.*

two proposals may not result in the same rating increase, arguing that, if the rating increase under J. Aron's proposal is less than 110 MVA, the cost of the upgrade could be materially different than Boston Energy's proposal. J. Aron concludes that, if MISO is planning to modify Boston Energy's proposal to match J. Aron's, this could make J. Aron's proposal considered an "earlier in time" proposal under the relevant definitions, and that Boston Energy's proposal benefitted from J. Aron's.³⁹

25. J. Aron states that it agrees with Boston Energy that later upgrade requests should not be allowed to "piggyback" on earlier submitted upgrade requests that have been publicly disclosed. Additionally, J. Aron states that it agrees that the MISO Business Practice Manual and Tariff could be improved to address competing or overlapping market participant funded transmission upgrade requests, possibly through a queue process or a similar mechanism. However, J. Aron argues that, absent a process, MISO should have the discretion to attempt to facilitate overlapping upgrade requests if possible. J. Aron asserts that there is low risk that "free ridership" problems will result from MISO facilitating negotiations surrounding overlapping requests, as the actual decision to fund such upgrades involves significant financial risks that each entity must evaluate for itself before agreeing to fund a project. Furthermore, J. Aron suggests that MISO's Business Practice Manual does not necessarily disallow market participants from proposing to fund the same already-disclosed transmission upgrade.⁴⁰

26. J. Aron requests that, if the Commission finds that changes are necessary to MISO's existing practices for processing market participant requests to fund transmission upgrades, the changes be applied prospectively. J. Aron claims that applying a new process retroactively would unfairly penalize J. Aron despite its good faith effort to independently conceptualize and submit its request consistent with MISO's then-current policy and disclosure schedule. J. Aron states that moving to a "first in time" queue process could improve MISO's current procedures; however, such process should include a requirement that MISO disclose in a timely manner the upgrade requests that have been submitted to it in order to protect market participants from wasting resources developing a later overlapping upgrade request.⁴¹

27. J. Aron states that it agrees with Boston Energy that there are opportunities to make prospective changes to the MISO Tariff and Business Practice Manual with regard to the processing of requests for market participant funded transmission upgrades and notes that MISO could establish a formal "first in time" queue process in MISO similar to

³⁹ J. Aron Limited Protest at 6-7.

⁴⁰ *Id.* at 8-9.

⁴¹ *Id.* at 10-11.

what exists in PJM.⁴² J. Aron further suggests that the Commission may wish to consider whether there are opportunities to improve the processes for market participant funded transmission upgrades more broadly across the RTOs and Independent System Operators (ISOs) in a separate generic proceeding.⁴³

28. NIPSCO argues that market participant funded transmission upgrades are a unique type of network upgrade that raise unique issues regarding service obligations, rights, responsibilities, and cost allocation, and thus, reliance on a Business Practice Manual is inadequate and contrary to the rule of reason.⁴⁴ NIPSCO asserts that, since MISO's Tariff does not have procedures addressing market participant funding, the process steps in the Business Practice Manual cannot be consistent with the Tariff.⁴⁵

29. NIPSCO argues that MISO's sole reliance on the stakeholder process in this instance would undercut the Commission's role required by section 205 of the FPA.⁴⁶ NIPSCO requests that the Commission direct MISO to develop Tariff provisions through its stakeholder process addressing not only how it will handle multiple, similar requests for market participant funding of a transmission upgrade, but also outlining the broader market participant funding process.⁴⁷

C. Boston Energy Answer

30. In its answer, Boston Energy acknowledges that J. Aron submitted its network upgrade proposal before MISO publicly noticed Boston Energy's proposal. However, Boston Energy asserts that Boston Energy's error (i.e., stating that J. Aron had benefitted from the public notice of Boston Energy's proposal) stems from MISO's failure to list J. Aron's project proposal within five days of MISO's receipt of J. Aron's application, as required.⁴⁸ Boston Energy argues that MISO's refusal to inform Boston Energy of

⁴² *Id.* at 12 (citing PJM Tariff, Attachment EE and Attachment S).

⁴³ *Id.* at 12-13.

⁴⁴ NIPSCO Comments at 7-8.

⁴⁵ *Id.* at 14-15.

⁴⁶ 16 U.S.C. § 824d (2012).

⁴⁷ NIPSCO Comments at 18.

⁴⁸ Boston Energy Answer at 5 (citing MISO Transmission Planning Business Practices Manual, BPM-020-r12 (dated Apr. 28, 2015) at § 4.3.4.1 (Process Steps)).

J. Aron's proposal until May 29, 2015 highlights the need for MISO to develop queuing procedures for market participant funded network upgrades.

31. Boston Energy claims that MISO fails to distinguish between a partnership during the study phase of Project No. 8881 and the eventual allocation of benefits once the upgrades are completed. Boston Energy argues that MISO refuses to acknowledge the most important issue, i.e., if, after the appropriate studies are concluded, Boston Energy and J. Aron both want to fund the same or nearly identical project, how will MISO allocate the costs and benefits of the upgrade between the two parties and on what basis? Boston Energy contends that unless MISO intends to award full compensation to Boston Energy for the project, then MISO is, in fact, forcing Boston Energy into a partnership. Boston Energy asserts that MISO's inability to give a clear answer as to how it will allocate the costs and benefits of the upgrade between Boston Energy and J. Aron underlines the lack of Tariff support for MISO's determination and thus the need for Commission action.⁴⁹

32. Boston Energy states that, despite J. Aron's submittal of its version of Project No. 8881 prior to MISO's listing of the Boston Energy proposal on the MISO website, MISO's answer does not dispute the possibility that, in future network upgrade proposals, a market participant could wait until an upgrade request is publicly filed and then file a copycat proposal. Boston Energy argues that the Tariff's silence on this issue also warrants granting Boston Energy's complaint.⁵⁰

33. Boston Energy claims that MISO's initiation of a stakeholder process clearly suggests that it recognizes that there are no Tariff provisions regarding the cost and benefit allocation of market participant funded network upgrade projects. However, Boston Energy asserts that the mere prospect of a future MISO filing under section 205 of the FPA does not protect existing developers from the possibility of copycat network upgrade requests between the earliest possible refund effective date made possible through Boston Energy's complaint filing and the time that MISO makes such future section 205 filing to clarify its rules. Boston Energy claims that Commission direction is necessary to ensure that MISO moves forward with its reform initiative. Boston Energy appreciates the possible path forward suggested by MISO and states that it would support the Commission granting Boston Energy's complaint, subject to MISO making a filing to fix the shortfalls in the existing Tariff process after the completion of the MISO stakeholder process.⁵¹

⁴⁹ *Id.* at 6-7.

⁵⁰ *Id.* at 8.

⁵¹ *Id.* at 9.

34. Boston Energy disputes MISO's claim that Boston Energy (and J. Aron) benefitted from Ameren's work product. Boston Energy claims that the entire point of the program is to encourage market participants to fund upgrades to the transmission system that otherwise would not be constructed for a number of years. Boston Energy further claims that it made a business decision to accelerate the Effingham Upgrade because Boston Energy's studies determined that the value of the incremental auction revenue rights to be received from the project would exceed the time value of money paid to Ameren for its upgrade. Boston Energy notes that, because Boston Energy's investment is made on a merchant basis, there is no guarantee that it will recover its costs from the market. However, whether Boston Energy profits or not, the entire MISO system benefits from the efficiency gains associated with putting Project No. 8881 into service, in this case at least seven years earlier than currently planned.⁵²

35. Finally, Boston Energy contests the notion that Boston Energy is barred from filing its complaint because Boston Energy did not exhaust MISO's Dispute Resolution procedures. According to Boston Energy, MISO is citing Attachment FF of the MISO Tariff out of context. Boston Energy argues that Attachment FF⁵³ only forbids a market participant from filing a complaint during the arbitration phase of the Dispute Resolution process.⁵⁴ Additionally, Boston Energy cites Attachment HH of the MISO Tariff, which states "[nothing] in these Dispute Resolution Procedures [Attachment HH] restrict the rights of any Party to file a complaint with the Commission under relevant provisions of the Federal Power Act."⁵⁵

IV. Discussion

A. Procedural Matters

36. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2015), the notice of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2015), the Commission will grant Wabash Valley's late-filed motion to intervene given its interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

⁵² *Id.* at 10.

⁵³ *Id.* at 11 (citing MISO, Tariff, Attachment FF, § I.C.14).

⁵⁴ *Id.*

⁵⁵ Attachment HH, § I.A (brackets added by Boston Energy).

37. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 358.213(a)(2) (2015), prohibits an answer to a protest or an answer unless otherwise ordered by the decisional authority. We will accept Boston Energy's answer because it has provided information that assisted us in our decision-making process.

B. Substantive Matters

38. We find that Boston Energy has met its burden under section 206 of the FPA to show that MISO's Tariff is unjust, unreasonable, unduly discriminatory, or preferential because the Tariff lacks provisions for processing market participant funded transmission projects. Accordingly, we will grant Boston Energy's complaint in part and direct MISO to submit, within 180 days of the date of this order, revisions to its Tariff to provide procedures for processing market participant funded transmission projects. Such Tariff provisions should address how MISO will handle multiple, similar requests for market participant funding of a transmission upgrade.

39. The Commission's policy is that matters that significantly affect rates and services, are readily susceptible of specification, and are not so generally understood, should be in the tariff rather than business practice manuals.⁵⁶ Although MISO argues that it has already initiated, via the stakeholder process, revisions to the Business Practice Manual for queuing and processing market participant funded transmission projects, we agree with Boston Energy and NIPSCO that Commission action is necessary to ensure that the revisions are filed in MISO's Tariff by a date certain. As MISO admits in its answer, the "queuing issue has been identified by stakeholders as a lower priority item."⁵⁷

40. With respect to MISO's argument that, because Boston Energy failed to invoke MISO's Dispute Resolution Procedures prior to initiating this proceeding, the complaint should be dismissed, we agree with Boston Energy that the dispute resolution procedures in the Tariff do not preclude filing a complaint, except while arbitration is pending.

41. Boston Energy also requests in its complaint that the Commission overturn MISO's decision to require Boston Energy and J. Aron to enter into a partnership to share a market participant funded transmission project and prohibit MISO from relying on its Business Practice Manual to force an earlier in time market participant transmission project into a partnership with a competitor that files its transmission upgrade after MISO publicly announces the original upgrades. We find that, because MISO has not yet made a determination as to which market participant will ultimately fund Project No. 8881, it is premature to rule on these issues. We note MISO's commitment in its answer to file an

⁵⁶ See *City of Cleveland v. FERC*, F.2d 1368, 1376 (D.C. Cir. 1985); *Midwest Indep. Transmission Sys. Operator, Inc.*, 140 FERC ¶ 61,171, at P 80 (2012).

⁵⁷ MISO Answer at 5.

unexecuted Facilities Construction Agreement to the extent Boston Energy is dissatisfied with any of the terms of the agreement after negotiations between MISO, Ameren, and Boston Energy. We find that the Facilities Construction Agreement will most likely be the appropriate forum to answer these issues, because the Facilities Construction Agreement provides the construct for the market participant to pay the transmission owner for its allocated construction costs of the Project No. 8881 network upgrades.

42. Regarding J. Aron's request that the Commission initiate a generic proceeding to consider whether there are opportunities to improve the processes for market participant funded transmission upgrades more broadly across the RTOs/ISOs, we dismiss J. Aron's request as we find that it is beyond the scope of Boston Energy's complaint.

43. Consistent with our general policy of providing maximum protection to customers,⁵⁸ we will set the refund effective date at the earliest date possible, i.e., the date of the filing of the complaint, which is August 6, 2015.

The Commission orders:

(A) The complaint is hereby granted, in part, and denied, in part, as discussed in the body of this order.

(B) MISO is hereby directed to submit a filing within 180 days of the date of this order, as discussed in the body of this order.

(C) The refund effective date in Docket No. EL15-89-000, established pursuant to section 206 of the Federal Power Act, will be August 6, 2015.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

⁵⁸ See, e.g., *Seminole Elec. Coop., Inc. v. Fla. Power & Light Co.*, 65 FERC ¶ 61,413, at 63,139 (1993); *Canal Elec. Co.*, 46 FERC ¶ 61,153, at 61,539 (1989), *reh'g denied*, 47 FERC ¶ 61,275 (1989).