

138 FERC ¶ 61,140  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Philip D. Moeller, John R. Norris,  
and Cheryl A. LaFleur.

Midwest Independent Transmission System  
Operator, Inc.

Docket Nos. ER12-715-000

FirstEnergy Service Company

v.

EL11-56-000

Midwest Independent Transmission System  
Operator, Inc.

(not consolidated)

ORDER ACCEPTING TARIFF REVISIONS IN PART, SUBJECT TO COMPLIANCE  
FILING; ACCEPTING AND SUSPENDING TARIFF REVISIONS AND  
ESTABLISHING HEARING AND SETTLEMENT JUDGE PROCEDURES IN PART;  
DISMISSING PETITION FOR DECLARATORY ORDER; AND DENYING RELIEF  
REQUESTED IN COMPLAINT

(Issued February 27, 2012)

1. On December 29, 2011, in Docket No. ER12-715-000, Midwest Independent Transmission System Operator, Inc. (MISO) and MISO Transmission Owners<sup>1</sup>

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<sup>1</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

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(collectively, Applicants) jointly submitted new Schedule 39 (Multi-Value Project Financial Obligations and Cost Recovery for Withdrawing Transmission Owners) and proposed revisions to Attachment MM (Multi-Value Project Charge) to MISO's Open Access Transmission, Energy and Operating Reserve Markets Tariff (Tariff).<sup>2</sup> The proposed revisions, among other things, allow MISO to charge, on an on-going basis, a Withdrawing Transmission Owner<sup>3</sup> a monthly Multi-Value Project (MVP) usage rate that includes a share of the costs of all MVP projects that the MISO Board of Directors approved prior to the effective date of the transmission owner's withdrawal. Applicants also proposed Appendix A (American Transmission Systems, Incorporated Schedule 39 MVPs) and Appendix B (Duke Energy Ohio, Inc./Duke Energy Kentucky, Inc. Schedule 39 MVPs) to Schedule 39 for American Transmission Systems, Incorporated (ATSI) and Duke Energy Ohio, Inc./Duke Energy Kentucky, Inc. (collectively, Duke), respectively, which list the MVPs approved prior to the effective date of ATSI's and Duke's withdrawals from MISO.<sup>4</sup> If another transmission owner withdraws from MISO in the future, MISO will update the Appendices to Schedule 39 to provide a similar list for that Withdrawing Transmission Owner.

2. In a related matter, on August 3, 2011, in Docket No. EL11-56-000, FirstEnergy Service Company<sup>5</sup> filed a petition for declaratory order and complaint against MISO concerning MISO's assessment of certain MVP transmission charges. ATSI requests a Commission determination that MISO may not allocate the costs of the Michigan Thumb

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Power Company; Southern Illinois Power Cooperative; Southern Minnesota Municipal Power Agency; Wabash Valley Power Association, Inc.; and Wolverine Power Supply Cooperative, Inc.

<sup>2</sup> The joint filing was made pursuant to section 205 of the Federal Power Act (FPA), 16 U.S.C. § 824d (2006).

<sup>3</sup> Section I.E of proposed Schedule 39 defines a Withdrawing Transmission Owner as: “[A]n owner of transmission facilities that withdraws its transmission facilities from the operational control of [MISO] after July 16, 2010.”

<sup>4</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>5</sup> FirstEnergy Service Company made the filing on behalf of its six affiliates: ATSI; The 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 Service Company.

Project<sup>6</sup> to ATSI or to other entities in the ATSI pricing zone in light of ATSI's announced withdrawal from MISO.

3. As explained below, we accept Schedule 39 and the related revisions to Attachment MM, in part, subject to a compliance filing, effective January 1, 2012, as requested. As applied to ATSI and Duke, we will conditionally accept Schedule 39 and Appendices A and B to Schedule 39, in part, suspend them for a nominal period, to become effective January 1, 2012, subject to refund, and set them for hearing and settlement judge procedures to determine 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.

4. We also dismiss ATSI's petition for declaratory order and deny the relief requested in the complaint in Docket No. EL11-56-000, as discussed below.

## **I. Background**

### **A. MISO Transmission Owners Agreement**

5. Article Five, Section II.B of the Agreement of Transmission Facilities Owners to Organize the Midwest Independent Transmission System Operator, Inc. (MISO Transmission Owners Agreement) reads:

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

### **B. Exit Fee Language in Schedules 10, 16 and 17**

6. When Louisville Gas & Electric Company (together, LG&E) withdrew from MISO in 2006, Schedules 10, 16 and 17<sup>7</sup> of the MISO Tariff provided specific formulas

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<sup>6</sup> The Michigan Thumb Project was the only MVP approved by MISO's Board of Directors for inclusion in Appendix A of the MISO Transmission Expansion Plan (MTEP) prior to ATSI's withdrawal from MISO.

<sup>7</sup> 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, 16, and 17. Schedule 16 (Financial Transmission Rights (FTR) Administrative Service Cost Recovery Adder) provides for the recovery of the costs associated with

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upon which the exit fee for a transmission owner withdrawing from MISO would be calculated. In the order addressing LG&E's withdrawal from MISO, the Commission found that the language then in Schedules 10, 16 and 17 provided only for recovery of MISO's un-amortized deferred costs and un-depreciated capital costs incurred prior to the effective date of the withdrawal. The Commission denied requests to include in the exit fee other costs that were not explicitly provided for in the MISO exit fee formulas, such as on-going operating costs.<sup>8</sup>

7. Several months after the Commission addressed LG&E's proposed withdrawal, MISO filed, and the Commission accepted, changes to Schedules 10, 16 and 17 to delete the language that described the specific costs that would be included, and how such costs would be allocated, in the exit fee of a transmission owner withdrawing from MISO.<sup>9</sup> The new provisions provide that the cost responsibility of a transmission owner withdrawing from MISO, under Schedules 10, 16, and 17, will be a negotiated or contested amount accepted by the Commission. Schedules 10, 16 and 17 describe the cost obligations of a transmission owner withdrawing from MISO as follows:

In the event that a [transmission owner] withdraws its transmission facilities ("Withdrawing Entity") from the operational control of the Transmission Provider, the Withdrawing Entity shall pay its share of all Schedule 10-related [Schedule 16-related or Schedule 17-related] financial obligations incurred and payments applicable to time periods prior to the effective date of such withdrawal (the "Schedule 10 [16 or 17] Withdrawal Obligation") as required by Article Five, Section II.B of the ISO Agreement. The Withdrawing Entity's total responsibility for the Schedule 10 [16 or 17] Withdrawal Obligation shall be based on the outcome of a negotiated or contested settlement accepted by the Commission.

**C. Exit Fee Language in Attachment FF**

8. MISO uses Attachment FF (Transmission Expansion Planning Protocol) of its Tariff to allocate among transmission owners the cost of transmission facilities in the MTEP. Similar to the revised Schedules 10, 16, and 17 exit fee language, the

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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>8</sup> *Louisville Gas & Elec. Co.*, 114 FERC ¶ 61,282, at P 58-59 (2006) (LG&E Withdrawal Order), *order on reh'g*, 116 FERC ¶ 61,020 (2006).

<sup>9</sup> *Midwest Indep. Transmission Sys. Operator, Inc.*, 118 FERC ¶ 61,160 (2007).

Attachment FF exit fee language obligates a transmission owner withdrawing from MISO to pay Attachment FF costs but does not specify what costs would be included or how such costs would be allocated to a transmission owner withdrawing from MISO. Attachment FF, Section III.A.2.j of MISO's Tariff describes the cost obligations of a transmission owner withdrawing from MISO as follows:

Withdrawal from [MISO]: 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 Member.

**D. Multi-Value Projects Proceeding**

9. In its order addressing the MVP proposal,<sup>10</sup> the Commission stated that its understanding of the Attachment FF exit fee language is 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>11</sup> In the MVP Order, the Commission found that existing transmission owners are on notice for potential MVP cost responsibility;<sup>12</sup> however, the 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. On rehearing, the Commission: (1) reiterated that it would not prejudge 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

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<sup>10</sup> *Midwest Indep. Transmission Sys. Operator, Inc.*, 133 FERC ¶ 61,221 (2010) (MVP Order), *order on reh'g*, 137 FERC ¶ 61,074 (2011) (MVP Rehearing Order).

<sup>11</sup> MVP Order, 133 FERC ¶ 61,221 at P 471.

<sup>12</sup> The Commission accepted MISO's corresponding revisions to Attachment FF of MISO's Tariff as consistent with the MISO Transmission Owners Agreement. *Id.* P 470.

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

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

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>

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

10. On June 20, 2011, the Commission conditionally accepted the ATSI-MISO Exit Fee Agreement, which provided the methodology for calculating ATSI's Schedules 10, 16 and 17 exit fees.<sup>16</sup> Section 2.2 of the ATSI-MISO Exit Fee Agreement<sup>17</sup> acknowledges that ATSI disputes the scope of ATSI's obligations under Article Five, Section II of the MISO Transmission Owners Agreement. However, section 3.2 of the ATSI-MISO Exit Fee Agreement<sup>18</sup> expressly provides that ATSI's payment of the exit

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

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

<sup>17</sup> Section 2.2 (No Actions Against this Agreement) provides in part:

Notwithstanding anything to the contrary in this Section 2.2, a Party's participation as to any matter at issue in [various dockets, including the MVP proceeding in Docket No. ER10-1791] or any other 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 [various dockets, including the MVP proceeding in Docket No. ER10-1791], 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 of the [MISO Transmission Owners Agreement].

<sup>18</sup> Section 3.2 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.

fee “shall satisfy ATSI’s financial obligations to [MISO] under Article Five, Section II.B of the [MISO] Transmission Owners Agreement.”

**F. Schedule 37**

11. On May 31, 2011, the Commission approved a new Schedule 37 (MTEP Project Cost Recovery For ATSI Zone), as well as revisions to Attachment GG (Network Upgrade Charge) of the MISO 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>19</sup>

**G. Duke-MISO Exit Fee Agreement**

12. On December 15, 2011, the Commission conditionally accepted the Duke-MISO exit fee agreement, which provided the methodology for calculating Duke’s Schedules 10, 16 and 17 exit fees.<sup>20</sup> It provides that “any remaining obligations of [Duke] under Article Five, Section II.B of the [Transmission Owners] Agreement will be determined and billed separately and apart from the Exit Fee calculation.”<sup>21</sup>

**H. Schedule 38**

13. 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) of the MISO 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>22</sup>

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<sup>19</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>20</sup> *Midwest Indep. Transmission Sys. Operator, Inc.*, 137 FERC ¶ 61,198 (2011).

<sup>21</sup> *Id.* P 17 and n.18 (citing section 3.1(a) of the Duke-MISO Exit Fee Agreement).

<sup>22</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.

## II. MISO's Proposed Schedule 39, Docket No. ER12-715-000

### A. Proposal

14. On December 29, 2011, Applicants jointly submitted, in Docket No. ER12-715-000, a new Schedule 39 (Multi-Value Project Financial Obligations and Cost Recovery for Withdrawing Transmission Owners) and proposed revisions to Attachment MM (Multi-Value Project Charge) to MISO's Tariff. The proposed revisions allow MISO to charge, on an on-going basis, a Withdrawing Transmission Owner a monthly MVP usage rate that includes a share of the costs of all MVP projects that the MISO Board of Directors approved prior to the effective date of the transmission owner's withdrawal. The MVP usage rate for a Withdrawing Transmission Owner is calculated the same way as the MVP usage rate applicable to others who are assessed costs of MVPs under Schedule 26-A (Multi-Value Project Usage Rate). A Withdrawing Transmission Owner's monthly Schedule 39 MVP usage rate is equal to its monthly net actual energy withdrawals<sup>23</sup> multiplied by the MVP usage rate. Proposed Schedule 39 also requires a Withdrawing Transmission Owner to provide its monthly net actual energy withdrawals for the previous month; if it does not do so, MISO will use a monthly estimate based on historical data plus a five percent annual growth factor. In addition, proposed Schedule 39 requires 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.

15. Applicants also propose Appendix A and Appendix B to Schedule 39 for ATSI and Duke, respectively, which list the MVPs approved prior to the effective date of ATSI's and Duke's withdrawals from MISO. If another transmission owner withdraws from MISO in the future, MISO will update the Appendices to Schedule 39 to provide a similar list for that Withdrawing Transmission Owner.

16. Applicants also propose revisions to Attachment MM, which sets forth the method for collecting the charges associated with MVPs. 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>24</sup>

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<sup>23</sup> 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. *See* proposed Schedule 39, § III.B.

<sup>24</sup> The MISO Transmission Owners periodically update the annual revenue requirements for MVPs using the methodology provided under Attachment MM. Annual

17. Applicants state that proposed Schedule 39 implements section III.A.2.j of Attachment FF (i.e., the exit fee language) and is consistent with Article Five, Section II.B to the MISO Transmission Owners Agreement (i.e., the existing obligations language). Applicants request waiver of the 60-day notice requirement so that the proposed changes can take effect on January 1, 2012. Applicants state there is good cause for such waiver because the Commission already accepted a July 16, 2010 effective date for the provisions of Attachment FF regarding the responsibility of transmission owners withdrawing from MISO to pay MVP costs, which the new and revised Tariff provisions are implementing, and ATSI already exited MISO on May 31, 2011, and Duke departed on December 31, 2011. Additionally, they state, while the MISO Board of Directors recently approved numerous MVPs on December 8, 2011, the formula rates for transmission owners with approved MVPs will begin having revenue requirements related to MVPs on January 1, 2012, that will be recovered under Schedule 26-A. To synchronize the recovery from MISO entities and Withdrawing Transmission Owners, they argue, proposed Schedule 39 and the revisions to Attachment MM should be effective January 1, 2012.

**B. Notice of Filing and Responsive Pleadings**

18. Notice of MISO's filing was published in the *Federal Register*, 77 Fed. Reg. 1478 (2012), with interventions and protests due on or before January 19, 2012. Notices of intervention and timely motions to intervene were filed by the Illinois Commerce Commission (Illinois Commission), the Public Utilities Commission of Ohio (Ohio Commission), Organization of MISO States, the Michigan Public Service Commission, Exelon Corporation, The Detroit Edison Company, FirstEnergy and Wisconsin Electric Power Company.

19. Timely protests were filed by the Ohio Commission and FirstEnergy. Timely motions to intervene and protests were filed by: American Municipal Power, Inc. (AMP); Duke; and Michigan Electric Transmission Company, LLC, International Transmission Company, Green Power Express LP, and ITC Midwest LLC (collectively, ITC).

20. On January 31, 2012, the Illinois Commission filed comments out of time. On February 3, 2012, MISO and MISO Transmission Owners filed answers to the protests. On February 21, 2012, Duke filed an answer to the answers of MISO and MISO Transmission Owners. On February 24, 2012, FirstEnergy filed an answer to the answers of MISO and MISO Transmission Owners.

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revenue requirements for Withdrawing Transmission Owner's MVPs is calculated pursuant to Schedule 39.

**C. Discussion****1. Procedural Matters**

21. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2011), the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. We also accept the late comments of the Illinois Commission, which timely intervened, given its interest in the proceeding, the early stage of the proceeding and the absence of undue prejudice or delay.

22. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2011), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We are not persuaded to accept the answers and will, therefore, reject them.

**2. Substantive Matters****a. Parties' Positions****i. Schedule 39**

23. Duke and ATSI maintain that Schedule 39 does not implement an existing obligation, but rather creates a new obligation without justification.<sup>25</sup> Contrary to Applicants' position that Schedule 39 is grounded in the exit fee obligation under Article Five, Section II.B of the MISO Transmission Owners Agreement and Attachment FF of the MISO Tariff, they state that neither Article Five, Section II.B nor Attachment FF establish an obligation that could apply to a transmission owner withdrawing from MISO.<sup>26</sup> To illustrate this point, ATSI points to Applicants' statement that MISO's "[t]ariff currently does not include the mechanism for implementing the allocation and recovery of MVP costs after a transmission owner exits MISO" and that "Schedule 39 provides that mechanism."<sup>27</sup> Because, Duke asserts, "there is no existing obligation, the central questions to be answered in this proceeding are whether [Applicants] have

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<sup>25</sup> Duke Protest at 6-10; ATSI Protest at 18-20.

<sup>26</sup> Duke Protest at 7; ATSI Protest at 34-35.

<sup>27</sup> ATSI Protest at 19 (citing Applicants Filing at 4 n.13 (quoting Applicants Filing, Curran Test. at 3)).

adequately justified the *creation* of the obligation it proposes in Schedule 39, and if so, whether the obligation can be applied to [Duke].”<sup>28</sup>

24. ATSI argues that, while Applicants’ proposal relies on Article Five, Section II.B of the MISO Transmission Owners Agreement and Attachment FF of the MISO Tariff, to forestall any expansion in Applicants’ theory, Schedule 39 cannot be justified under any other of the provisions in Article Five. ATSI asserts that Applicants cannot claim that MVP charges are appropriate under Article Five, section II.A or section II.C of the MISO Transmission Owners Agreement. ATSI explains that Article Five, section II.A, which contains the “hold harmless” language, relates to obligations between ATSI and its transmission customers, not MISO.<sup>29</sup> ATSI states that, regardless, ATSI’s transmission rates with its customers related to Article Five, section II.A of the MISO Transmission Owners Agreement are being addressed in other proceedings.<sup>30</sup> Further, ATSI states that Article Five, section II.C obligation applies to the construction of new facilities and should be interpreted as a requirement of an exiting transmission owner to build any transmission facilities in its zone that were approved by the MISO Board of Directors prior to their withdrawal (i.e., not charges to pay for MVP costs).<sup>31</sup>

25. Duke and ATSI argue that Applicants’ proposal to impose usage-based charges on a departed utility under Schedule 39 is contrary to the Commission’s rehearing order regarding Duquesne Light Company’s (Duquesne) proposed withdrawal from

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<sup>28</sup> Duke Protest at 10 (emphasis in original).

<sup>29</sup> ATSI Protest at 32. Article Five, Section II.A provides: “Users taking service which involves the withdrawing Owner and which involves transmission contracts executed before the Owner provided notice of its withdrawal shall continue to receive the same service for the remaining term of the contract at the same rates, terms, and conditions that would have been applicable if there were no withdrawal. The withdrawing Owner shall agree to continue providing service to such Users and shall receive no more in revenues for that service than if there had been no withdrawal by such Owner.”

<sup>30</sup> *Id.* See, e.g., *PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,198 (2011).

<sup>31</sup> ATSI Protest at 32. Article Five, Section II.C provides: “[o]bligations relating to the construction of new facilities pursuant to an approved plan of [MISO] shall be renegotiated as between [MISO] and the [transmission owner withdrawing from MISO]. If such obligations cannot be resolved through negotiations, they shall be resolved in accordance with Attachment HH of the Tariff.”

PJM Interconnection, L.L.C. (PJM).<sup>32</sup> Duke states that in *Duquesne*, the Commission rejected a proposal to allocate high-voltage transmission system costs to a transmission owner withdrawing from PJM where the governing tariff provisions required periodic reallocation of such costs to users of the RTO transmission system, reasoning that “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 [rate] purposes.”<sup>33</sup> ATSI states that “*Duquesne* makes clear that a usage-based transmission charge does not qualify as an ‘obligation incurred prior to the effective date of [the ATSI Zone’s] withdrawal’ for purposes of determining whether a transmission owner can be allocated such costs after it departs.”<sup>34</sup>

26. Duke further asserts that the withdrawal provision in the MISO Transmission Owners Agreement and the PJM Transmission Owners Agreement are similar in that both provide that a transmission owner would remain liable for all “obligations” that it “incurred” under the agreement “prior” to withdrawal. Because PJM’s tariff required PJM to recalculate load-ratio share on an annual basis “to reflect PJM’s then-existing zones and loads,” Duke avers, the Commission concluded that a transmission owner withdrawing from PJM should not be included in future period transmission expansion cost allocations, once it is no longer a member of the RTO.<sup>35</sup> Duke contends that the cost allocation for some categories of the PJM transmission system became “fixed” during the

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<sup>32</sup> Duke Protest at 10-16 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 124 FERC ¶ 61,219 (2008) (*Duquesne*)); ATSI Protest at 28-29. The *Duquesne* proceeding involved a proposal by Duquesne and MISO, allowing for the transfer of Duquesne’s membership in PJM to MISO. In its compliance filing in the same proceeding, Duquesne addressed its financial liability, as a withdrawing member of PJM, including its cost responsibility for transmission expansions approved and constructed pursuant to PJM’s regional transmission expansion plan (RTEP). The Commission determined that “upon Duquesne’s withdrawal from PJM, the Duquesne zone will not be subject to PJM’s future-period, annually-updated RTEP allocations. However, we also find that project costs that have been allocated to the Duquesne zone, i.e., established and made binding on the Duquesne zone pursuant to PJM’s current-year RTEP cost allocations, will continue to apply to the Duquesne zone and may be collected by PJM through the current calendar year.” *Duquesne*, 124 FERC ¶ 61,219 at P 5.

<sup>33</sup> Duke Protest at 10 (citing *Duquesne*, 124 FERC ¶ 61,219 at P 167).

<sup>34</sup> ATSI Protest at 29.

<sup>35</sup> Duke Protest at 12 (citing *Duquesne*, 124 FERC ¶ 61,219 at P 162-177).

approval process.<sup>36</sup> However, by contrast, Duke states that “cost assignments for [PJM’s] higher voltage facilities are not fixed during the Regional Transmission Expansion Plan (RTEP) process.”<sup>37</sup> Duke asserts that the difference in cost treatment has to do with the regionally beneficial nature of the projects in question, as the Commission determined in *Duquesne*:

*These new high-voltage projects were not undertaken specifically to support Duquesne’s load or the reliability of that load, but would have occurred regardless of whether Duquesne was a member of PJM, and the costs were not the result of a final allocation to Duquesne. Rather, these costs are treated under PJM’s tariff as system costs ... that are allocated as they are incurred on a load ratio share basis to the then-existing members of PJM ... the Duquesne zone, following Duquesne’s departure from PJM, will not be liable for [RTEP charges] that have not been allocated under PJM’s currently-effective schedule 12 cost allocations.<sup>[38]</sup>*

27. Duke and ATSI state that MISO fixes cost responsibility for Regional Expansion Criteria and Benefits (RECB)<sup>39</sup> projects at the time of MISO Board of Directors approval of the project, but reallocates MVP cost responsibility monthly, making MVP cost allocation like the periodic RTEP cost allocation at issue in *Duquesne*, and unlike the allocation for RECB projects.<sup>40</sup> For instance, Duke argues that, if Applicants had proposed to allocate MVP costs to all transmission owners upfront, at the time of the MISO Board of Directors’ approval, on the same basis, as with RECB projects and then develop an alternative mechanism for billing that allocation to Withdrawing

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<sup>36</sup> *Id.* at 13 (citing *Duquesne*, 124 FERC ¶ 61,219 at P 168).

<sup>37</sup> *Id.* (citing *Duquesne*, 124 FERC ¶ 61,219 at P 168).

<sup>38</sup> *Id.* (citing *Duquesne*, 124 FERC ¶ 61,219 at P 169-170) (emphasis added by Duke).

<sup>39</sup> RECB projects include Baseline Reliability Projects (as approved in the RECB I Proceeding) and Market Efficiency Projects (approved under the name Regionally Beneficial Projects in the RECB II Proceeding). See *Midwest Indep. Transmission Sys. Operator, Inc.*, 114 FERC ¶ 61,106 (2006) (RECB I Order), *order on reh’g*, 117 FERC ¶ 61,241 (2006) (RECB I Rehearing Order) (collectively, RECB I Proceeding). See also *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) (collectively, RECB II Proceeding).

<sup>40</sup> Duke Protest at 15-16; ATSI Protest at 26.

Transmission Owners after their withdrawal, such a different mechanism might not be unlawful, because the cost allocation would occur at the same time on the same basis, and no costs would be shifted unilaterally to a single group of transmission owners (i.e., Withdrawing Transmission Owners). But, Duke maintains that there is no simultaneous allocation to all transmission owners in this case – some transmission owners may never be allocated MVP costs, if they do not withdraw and do not use the transmission system.<sup>41</sup> Both Duke and ATSI assert that, as in *Duquesne*, they should not be obligated to pay Schedule 39 MVP charges on the basis of a hypothetical construct of the way things would operate had they remained in MISO.<sup>42</sup>

28. The Ohio Commission also argues that Duke's and ATSI's usage within MISO is reduced to zero as a result of their respective exits from MISO and, therefore, there is nothing to allocate to these companies.<sup>43</sup>

29. Duke states that the proposed monthly MVP usage rate that would be charged to Withdrawing Transmission Owners is diametrically opposed to the rationale provided in the MVP Order for approving the MVP cost allocation.<sup>44</sup>

30. Duke states that proposed Schedule 39 MVP costs will be allocated based either on: (1) monthly net actual energy withdrawals, which will occur in PJM and reflect use of PJM's transmission system; or (2) historic usage of the Duke transmission system while Duke was in MISO.<sup>45</sup>

31. Duke states that when it moved to PJM, its usage of the MISO system declined. Duke argues that, neither historic usage of the MISO system nor current usage of the PJM system will reflect actual usage of the MISO system, and that both measures will create a usage figure that is much higher than a Withdrawing Transmission Owner's actual usage of the MISO system. Moreover, Duke asserts that proposed Schedule 39 will charge Withdrawing Transmission Owners for more than their actual usage of the MISO

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<sup>41</sup> Duke Protest at 21.

<sup>42</sup> *Id.* at 14-15; ATSI Protest at 27-28.

<sup>43</sup> Ohio Commission Protest at 9-10.

<sup>44</sup> Duke Protest at 16-17 (citing MVP Order, 133 FERC ¶ 61,221 at P 383).

<sup>45</sup> *Id.* at 17.

transmission system and, therefore, will not reflect the change in the benefits they receive.<sup>46</sup>

32. In addition, several parties argue that Schedule 39, in violation of section 205(b) of the FPA, unduly discriminates against Withdrawing Transmission Owners by allocating MVP costs at a different rate than transmission owners that remain in MISO. Duke and ATSI state that only Withdrawing Transmission Owners, such as Duke and ATSI, will be allocated MVP costs based upon usage of the PJM transmission system or historic usage of the MISO transmission system and only Withdrawing Transmission Owners will be allocated costs for more than their actual usage of the MISO transmission system.<sup>47</sup> Several parties also argue that proposed Schedule 39 would shift costs from future users of the MISO transmission system to Withdrawing Transmission Owners.<sup>48</sup> While the costs being allocated will be MISO costs, the rate Applicants propose to charge will be based upon usage of facilities that are not under MISO's control.<sup>49</sup> Indeed, Duke argues that Withdrawing Transmission Owners will be charged MISO's monthly MVP usage rate for all transactions sinking in their respective PJM zone, including many transactions that never use or benefit from the MISO system or its MVPs. Duke asserts that it is a bedrock principle of the FPA that MISO can only charge for services that it provides over facilities that it owns or operates.<sup>50</sup> ATSI further asserts that Schedule 39 is unduly discriminatory as between ATSI and Duke because, unlike Duke, ATSI is only a transmission provider and therefore is not a transmission customer that withdrew energy prior to its withdrawal from MISO, which is the basis of determining the MVP costs allocated to ATSI.<sup>51</sup> Finally, based on the fact that neither ATSI nor the ATSI Zone benefit from MVPs in any way that differs from other PJM transmission owners or load, ATSI claims that it is unduly discriminatory to require ATSI to pay different rates than similarly situated PJM transmission owners for the same service.<sup>52</sup>

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<sup>46</sup> *Id.* The Ohio Commission also agrees that MISO cannot base its updated cost allocations to Duke and ATSI based on their usage in another RTO. Ohio Commission Protest at 9-10.

<sup>47</sup> Duke Protest at 18; ATSI Protest at 36.

<sup>48</sup> Duke Protest at 20; ATSI Protest at 36; ITC Protest at 3.

<sup>49</sup> Duke Protest at 25.

<sup>50</sup> *Id.* at 26; *see also* ATSI Protest at 43-44.

<sup>51</sup> ATSI Protest at 37.

<sup>52</sup> *Id.* at 37-38.

33. ITC further states that, while it is accurate that a transmission owner who withdraws from MISO is responsible for financial obligations and payments prior to the withdrawal of the owner, MVP costs are not identified in Attachment FF as a transmission owner obligation and therefore Schedule 39, as proposed, cannot be utilized to collect these costs.<sup>53</sup> Ultimately, ITC asserts that Schedule 39 must be modified to remain consistent with all MISO Tariff documents, namely that the cost responsibility of MVPs as assigned in Attachment FF should remain with Transmission Customers. At a minimum, if Schedule 39 is approved, ITC argues that the Commission should stipulate that the cost responsibility not apply to Independent Transmission Companies (defined as transmission owners that have no retail customers). ITC argues that Independent Transmission Companies have no load and pay neither transmission rates nor charges under the MISO Tariff, and thus would be held responsible for MVP cost liabilities not similarly shared by other similarly situated transmission owners.<sup>54</sup>

34. Duke argues that an allocation mechanism of MVP costs triggered by the withdrawal of a transmission owner is contrary to, and impermissibly modifies, the MISO Transmission Owners Agreement. Duke states that allocation will never occur before withdrawal but instead, will only occur as a result of withdrawal.<sup>55</sup> Duke argues that no transmission owner is allocated MVP costs at the time of the MISO Board of Directors approval of MVP projects. Specifically, none of the costs for the \$4.7 billion in MVP costs approved by the MISO Board on December 8, 2011 were allocated that day.<sup>56</sup>

35. Duke states that the MISO Transmission Owners Agreement permits withdrawals from MISO “at any time” under the terms and conditions agreed to by the members and approved by the Commission.<sup>57</sup> Essentially, Duke argues that because the allocation of MVP costs occurs only if a transmission owner withdraws, it cannot be viewed as anything other than an impermissible modification of the withdrawal rights of transmission owners. Duke contends that neither MISO nor any sub-group of MISO transmission owners is permitted to modify the withdrawal rights of transmission owners. Duke argues that MISO should not be permitted to accomplish indirectly, through the

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<sup>53</sup> ITC Protest at 4.

<sup>54</sup> *Id.* at 5.

<sup>55</sup> Duke Protest at 23; *see also* ATSI Protest at 36.

<sup>56</sup> Duke Protest at 23.

<sup>57</sup> *Id.* at 24 (citing MISO Transmission Owners Agreement, Article Two, § X.B).

MISO Tariff, a modification of withdrawal rights that MISO is prohibited from accomplishing directly.<sup>58</sup>

36. ATSI also argues that the MISO Transmission Owners Agreement does not allow MISO and/or the MISO transmission owners to change the withdrawal rights—including the financial obligations—of transmission owners withdrawing from MISO without the consent of all of the MISO transmission owning members, including ATSI.<sup>59</sup> Because ATSI never consented to impose MVP cost allocation, Schedule 39 violates the MISO Transmission Owners Agreement.<sup>60</sup>

37. ATSI argues that Applicants' proposal to compel a former transmission owner to report its monthly net actual energy withdrawals to MISO is unlawful. ATSI states that there is no legal basis for imposing these unwanted filing burdens on a former MISO transmission owner. ATSI avers that RTO membership is voluntary and RTOs may not erect unreasonable barriers to withdrawal or impose continuing obligations on former members.<sup>61</sup> Furthermore, ATSI states that neither state agencies nor RTO committees composed of state agencies may force a utility to make filings without the utility's consent.<sup>62</sup> Accordingly, ATSI avers that it would be inconsistent to compel ATSI to continue to make monthly filings with MISO in order to pay for transmission facilities that ATSI and its zonal customers did not ask for and do not benefit from.<sup>63</sup>

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<sup>58</sup> *Id.* at 25.

<sup>59</sup> ATSI Protest at 33. Specifically, ATSI points to Article Two, Section IX.C.8 of the MISO Transmission Owners Agreement that provides: “withdrawal rights set forth in Articles Five and Seven of this Agreement shall not be changed except by unanimous vote by the Owners.”

<sup>60</sup> ATSI Protest at 33.

<sup>61</sup> *Id.* at 46 (citing *Regional Transmission Organizations*, Order No. 2000, FERC Stats. & Regs. ¶ 31,089 (1999), *order on reh'g*, Order No. 2000-A, FERC Stats. & Regs. ¶ 31,092 (2000), *aff'd sub nom. Pub. Util. Dist. No. 1 of Snohomish County, Washington v. FERC*, 272 F.3d 607 (D.C. Cir. 2001); *Atl. City Elec. Co. v. FERC*, 295 F.3d 1 (D.C. Cir. 2002)).

<sup>62</sup> *Id.* (citing *Mass. Dep't of Pub. Utils. v. FERC*, 729 F.2d 886, 888 (1st Cir. 1984); *Entergy Ark., Inc.*, 133 FERC ¶ 61,211, at PP 1, 15 (2010); *Sw. Power Pool, Inc.*, 106 FERC ¶ 61,110, at P 219, *reh'g denied*, 109 FERC ¶ 61,010, at P 92-93 (2004)).

<sup>63</sup> ATSI Protest at 46-47.

38. Duke and ATSI dispute Applicants' proposal to use a five percent annual growth rate in the instance Withdrawing Transmission Owners do not provide the necessary data to MISO to calculate their Schedule 39 rate.<sup>64</sup> Duke states that the projected growth rate is designed to be so punitive that a Withdrawing Transmission Owner will be pushed to avoid it and therefore is facially unjust and unreasonable. Duke states that proposed Schedule 39 calls for Withdrawing Transmission Owners to either volunteer their customers' actual energy usage or be forced to pay based on the assumption of a five percent annual energy growth rate. Duke states that MISO justifies the five percent rate only by asserting that it "was chosen to incent the Withdrawing Transmission Owners to provide actual values."<sup>65</sup> First, Duke argues that there is no effort to tie the growth rate to an actual projection of growth, or any reasonable proxy and, second, the implication, in stating that it is designed to "incent" transmission owners withdrawing from MISO to provide real usage values, is that MISO understands that five percent is well above likely growth rates, and is deliberately proposing a growth rate that is so high as to be punitive.<sup>66</sup>

39. Duke argues that the burden to show reasonableness falls on Applicants. Duke states that the Court of Appeals for the D.C. Circuit has held, "[a]lthough the use of projected expense and demand figures in ratemaking has been upheld by this Court. . .we cannot allow the practice to subvert the Federal Power Act's requirement that. . . 'the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility'"<sup>67</sup> Duke states that the Court further held that to justify projecting growth rates forward, "the utility must demonstrate that its estimates were reasonable when made, either by explaining the chain of reasoning that it employed to arrive at its projections, or by comparing its estimates with actual data, and so establishing their accuracy."<sup>68</sup> Lastly, Duke states that the Commission itself has asserted

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<sup>64</sup> Duke Protest at 37-39; ATSI Protest at 46-47.

<sup>65</sup> Duke Protest at 38 (citing Applicants Filing, Curran Test. at 6).

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

<sup>67</sup> *Id.* at 37 (citing *Chatham v. FERC*, 662 F.2d 23, 28 (D.C. Cir. 1981) (quoting 16 U.S.C. § 824(d)e)).

<sup>68</sup> *Id.* (citing *Chatham v. FERC*, 662 F.2d 29 (D.C. Cir. 1981) (quoting 16 U.S.C. § 824(d)e)).

that it “will not approve rates based on unsubstantiated cost estimations. The burden will be on such companies to establish the validity and accuracy of their cost estimates.”<sup>69</sup>

40. Duke further states that Applicants’ alternative proposal to use historic usage data, in the instance the Withdrawing Transmission Owner does not provide MISO with monthly withdrawal data, constitutes retroactive ratemaking.<sup>70</sup> Duke states that Applicants are proposing to use historical usage data from when Withdrawing Transmission Owners were still members of MISO to determine their monthly MVP obligations now that they are members of PJM. Duke states that its historical usage data reflects prior purchases of transmission service that are not tied in any way to MVPs because those purchases of transmission service were made long before any MVPs were operational, in service, or approved and before any MVP costs were allocated to it.<sup>71</sup>

41. Moreover, Duke argues that the entire year of the proposed historic period falls before the requested effective date of Schedule 39, and more importantly, Applicants did not even file their proposal until 363 of the 365 days of the historic usage period had already passed. Thus, Duke argues that Duke’s monthly MVP obligation would be based solely upon past, pre-Schedule 39 service for which Duke has already paid.<sup>72</sup> ATSI adds that Schedule 39 violates the filed rate doctrine and the rule against retroactive ratemaking.<sup>73</sup> ATSI argues that notice is not effective if an RTO announces a new transmission cost allocation process and then “stages an eight-week forced-march stakeholder process in order to plan an entire new class of transmission costs on departing.”<sup>74</sup>

42. ATSI, Duke and the Ohio Commission argue that proposed Schedule 39 is inconsistent with the principles of Order No. 1000 concerning allocation of costs to

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<sup>69</sup> *Id.* at 37-38 (citing *Filing of Electric Service Tariff Changes*, 50 FPC 125, at 127 (1973)).

<sup>70</sup> *Id.* at 27-28 (citing *Consolidated Edison Co. of New York v. FERC*, 347 F.3d 964, 969 (D.C. Cir. 2003) (*Consolidated Edison*) (referring to *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 (1981)); *Pac. Gas & Elec. Co. v. FERC*, 373 F.3d 1315, 1320 (D.C. Cir. 2004) (quoting *Panhandle Eastern Pipeline Co. v. FERC*, 95 F.3d 62, 68 (D.C. Cir. 1996)).

<sup>71</sup> *Id.* at 28.

<sup>72</sup> *Id.*

<sup>73</sup> ATSI Protest at 1, 20-23.

<sup>74</sup> *Id.* at 20.

beneficiaries, not involuntarily allocating costs to non-beneficiaries, and allocation solely within the region where a facility is built.<sup>75</sup>

43. According to ATSI, Duke, the Ohio Commission, and the Illinois Commission, assigning cost responsibility under proposed Schedule 39 to Withdrawing Transmission Owners violates the court precedent prohibiting a group of utilities from paying for facilities from which its members derive no benefits, or benefits that are trivial in relation to the costs sought to be shifted to its members.<sup>76</sup> They argue that, simply because the MVP Order and MVP Rehearing Order found the MVP cost allocation to be just and reasonable, Duke avers, does not support the same finding for the proposed Schedule 39.<sup>77</sup> Duke argues that proposed Schedule 39 suffers from the same problem as the rate rejected in *Illinois Commerce Commission* in that Schedule 39 offers no assessment or quantification of the benefits to either Duke or Withdrawing Transmission Owners, nor do Applicants make an effort to demonstrate cost causation.<sup>78</sup>

44. AMP states that that if the Commission accepts proposed Schedule 39 and related revisions to Attachment MM, it should not rule on the validity of a Withdrawing Transmission Owner's attempt to pass through the MVP costs to load in the zone of a Withdrawing Transmission Owner. AMP argues that the issue of pass-through should be left to a separate proceeding in which a Withdrawing Transmission Owner specifically proposes a rate to be implemented after their transition out of MISO.<sup>79</sup>

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<sup>75</sup> *Id.* at 3-4, 38-39 (citing *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at PP 586, 657 (2011)), Duke Protest at 29-30 (citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at PP 586, 622-23, 637, 657); Ohio Commission Protest at 6-7 (citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at PP 586, 657); Illinois Commission Protest at 5-6 (citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 586-87).

<sup>76</sup> ATSI Protest at 3-4 (citing *Ill. Commerce Comm'n v. FERC*, 576 F.3d 470 (7th Cir. 2009) (*Illinois Commerce Commission*)); Duke Protest at 34-39 (citing *Illinois Commerce Commission*, 576 F.3d at 475-77); Ohio Commission Protest 4-5 (citing *Illinois Commerce Commission*, 576 F.3d 470); Illinois Commission Protest at 2-6 (citing *Illinois Commerce Commission*, 576 F.3d 470, 476-77).

<sup>77</sup> Duke Protest at 35.

<sup>78</sup> *Id.* at 36.

<sup>79</sup> AMP Protest at 5.

45. The Ohio Commission states that rejecting proposed Schedule 39 supports additional RTO participation. The Ohio Commission argues that, if approved, proposed Schedule 39 creates a huge disincentive for a state to permit transmission owners to join an RTO.<sup>80</sup> Further complicating matters, according to the Ohio Commission, “is the fact that [the MISO Board of Directors] approved an additional 16 MVPs just weeks prior to [Duke’s] integration with PJM.”<sup>81</sup>

**ii. Application of Schedule 39 to Duke and ATSI**

46. In addition to arguments on the justness and reasonableness of the proposal in general, several parties commented on the specific application of Schedule 39 to Duke and ATSI.

47. ATSI argues that Applicants’ attempt to place Michigan Thumb Project<sup>82</sup> costs on ATSI conflicts with Attachment A of the ATSI Exit Fee Agreement, which sets forth the Exit Fee methodology.<sup>83</sup> ATSI states that Attachment A to the ATSI Exit Fee Agreement begins with a subsection entitled Basis for Exit Fee Calculation, which quotes Article 5, Section II.B of the MISO Transmission Owners Agreement in full. The ATSI Exit Fee Agreement then provides:

The financial obligations incurred as of the Withdrawal Date will be the liabilities on [MISO’s] balance sheet of its financial statements as of the day before the Withdrawal Date (the “Calculation Date”) as well as the liabilities disclosed in the footnotes to such financial statements.

ATSI shall be responsible for a pro rata share of financial obligations based on the ratio of its billing determinants to the total of all other billing determinants. The final allocation of financial obligations to ATSI shall be

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<sup>80</sup> Ohio Commission Protest at 10.

<sup>81</sup> *Id.* The Illinois Commission also generally argues that acceptance of Schedule 39 will impact RTO membership decision. Illinois Commission Protest at 6-7.

<sup>82</sup> The Michigan Thumb Project was the only MVP approved by MISO’s Board of Directors for inclusion in Appendix A of the MTEP prior to ATSI’s withdrawal from MISO.

<sup>83</sup> ATSI Protest at 30.

based on twelve months of billing determinants preceding the Withdrawal Date. Allocations shall reflect all Persons taking services from [MISO] as of the Calculation Date.<sup>84</sup>

48. ATSI argues that consistent with the termination of ATSI's obligations under the MISO Transmission Owners Agreement and MISO Tariff as of midnight on May 31, 2011, the ATSI Exit Fee Agreement plainly limits ATSI's responsibility under Article Five, Section II.B of the MISO Transmission Owners Agreement to "financial obligations incurred as of" June 1, 2011 that are "liabilities on [MISO's] balance sheet of its financial statements as of" May 31, 2011.<sup>85</sup> ATSI argues that Schedule 39 does not conform with either requirement, nor does Schedule 39 reflect ATSI's "pro rata share of financial obligations based on the ratio of its billing determinants to the total of all other billing determinants . . . based on twelve months of billing determinants preceding" June 1, 2011. ATSI states that unlike Schedule 39, the ATSI Exit Fee methodology is consistent with the Commission's determination that a transmission owner's "financial obligations incurred with respect to the MVP Tariff provisions while a member of [MISO] . . . would be determined at the time of the withdrawal."<sup>86</sup> ATSI asserts that the exclusion of MVP costs from the ATSI Exit Fee Agreement is significant because of the Commission's repeated statements in the MVP Orders—both before and after the ATSI Exit Fee Agreement was filed—that it expected MISO sort out any cost incurred prior to withdrawal date subject to negotiated settlement or contested exit agreement accepted by the Commission.<sup>87</sup>

49. Duke also argues that its exit fee obligation does not include MVP costs since these costs are not contemplated under the MISO Transmission Owners Agreement.<sup>88</sup>

50. ATSI argues that MISO's attempt to apply Schedule 39 to ATSI or the ATSI Zone would violate the filed rate doctrine and the rule against retroactive ratemaking because MISO failed to propose any tariff language prior to the effective date of ATSI's

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<sup>84</sup> *Id.* (citing ATSI-MISO Exit Fee Agreement, Attachment A at A-1).

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

<sup>86</sup> *Id.* (citing MVP Order, 133 FERC ¶ 61,221 at P 471).

<sup>87</sup> *Id.* at 30-31 (citing MVP Rehearing Order, 137 FERC ¶ 61,074 at P 322).

<sup>88</sup> Duke Protest at 2-3.

withdrawal.<sup>89</sup> ATSI states that there are only two circumstances in which a rate adjustment may take effect prior to a section 205 filing: (1) when the parties have notice that a rate is tentative and may be later adjusted with retroactive effect; or (2) when the parties have agreed to make a rate effective retroactively.<sup>90</sup> ATSI states that neither of these circumstances is present here and, therefore, the application of Schedule 39 to ATSI or any of the load within the ATSI Zone would be unlawful.<sup>91</sup>

51. ATSI further argues that Applicants' reliance on the Commission's statement 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]" to demonstrate the prior establishment of a financial obligation for MVP costs is misplaced. ATSI maintains that the MVP Order did not find that MISO's submission created any new obligation but clarified confusing language in Attachment FF by substituting the phrase "Transmission Owner" for "Member."<sup>92</sup> Furthermore, ATSI maintains the Commission should not interpret the withdrawal language in Attachment FF broadly to mean that a transmission owner in MISO would be responsible for any MVP "approved for construction" before it withdraws.<sup>93</sup>

52. Duke states that its MVP obligations are limited to those created "before [Duke's] withdrawal date."<sup>94</sup> Duke states that during the time period between Duke's submission of its withdrawal notice and its actual departure (i.e., December 31, 2011), MISO approved \$5.2 billion of MVP projects, with the bulk of those projects, with projected costs of \$4.7 billion, approved only a few weeks before its withdrawal from MISO.<sup>95</sup>

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<sup>89</sup> ATSI Protest 20-25; *see also* Ohio Commission Protest at 8 (stating that application of Schedule 39 to either Duke or ATSI would be tantamount to retroactive ratemaking because both companies exited from MISO prior to proposed effective date).

<sup>90</sup> ATSI Protest at 21 (citing *Consolidated Edison*, 347 F.3d at 969).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 23-24 (citing MVP Order, at P 471; MVP Rehearing Order, at P 323).

<sup>93</sup> *Id.* at 25-26.

<sup>94</sup> Duke Protest at 1 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 137 FERC ¶ 61,074 at P 322). Duke maintains that its exit fee obligations are limited to those found in the MISO Transmission Owners Agreement. *Duke Energy Ohio, Inc.*, 133 FERC ¶ 61,058, at P 47 (2010) (citing LG&E Withdrawal Order, 114 FERC ¶ 61,282 at P 28).

<sup>95</sup> Duke Protest at 31.

Duke states that after the MISO Board of Directors approved these MVPs, and just days before its withdrawal date, MISO filed proposed Schedule 39. Duke argues that this was an effort by MISO to shift a substantial portion of MVP costs out of the RTO, away from the customers who will use and benefit from MVP facilities, and onto Duke.<sup>96</sup>

53. Duke states that regardless of whether the Commission accepts proposed Schedule 39 as forming an obligation with respect to future Withdrawing Transmission Owners, in Duke's case, proposed Schedule 39 cannot create an obligation before it is effective. Duke argues that proposed Schedule 39 has not yet been made effective, and Duke has not been a member of MISO since 11:59 p.m. on December 31, 2011.<sup>97</sup> Duke argues that even if the Commission grants Applicants' requested effective date of January 1, 2012 (i.e., the day after Duke withdrew from MISO), there is no enforceable MVP obligation before Duke's withdrawal date.<sup>98</sup> Therefore, pursuant to the MISO Transmission Owners Agreement, Duke argues that it has not incurred any MVP financial obligations "applicable to time periods prior to the effective date of [Duke's] withdrawal."<sup>99</sup> Finally, Duke states that the MISO Board of Directors "planned for MVP projects at its [December 2011] meeting with full knowledge that [Duke was] withdrawing from MISO" and, therefore, MISO cannot claim any reliance interest that warrants allocation of Schedule 39 MVP costs to Duke.<sup>100</sup>

54. ATSI argues that it would be grossly inequitable to charge Michigan Thumb Project costs to ATSI or the ATSI Zone when that project was neither proposed nor approved until long after the Commission authorized ATSI's realignment into PJM and months after the utilities in the ATSI Zone relied on that authorization to incur substantial new capacity obligations in PJM.<sup>101</sup> ATSI argues that given this known and measurable change in MISO's system, it was unreasonable for MISO to act as if it were still planning future transmission projects on behalf of ATSI and its customers.<sup>102</sup> ATSI states that the

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<sup>96</sup> *Id.* at 31-32.

<sup>97</sup> *Id.* at 32-33

<sup>98</sup> *Id.* at 32-33, 39-40.

<sup>99</sup> *Id.* at 39 (citing MISO Transmission Owners Agreement, Article Five, § II.B).

<sup>100</sup> *Id.* at 41.

<sup>101</sup> ATSI Protest at 4 (referring to *Am. Transmission Sys., Inc.*, 129 FERC ¶ 61,249 (2009) (ATSI Realignment Order).

<sup>102</sup> *Id.* at 4 (citing *Pub. Serv. Co. of N.H.*, 32 FERC ¶ 61,251, at 61,598 (1985); *Ky. Utils. Co.*, 23 FERC ¶ 61,317, at 61,679 (1983)).

Commission can find that ATSI is not responsible for MVP costs without undermining its ability to allocate MVP costs to other transmission owners or load-serving entities who choose to leave MISO in the future under materially different facts.

55. ATSI also states that it did not cause the Michigan Thumb Project to be built, nor did ATSI agree to it. Moreover, ATSI states that the Michigan Thumb Project is not needed to serve the ATSI Zone, nor will any LSE in the ATSI Zone benefit.<sup>103</sup>

### iii. Effective Date

56. AMP, the Ohio Commission, Duke and ATSI oppose the January 1, 2012 effective date, arguing that Applicants have failed to demonstrate good cause for waiver of the 60-day notice requirement.<sup>104</sup> Several parties state that in situations that involve rate increases, such as here, the Commission requires a “strong showing” of good cause to grant waiver of the prior notice requirement.<sup>105</sup> Moreover, AMP asserts that the Commission “will not grant waiver for contested filings, even if they do not have an impact on rates.”<sup>106</sup> AMP also states that the Commission should deny waiver because the timing for filing the proposed Schedule 39 Tariff revisions was within MISO’s control and MISO has offered no explanation why it needed to file the proposal three days prior to the proposed effective date, thus requiring a waiver of the 60-day notice requirement. AMP adds that Applicants have been on notice for well over a year that they would need to submit to the Commission a filing attempting to recover MVP costs from Withdrawing Transmission Owners.<sup>107</sup>

### iv. Miscellaneous

57. ATSI argues that Applicants should be required to revise Schedule 39 to replace the term “Withdrawing Transmission Owner” with “Former Transmission Owner” for accuracy.<sup>108</sup> ATSI argues that Schedule 39 would never be applied to any utility until

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<sup>103</sup> *Id.* at 39-42.

<sup>104</sup> AMP Protest at 5-6; Ohio Commission Protest at 11; Duke Protest at 33-34, ATSI Protest at 18, 50-51.

<sup>105</sup> *E.g.*, AMP Protest at 6 (citing *Central Hudson Gas & Elec. Corp.*, 60 FERC ¶ 61,106, at 61,339, *reh’g denied*, 61 FERC ¶ 61,089 (1992) (*Central Hudson*)).

<sup>106</sup> *Id.* at 7 (quoting *PacifiCorp*, 131 FERC ¶ 61,043, at P 25 (2010), *reh’g denied*, 134 FERC ¶ 61,099 (2011)).

<sup>107</sup> *Id.* at 6.

<sup>108</sup> ATSI Protest at 42-43.

after its withdrawal from MISO is complete and, thus the terminology would never be accurate.

**b. Commission Determination**

**i. Schedule 39, As Applied Prospectively**

58. We will accept Schedule 39 and the related revisions to Attachment MM, in part, subject to modifications ordered below, as a just and reasonable basis for MISO to charge a transmission owner that withdraws from MISO after January 1, 2012 for the Withdrawing Transmission Owner's financial obligation to pay costs for MVPs approved by the MISO Board of Directors prior to the effective date of withdrawal.

59. Attachment FF, section III.A.2.j of MISO's Tariff states:

Withdrawal from [MISO]: 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 Member.

The Commission has already 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]."<sup>109</sup> In the MVP Rehearing Order, the Commission clarified 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 fee agreement accepted by the Commission."<sup>110</sup> We find 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.

60. We also find that Schedule 39 is an appropriate mechanism to make clear which MVP costs are a part of a Withdrawing Transmission Owner's exit fee obligation. Moreover, Schedule 39 and the associated revisions to Attachment MM provide a mechanism by which a Withdrawing Transmission Owner's remaining financial

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<sup>109</sup> MVP Order, 133 FERC ¶ 61,221 at P 471.

<sup>110</sup> MVP Rehearing Order, 137 FERC ¶ 61,074 at P 322.

obligations for MVP projects costs are determined and billed. In addition, section I.C to Schedule 39 provides that “Withdrawing Transmission Owners shall pay the [monthly MVP usage rate] calculated pursuant to Attachment MM for those MVPs approved by the [MISO] Board of Directors after the Withdrawing Transmission Owner’s integration date into [MISO] and prior to the effective date of the Withdrawing Transmission Owner’s exit from [MISO].”<sup>111</sup>

61. We find the Withdrawing Transmission Owner’s monthly MVP usage charge to be just and reasonable, as calculated pursuant to proposed Schedule 39 and revised Attachment MM, as modified. MISO will calculate the Withdrawing Transmission Owner’s MVP usage charge using the same Commission-approved methodology for determining the MVP usage rate applicable to others who are assessed costs of MVPs under Schedule 26-A and apply the MVP usage charge to the Withdrawing Transmission Owner’s monthly energy withdrawals.<sup>112</sup>

62. We also find 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. 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, including an escalation factor to sufficiently account for load growth, a Withdrawing Transmission Owner would have an incentive to not provide MISO with the actual data MISO needs to calculate MVP usage charges. And if a Withdrawing Transmission Owner believes that the default mechanism produces a value that is higher than its actual monthly net actual energy withdrawals, its recourse is to simply provide MISO with its actual energy withdrawal information.

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<sup>111</sup> See proposed Schedule 39, § I.C.

<sup>112</sup> This approach effectively recovers 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 a member of MISO. While not prejudging whether the methodology set forth in Schedule 39 applies to ATSI and Duke, which we set for hearing below, we note that this approach is consistent with how MISO will recover RECB costs from ATSI and Duke under Schedules 37 and 38. See *Midwest Indep. Transmission Sys. Operator, Inc.*, 135 FERC ¶ 61,204 (2011) (approving Schedule 37); *Midwest Indep. Transmission Sys. Operator, Inc.*, 137 FERC ¶ 61,254 (2011) (approving Schedule 38); see also *supra* PP 11, 13.

63. Several parties raise arguments contending that *Duquesne*<sup>113</sup> is controlling precedent against allowing MISO to assess MVP cost responsibility on Withdrawing Transmission Owners. We disagree and find that *Duquesne* is distinguishable. 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, which the Commission rejected as part of a PJM exit fee. However, 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 lack thereof, in the PJM tariff.<sup>114</sup> Here, 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>115</sup> Therefore, we 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.

We also find misplaced those arguments related to cost causation. The issues presented in this case relate 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 MISO tariff. As discussed above, we find that proposed Schedule 39 appropriately clarifies, on a prospective basis, the calculation of the financial obligations related to the withdrawal of a transmission owner from MISO. These financial obligations flow from the language of Attachment FF, which provides that a withdrawing transmission owner "shall remain responsible for all financial obligations incurred pursuant to . . . Attachment FF while a member of [MISO]." Determining the "financial obligations incurred pursuant to . . . Attachment FF" is a tariff and contract interpretation matter, not a cost causation matter. In requiring 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" the Commission explained that "[i]n principle, a transmission owner should not be able to avoid previously allocated costs by withdrawing from [MISO]."<sup>116</sup> The Commission further explained this finding on rehearing, stating "that cost allocations made under

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<sup>113</sup> *Duquesne*, 124 FERC ¶ 61,219.

<sup>114</sup> *Id.* P 167.

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

<sup>116</sup> RECB II Order, 118 FERC ¶ 61,209 at P 193.

Attachment FF are rightfully included in the ‘all financial obligations’ contemplated by the [MISO Transmission Owners] Agreement,” because “failing to include the costs allocated . . . 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>117</sup> The purpose of the financial obligation placed on a Withdrawing Transmission Owner for the costs of transmission facilities allocated to it under Attachment FF prior to withdrawal, then, is to ensure that such costs are not inappropriately shifted to the remaining members. Because the issue in this case is whether Schedule 39 appropriately implements (and serves the intent of) the contractual and tariff obligation to pay for already planned transmission facilities that applies to withdrawing transmission owners, we need not address issues regarding cost allocation and cost causation.

64. 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 assume that Schedule 39 amends the MISO Transmission Owners Agreement. We 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 financial obligations consist of. Therefore, we find that Schedule 39 does not amend the MISO Transmission Owners Agreement to include new financial obligations, but instead specifies under the Tariff what financial obligations, in part, are to be honored upon withdrawal.<sup>118</sup>

65. We find it appropriate that Schedule 39 charges will be assessed to a Withdrawing Transmission Owner, not the Withdrawing Transmission Owner’s wholesale

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<sup>117</sup> RECB II Rehearing Order, 120 FERC ¶ 61,080 at P 83.

<sup>118</sup> See *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). 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.

transmission customers. We disagree with parties' assertions that Schedule 39 improperly shifts cost responsibility from the transmission customers to the Withdrawing Transmission Owner. The 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 transmission customers in the Withdrawing Transmission Owner's zone. Moreover, we disagree that MVP charges cannot be part of a transmission owner's exit fee obligation because, prior to a transmission owner's withdrawal, MVP charges are assessed to transmission customers. Attachment FF states, as discussed above, that transmission owners, upon withdrawal, become responsible for costs contemplated in Attachment FF.<sup>119</sup> This responsibility is triggered by the transmission owner's decision to leave MISO, and it would be inappropriate to automatically shift costs related to a transmission owner's decision to withdraw from MISO to its wholesale transmission customers. For the same reasons, we also disagree with the assertion that Schedule 39 should not apply to transmission owners, such as ITC, that do not have load and do not pay transmission rates under the MISO Tariff. We therefore reject ITC's argument.

66. We agree with AMP that whether the costs incurred by a transmission owner withdrawing from MISO under Attachment FF warrant consideration of cost recovery from wholesale transmission customers is a separate issue not before us and is more appropriately addressed in a separate section 205 proceeding in which a Withdrawing Transmission Owner specifically proposes and justifies a rate to recover such costs.<sup>120</sup>

67. 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 section 205 filing seeking recovery of those costs. The transmission owner would have to 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.<sup>121</sup>

68. We are also not persuaded by arguments that MVP cost responsibility on Withdrawing Transmission Owners could be an undue barrier to exiting an RTO, or deter entry of new MISO members. We believe the entry barrier argument to be speculative.

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<sup>119</sup> The Commission found that the withdrawal provisions of Attachment FF "define[] the financial obligations that [transmission owners withdrawing from MISO] face." MVP Order, 133 FERC ¶ 61,221 at P 470.

<sup>120</sup> See AMP Protest at 5.

<sup>121</sup> See, e.g., *PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,198, at P 59-61 (2011) (Order on ATSI-PJM Formula Rate).

Additionally, we reiterate the Commission's finding in the ATSI RTO Realignment Order that "[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>122</sup>

69. With regard to concerns about the MVP usage rate, including arguments relating to rate pancaking and exports to PJM, we find that the MVP Order addressed these concerns and we will therefore dismiss those arguments.<sup>123</sup> We also find unpersuasive the claim that Schedule 39 is unduly discriminatory because it will result in a Withdrawing Transmission Owner having to pay a different rate than other transmission owners. A transmission owner that pays Schedule 39 charges is not similarly situated to a transmission owner that does not pay Schedule 39 charges – the former made a decision to withdraw from MISO and therefore subjected itself to Schedule 39 charges, while the latter did not.

70. ATSI argues that Applicants should be required to revise Schedule 39 to replace the term "Withdrawing Transmission Owner" with "Former Transmission Owner" for accuracy.<sup>124</sup> ATSI argues that Schedule 39 would never be applied to any utility until after its withdrawal from MISO is complete and, thus the terminology would never be accurate. We find that the term Withdrawing Transmission Owner does not need clarification and, in fact, is consistent with the generally used language throughout MISO's Tariff when referring to a former transmission owner (i.e., withdrawing transmission owner, Withdrawing Entity). We believe modification of this term would create undue confusion and, therefore, we will reject the proposed revision to Schedule 39.

71. Although we are accepting Schedule 39 and the related revisions to Attachment MM prospectively, we find that certain discrete language may require revision to clarify the methodology with which Withdrawing Transmission Owners monthly MVP usage charge is determined. First, the definition of "Withdrawing Transmission Owner Monthly Net Actual Energy Withdrawals" (WTO MNAEW) in Schedule 39 is unclear. Sections I.F and III.B of Schedule 39 set forth the definition and determination of WTO MNAEW, respectively. Section I.F of Schedule 39 defines WTO MNAEW as the

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<sup>122</sup> ATSI RTO Realignment Order, 129 FERC ¶ 61,249 at P 113 (internal citations omitted).

<sup>123</sup> See MVP Order, 133 FERC ¶ 61,221 at P 471.

<sup>124</sup> ATSI Protest at 42-43.

“[MNAEW] amounts for a Withdrawing Transmission Owner as determined under section III.B.” Section III.B states that a Withdrawing Transmission Owner’s Schedule 39 MVP monthly obligation will be equal to its WTO MNAEW times the Schedule 39 monthly usage rate, and the Withdrawing Transmission Owner must provide MISO with: (1) its WTO MNAEW that includes load under Grandfathered Agreements; and (2) its WTO MNAEW specific to the Grandfathered Agreements. We find potentially confusing whether the WTO MNAEW used to determine the Schedule 39 MVP usage rate and to assess a Withdrawing Transmission Owner’s Schedule 39 MVP monthly obligation will include or exclude net energy withdrawals specific to grandfathered agreements. Therefore, we will require Applicants, in the compliance filing ordered below, to revise Attachment MM and Schedule 39 to clarify the definition of WTO MNAEW MISO will use to determine a Withdrawing Transmission Owner’s monthly Schedule 39 MVP usage rate and to assess a Withdrawing Transmission Owner’s Schedule 39 MVP monthly obligation.

72. Second, it appears that the proposed revisions to Attachment MM provide that MISO will calculate the MVP annual revenue requirement for both current *and* Withdrawing Transmission Owners under Schedule 39, even though Schedule 39 deals only with Withdrawing Transmission Owners. Revised sections 3(a) through 3(c) of Attachment MM set forth the calculation of the annual revenue requirements for MVPs. Revised section 3(a) describes how MISO will calculate the MVP annual revenue requirement for “Transmission Owners and/or [Independent Transmission Companies].” New section 3(b) provides that the MVP annual revenue requirement for Withdrawing Transmission Owner shall be calculated pursuant to Schedule 39. New section 3(c) provides that the “[t]he Total MVP Annual Revenue Requirement shall be the sum of the MVP Annual Revenue Requirements for MVPs of Transmission Owners and/or [Independent Transmission Companies] calculated pursuant to section III.A of Schedule 39 and the MVP Annual Revenue Requirement for MVPs of the Withdrawing Transmission Owners calculated pursuant to Section III.B of Schedule 39.” It appears that section 3(c) is misleading in that the MVP Annual Revenue Requirements for MVPs of Transmission Owners and/or Independent Transmission Companies are not calculated pursuant to section III.A of Schedule 39, but instead should reference section 3(a) of Attachment MM. Given that proposed Schedule 39 does not provide a calculation for existing Transmission Owners and/or Independent Transmission Companies’ MVP annual revenue requirements, we will require Applicants, in the compliance filing ordered below, to revise section 3(c) of Attachment MM by deleting the incorrect reference to Schedule 39 and placing the correct tariff reference to where the MVP annual revenue requirement for Transmission Owners and/or Independent Transmission Companies is calculated.

73. We will therefore require Applicants to revise Schedule 39 and Attachment MM, as discussed above, and include these revisions in the compliance filing ordered below.

ii. **Schedule 39 As Applied to ATSI and Duke**

74. In addition to proposing Schedule 39 to make clear which MVP costs are a part of the exit fee obligation of a transmission owner that withdraws from MISO on or after the effective date of Schedule 39, MISO also proposes to use the methodology in Schedule 39 to calculate ATSI's and Duke's obligation to pay for MVP costs. However, both ATSI and Duke withdrew from MISO prior to the proposed January 1, 2012 effective date for Schedule 39, and, therefore, MISO cannot automatically apply those 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>125</sup> We find that this aspect of MISO's proposal raises issues of material fact that cannot be resolved based on the record before us, and that are more appropriately addressed in the hearing and settlement judge procedures ordered below. Therefore, we 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.

75. As it specifically relates to ATSI, we note the ATSI-MISO Exit Agreement provides specific language discussing the scope of ATSI's obligations under Article Five, Section II of the MISO Transmission Owners Agreement. Therefore, to be determined as part of the hearing and settlement judge procedures is whether ATSI retains any cost responsibility for MVP costs under the terms of the ATSI-MISO Exit Fee Agreement and if so, the amount of that cost responsibility.<sup>126</sup>

76. Our preliminary analysis indicates that MISO's proposal as it relates to ATSI and Duke has not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Therefore, as applied to ATSI and Duke, we will conditionally accept Schedule 39, and Appendices A and B to Schedule 39 for filing, in part, suspend them for a nominal period, make them effective January 1, 2012, subject to refund, and set them for hearing and settlement judge procedures.

77. While we are setting these matters for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their disputes before hearing procedures are commenced. To aid the parties in their settlement efforts, we will hold the

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<sup>125</sup> See *supra* note 4.

<sup>126</sup> See *supra* P 10. See Order on ATSI-MISO Exit Fee Agreement, 135 FERC ¶ 61,255.

hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.<sup>127</sup> If the parties desire, they may, by mutual agreement, request a specific judge as a settlement judge in the proceeding; otherwise the Chief Judge will select a judge for this purpose.<sup>128</sup> The settlement judge shall report to the Chief Judge and the Commission within 30 days of appointment of the settlement judge concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for the commencement of a hearing by assigning the case to a presiding judge.

### iii. Effective Date

78. Several parties contend that the Commission should deny Applicants' request for waiver of the 60-day prior notice requirement because Applicants failed to make a showing of good cause.<sup>129</sup> We disagree. In support of their waiver request, Applicants state that proposed Schedule 39 implements the previously accepted provisions of Attachment FF regarding Withdrawing Transmission Owners' responsibility to pay MVP costs and that proposed Schedule 39 and the revisions to Attachment MM should be effective January 1, 2012, the date that recovery of revenue requirements related to MVPs will commence under the Tariff. We note that the only Withdrawing Transmission Owners affected by the waiver are ATSI and Duke. As discussed above, we find 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 and establish hearing and settlement judge procedures to determine their MVP-related withdrawal obligations under the Tariff at the time that they withdrew from MISO. The Commission generally grants waiver of the 60-day prior notice requirement for filings that implement rates as prescribed by previously accepted contracts or settlements.<sup>130</sup> Accordingly, we find good cause to grant the requested effective date of January 1, 2012, the date that transmission owners will commence recovering revenue requirements related to MVPs under the Tariff. We disagree with

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<sup>127</sup> 18 C.F.R. § 385.603.

<sup>128</sup> If the parties decide to request a specific judge, they must make their request to the Chief Judge by telephone at 202-502-8500 within five days of the date of this order. The Commission's website contains a list of Commission judges available for settlement proceedings and a summary of their background and experience (<http://www.ferc.gov/legal/adr/avail-judge.asp>).

<sup>129</sup> 18 C.F.R. § 35.3(a).

<sup>130</sup> *Central Hudson*, 60 FERC ¶ 61,106 at 61,338.

protestors that a “strong showing” of good cause is required to support waiver of the prior notice requirement in this situation.

**D. ATSI’s Petition and Complaint, Docket No. EL11-56-000**

79. ATSI requests a Commission determination that MISO may not allocate the costs of the Michigan Thumb Project<sup>131</sup> to ATSI or other entities in the ATSI pricing zone in light of ATSI’s announced withdrawal from MISO. As explained below, we will dismiss the petition for declaratory order and deny the relief requested in the complaint.

**1. Background**

80. On July 31, 2009, ATSI gave notice of its intent to withdraw from MISO, effective at 11:59 PM on May 31, 2011. On August 17, 2009, ATSI submitted to the Commission its application to withdraw from MISO and join PJM. Separately, it filed a related complaint against PJM, seeking revisions to PJM’s tariff to recognize that ATSI’s entry into PJM will not require that the ATSI zone pay PJM’s RTEP charges for projects approved prior to June 1, 2011. The Commission approved ATSI’s withdrawal from MISO, but denied ATSI’s request to limit the applicability of PJM’s tariff Schedule 12 regarding the allocation of PJM RTEP costs to the ATSI zone.<sup>132</sup> The ATSI Realignment Order conditioned the Commission’s approval of the RTO realignment on 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. In addition, the ATSI Realignment Order found that ATSI had satisfied the requirements under

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<sup>131</sup> The Michigan Thumb Project was the only MVP approved by MISO’s Board of Directors for inclusion in Appendix A of the MTEP prior to ATSI’s withdrawal from MISO.

<sup>132</sup> ATSI Realignment Order, 129 FERC ¶ 61,249 at P 7. The Commission stated that it could not find, based on PJM’s current design of its markets, that allocating a portion of RTEP costs to new entrants is unjust and unreasonable, or unduly discriminatory or preferential. However, it stated that if sufficient cost savings will result, the PJM transmission owners should have both a will and an incentive to facilitate ATSI’s realignment on a mutually beneficial basis and may submit a tariff amendment reflecting the value of these savings, e.g., as a reduction in ATSI’s RTEP obligation.

Article Five, section II.C of the MISO Transmission Owners Agreement regarding the construction of new facilities, as ATSI had committed to satisfy its obligations.<sup>133</sup>

81. On April 21, 2011, MISO and ATSI notified the Commission that they had successfully negotiated the exit fees required of ATSI upon its withdrawal from MISO as directed by the Commission in the ATSI Realignment Order. In addition, in Docket No. ER11-3415-000, MISO and ATSI submitted an executed Exit Fee Agreement (ATSI-MISO Exit Fee Agreement) along with three new associated schedules, Schedule 10-D, Schedule 16-B and Schedule 17-B to the MISO Tariff, to provide for the recovery of exit fees for Schedule 10, 16 and 17 costs.<sup>134</sup> On June 20, 2011, the Commission issued an order conditionally accepting the ATSI-MISO Exit Fee Agreement and the new MISO Tariff schedules.<sup>135</sup>

82. On May 3, 2011, the Commission accepted ministerial revisions to PJM's open access transmission tariff in connection with ATSI's integration into PJM. The Commission also accepted and suspended ATSI's formula rate tariff provisions under the PJM tariff, subject to refund and subject to ATSI making a compliance filing to remove from its formula rates: (1) the costs incurred by PJM in connection with ATSI's integration and billed to ATSI; (2) ATSI's deferred internal integration costs; and (3) MISO exit fees, including Legacy MTEP costs.<sup>136</sup> Finally, the Commission set ATSI's proposed formula rate protocols for hearing and settlement judge proceedings.

83. Now that it has officially withdrawn from MISO, ATSI requests in the instant petition for declaratory order and complaint that the Commission make a determination regarding ATSI's financial obligations related to MVPs. ATSI states that the Commission may issue a declaratory order to terminate a controversy or remove uncertainty. It asserts that there is no other proceeding to address the issue presented here in a timely fashion. Further, ATSI states that the Commission may also find (or in the

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<sup>133</sup> *Id.* P 54. Article Five, Section II.C of the MISO Transmission Owners Agreement states: “[o]bligations relating to the construction of new facilities pursuant to an approved plan of the [MISO] shall be renegotiated as between the [MISO] and the withdrawing Owner.”

<sup>134</sup> *See supra* note 7.

<sup>135</sup> Order on ATSI-MISO Exit Fee Agreement, 135 FERC ¶ 61,255.

<sup>136</sup> Order on ATSI-PJM Formula Rate, 135 FERC ¶ 61,198. ATSI defines Legacy MTEP costs as the costs of certain transmission projects identified in the MTEP and approved by the MISO Board of Directors prior to ATSI's integration into PJM.

alternative find) that the allocation of Michigan Thumb Project costs to ATSI is unjust, unreasonable or unduly discriminatory or preferential under section 206 of the FPA.

## **2. Notice of Filing and Responsive Pleadings**

84. Notice of ATSI's petition for declaratory order and complaint was published in the *Federal Register*, 76 Fed. Reg. 49,762 (2011), with the respondent's answer, protests and interventions due on or before September 2, 2011. Timely motions to intervene, raising no substantive issues, were filed by: American Electric Power Service Corporation; NRG Companies; The Detroit Edison Company; Consumers Energy Company; AMP; Constellation Energy Commodities Group, Inc. and Constellation NewEnergy, Inc.; Indianapolis Power and Light Company; Hoosier Energy Rural Electric Cooperative, Inc. and Southern Illinois Power Cooperative; Iberdrola Renewables, Inc.; and Wisconsin Electric Power Company. The Public Service Commission of Wisconsin filed a notice of intervention, raising no substantive issues.

85. On September 1, 2011, International Transmission Company, Michigan Electric Transmission Company, LLC, and ITC Midwest LLC (collectively, ITC Petition Commenters) filed a motion to intervene and comments.

86. On September 2, 2011, MISO filed an answer. Also on September 2, 2011, the Michigan Public Service Commission (Michigan Commission) filed a notice of intervention and comments, the MISO Transmission Owners filed a motion to intervene and response to the petition and complaint, Duke filed a motion to intervene and comments, Madison Gas & Electric Company and WPPI Energy (collectively, Midwest TDUs) filed a motion to intervene and comments, and American Wind Energy Association and Wind on the Wires (AWEA-WOW) filed a motion to intervene and comments.

87. On September 19, 2011, ATSI filed a motion for leave to answer and answer to MISO's answer and the comments.

88. On October 26, 2011, the Ohio Commission filed a motion to intervene out-of-time and comments.

## **3. Discussion**

### **a. Procedural Matters**

89. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2011), the notices 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) (2011), we will grant the Ohio Commission's motion to intervene

out-of-time, given its interest in the proceeding, the early stage of the proceeding and the absence of undue prejudice or delay.

90. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2011), prohibits an answer to an answer or an answer to a protest unless otherwise ordered by the decisional authority. We are not persuaded to accept ATSI's answer and will, therefore, reject it.

**b. Substantive Matters**

**i. ATSI's Petition and Complaint**

91. According to ATSI, MISO's transmission cost allocation documents indicate that MISO intends to allocate 11.5 percent of the costs of the Michigan Thumb Project, which MISO estimates at almost \$16 million per year, to load in the ATSI zone.<sup>137</sup> ATSI notes that it announced its withdrawal from MISO before the Michigan Thumb Project was approved in the MTEP and that the ATSI zone will not be in MISO when the Michigan Thumb Project is built. ATSI argues that: (1) ATSI did not cause the Michigan Thumb Project costs to be incurred and will not benefit from the project; (2) principles of equity preclude charging any of the Michigan Thumb Project costs – or any other MVP costs – to ATSI or the ATSI zone; and (3) there is no lawful basis for allocating the Michigan Thumb Project costs to the ATSI zone, based on the MISO Transmission Owners Agreement, the MISO Tariff, the ATSI-MISO Exit Fee Agreement and the Commission's orders on MISO's RECB filings.<sup>138</sup>

92. Among other things, ATSI asserts that the ATSI-MISO Exit Fee Agreement undercuts any claim that the MVP charges are consistent with ATSI's withdrawal obligations set out in Article Five, Section II of the MISO Transmission Owners Agreement and Attachment FF of the Tariff. ATSI notes that Section 2.2 of the ATSI-MISO Exit Fee Agreement<sup>139</sup> acknowledges that ATSI disputes the scope of ATSI's obligations under Article Five, Section II of the MISO Transmission Owners Agreement, but that section 3.2 of the ATSI-MISO Exit Fee Agreement<sup>140</sup> also expressly provides that ATSI's payment of the exit fee "shall satisfy ATSI's financial obligations to [MISO] under Article Five, Section II.B of the [MISO Transmission Owners Agreement]." ATSI

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<sup>137</sup> ATSI Complaint at 2, 26-27.

<sup>138</sup> *See supra* note 39.

<sup>139</sup> *See supra* note 17.

<sup>140</sup> *See supra* note 18.

then states that “[t]he exclusion of the MVP costs from the [ATSI-MISO] Exit Fee Agreement is especially significant” because the Commission stated in the MVP Order that any obligation of the departing [transmission owner] for MVP costs “would be determined at the time of the withdrawal.”<sup>141</sup> ATSI contends that the determination at the time of ATSI’s withdrawal, as set forth in the ATSI-MISO Exit Fee Agreement, was that ATSI had no such MVP obligation.<sup>142</sup> ATSI also maintains that no other provision of Article Five, Section II of the MISO Transmission Owners Agreement allows MISO to allocate the Michigan Thumb Project to ATSI.

93. ATSI also argues that in *Duquesne* the Commission held that “a departing transmission owner leaving PJM would ... no longer be subject to these [RTEP] charges [because] it would not have a zonal annual peak load as it would no longer be a zone in PJM.”<sup>143</sup> Therefore, ATSI states that it is impossible for ATSI to have incurred any financial obligations prior to the effective date of the withdrawal because the Commission’s finding makes clear that a usage-based transmission charge does not qualify as an “obligation incurred prior to the effective date of [the ATSI Zone’s] withdrawal” for purposes of determining whether a transmission owner can be allocated such costs after it departs.<sup>144</sup> ATSI contrasts the MVP cost allocation with the up-front allocation of the costs of MTEP baseline reliability projects which, because they are allocated on a one-time basis, may be charged to transmission customers in the zone of a departing transmission owner in certain circumstances.

## ii. Responsive Pleadings

94. MISO responds that the Michigan Thumb Project was approved for inclusion in Appendix A of the MTEP as an MVP before ATSI’s withdrawal became effective, regardless of when ATSI announced its withdrawal or what actions it took in preparation for its withdrawal. MISO states 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.<sup>145</sup> Accordingly, MISO states that it has determined

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<sup>141</sup> ATSI Complaint at 21 (citing MVP Order, 133 FERC ¶ 61,221 at P 471).

<sup>142</sup> *Id.* (stating that section 3.2 of the ATSI-MISO Exit Fee Agreement “expressly provides that ATSI’s payment of the exit fee ‘shall satisfy ATSI’s financial obligations to [MISO] under Article Five, Section II.B of the [MISO] Agreement.’”).

<sup>143</sup> *Id.* at 15-18.

<sup>144</sup> *Id.* at 18.

<sup>145</sup> MISO Answer at 22.

that the project would result in regional benefits beyond Michigan, including the vicinity of ATSI's operations. Further, MISO states that the portfolio of MVPs that include the Michigan Thumb Project is expected to benefit ATSI even after it has joined PJM.

95. Regarding ATSI's argument that there is no lawful basis for allocating the Michigan Thumb Project costs to the ATSI zone, MISO responds that ATSI's arguments concerning the usage-based nature of MVP charges are rehearing-type arguments that challenge the MVP Order's acceptance of revisions to Tariff Attachment FF. MISO contends that these arguments should be rejected as mere reiterations of ATSI's request for rehearing on that aspect of the MVP Order. Nonetheless, MISO states that the MVP Proposal's revision to the withdrawal provision in Attachment FF of the Tariff to replace the word "Party" with "Transmission Owner," and the Commission's acceptance of that revision, clarified the applicability of the withdrawal provision to transmission owners. The applicability of the withdrawal provision includes obligations incurred while the transmission owner was a MISO member, including MVP costs approved prior to the effective date of the transmission owner's withdrawal. MISO contends that, taken together, the Attachment FF revisions and the MVP Order's acceptance of them reflect an intent to apply to MVP charges the provisions of the MISO Transmission Owners Agreement regarding withdrawal obligations, regardless of the usage-based nature of such charges.<sup>146</sup>

96. With respect to the ATSI-MISO Exit Fee Agreement, MISO responds that ATSI should be precluded from relying on the ATSI-MISO Exit Fee Agreement to support its argument against the allocation of MVP costs, because the agreement stipulates that matters covered in Article Five, Section II of the MISO Transmission Owners Agreement are to also be addressed in other agreements.<sup>147</sup> In addition, MISO states that Article Five, Section II.C, regarding the construction of new facilities, shows that the mere fact that a project will be constructed after the withdrawal does not preclude the allocation of a share of the project's costs to ATSI.<sup>148</sup> Furthermore, MISO adds that while Article Five, Section II.C and/or Section II.D might otherwise have been applicable to MVPs if Attachment FF had not been revised to expressly recognize a Withdrawing Transmission Owners responsibility for MVP costs, Attachment FF's specific statement of such a

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<sup>146</sup> *Id.* at 8-10.

<sup>147</sup> *Id.* at 19 (citing Section 2.2 of ATSI's Exit Fee Agreement).

<sup>148</sup> *Id.* at 21. Article Five, section II.C provides: "[o]bligations relating to the construction of new facilities pursuant to an approved plan of [MISO] shall be renegotiated as between [MISO] and the [transmission owner withdrawing from MISO]. If such obligations cannot be resolved through negotiations, they shall be resolved in accordance with Attachment HH of the [t]ariff."

withdrawal obligation renders Article Five, Section II.B more appropriately applicable to the allocation of MVP costs to ATSI.<sup>149</sup>

97. MISO also disputes ATSI's reliance on *Duquesne*. MISO contends that, unlike Attachment FF in the MISO Tariff, Schedule 12 of PJM's tariff does not contain language allowing PJM to assess the cost of regionally beneficial facilities to departing members, a distinction noted by the Commission in *Duquesne*.<sup>150</sup> According to MISO, ATSI's claims should address only the implementation of the revisions to Attachment FF of MISO's Tariff, and not the justness and reasonableness of the Tariff provisions themselves.

98. Thus, MISO argues 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. MISO also disputes ATSI's claim that ATSI will receive no benefits from the Michigan Thumb Project while ATSI is in PJM.

99. Duke and the Ohio Commission support ATSI's complaint. Duke argues that the Commission should also find that MISO may not allocate Michigan Thumb Project costs to Duke. AWEA-WOW offer some general principles that they contend the Commission should consider in deciding cost allocation for withdrawing RTO or Independent System Operator (ISO) members such that parties, including transmission owners and load, will not have an incentive to withdraw from an RTO or ISO to avoid costs that they would have paid had they remained an RTO or ISO member.<sup>151</sup> The remaining parties oppose ATSI's complaint, arguing that ATSI should be allocated its share of costs of the Michigan Thumb Project.<sup>152</sup>

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<sup>149</sup> MISO Answer at 20-21.

<sup>150</sup> *Id.* at 11-12 (citing *Duquesne*, 124 FERC ¶ 61,219 at P 173 (“we agree that it might be just and reasonable for PJM to adopt a similar requirement” to the MISO Tariff's provisions pertaining to financial obligations of transmission owners withdrawing from MISO)).

<sup>151</sup> AWEA-WOW Comments at 4.

<sup>152</sup> MISO Transmission Owners Comments at 7-19 (arguing, among other things, that costs associated with MVP projects approved prior to ATSI's withdrawal are financial obligations under the MISO Transmission Owners Agreement and Attachment FF of the Tariff; ATSI's responsibility to meet its financial obligations is independent of the future benefits the MVP projects provide to it); ITC Petition Commenters Comments at 3 (arguing that, even if ATSI does successfully dispute the MVP costs allocated to it, the Total MVP Annual Revenue Requirement will not change, leaving the remaining

(continued...)

**iii. Commission Determination**

100. Rule 207(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.207(a)(2) (2011), governs petitions seeking a declaratory order to terminate a controversy or remove uncertainty. The Commission has discretion in whether to provide declaratory relief under this provision.<sup>153</sup> The Commission finds that the concerns addressed in ATSI's petition are addressed in Docket No. ER12-715-000 and, thus, we dismiss the petition.

101. As to the complaint, to the extent ATSI is arguing that MISO's existing Tariff provisions are unjust and unreasonable and seeks to modify the existing Tariff, we deny the complaint. 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 under FPA section 206. Accordingly, the complaint is summarily denied on procedural grounds to the extent it seeks modification to the MISO Tariff. To the extent ATSI is arguing that MISO's existing Tariff provisions are unjust and unreasonable as applied to ATSI, we note, that those MISO Tariff provisions do not specify the amount or method of MVP exit fee responsibility, as discussed above, but instead left that to be determined on a case-by-case basis. ATSI will have an opportunity in the hearing on Schedule 39 and Appendices A and B to 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 absolves it of MVP cost responsibility.

The Commission orders:

(A) MISO's proposed Schedule 39 and related revisions to Attachment MM are hereby accepted, in part, for filing, to become effective on January 1, 2012, subject to a compliance filing, as discussed in the body of this order.

(B) MISO's proposed Schedule 39 and Appendices A and B to Schedule 39 as applied to ATSI and Duke are hereby conditionally accepted, in part, for filing and suspended for a nominal period, to become effective January 1, 2012, subject to refund, as discussed in the body of this order.

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MISO load to incur larger MVP charges); Michigan Commission Comments at 3 (arguing that the charges to ATSI are intended to hold the remaining members of MISO harmless and avoid cost shifts resulting from ATSI's withdrawal); Midwest TDUs Comments at 5-6 (arguing the Commission clarified in its order conditionally accepting the ATSI-MISO Exit Fee Agreement that it did not waive or restrict MISO's right to charge ATSI).

<sup>153</sup> See, e.g., *U.S. Gen New England, Inc.*, 118 FERC ¶ 61,172, at P 18 (2007).

(C) MISO is hereby directed to submit a compliance filing within 30 days of the date of this order, as discussed in the body of this order.

(D) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, particularly sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R. Chapter I), a public hearing shall be held concerning the amount of, and methodology for calculating, ATSI's and Duke's MVP cost responsibility. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (E) and (F) below.

(E) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2011), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within 15 days of the date of this order. Such settlement judge shall have all the powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge in writing or by telephone within five days of the date of this order.

(F) Within 30 days of the date of this order, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every 60 days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(G) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within 15 days of the date of the presiding judge's designation, convene a prehearing conference in this proceeding in a hearing room of the Commission, 888 First Street, NE, Washington, DC 20426. Such a conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

(H) ATSI's petition is hereby dismissed, and the relief requested in ATSI's complaint is hereby denied, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.