

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Midwest Independent Transmission System Operator, Inc.) **Docket No. EL12-35-000**
ALLETE, Inc.
Ameren Illinois Company
Ameren Transmission Company of Illinois
American Transmission Company, LLC
Big Rivers Electric Corporation
Board of Water, Electric and Communications Trustees
of the City of Muscatine, Iowa
Central Minnesota Municipal Power Agency
City of Columbia, Missouri, Water & Light Company
City Water, Light & Power (Springfield, Illinois)
Duke Energy Indiana, Inc.
Dairyland Power Cooperative
Great River Energy
Hoosier Energy Rural Electric Cooperative, Inc
Indiana Municipal Power Agency
Indianapolis Power & Light Company
International Transmission Company
ITC Midwest, LLC
Michigan Electric Transmission Company, LLC
Michigan Public Power Agency
Michigan South Central Power Agency
MidAmerican Energy Company
Missouri River Energy Services
Montana-Dakota Utilities Company
Montezuma Municipal Light & Power
Municipal Electric Utility of the City of Cedar Falls, Iowa
Muscatine Power and Water
Northern Indiana Public Service Company
Northern States Power Company, a Minnesota Corporation
Northern States Power Company, a Wisconsin Corporation
Northwestern Wisconsin Electric Company
Otter Tail Power Company
Southern Illinois Power Cooperative
Southern Indiana Gas & Electric Company
Southern Minnesota Municipal Power Agency
Tipton Municipal Utilities
Union Electric Company

Wabash Valley Power Association, Inc.
Wolverine Power Supply Cooperative, Inc.

INITIAL BRIEF OF THE ORGANIZATION OF MISO STATES

June 20, 2012

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INITIAL BRIEF OF THE ORGANIZATION OF MISO STATES

Pursuant to the Order Initiating Investigation of Formula Rate Protocols and Establishing Paper Hearing Procedures issued by the Federal Energy Regulatory Commission (“Commission”) on May 17, 2012, (“May 17 Order”) in the above caption docket, the Organization of MISO States (“OMS”) respectfully submits this Initial Brief.¹

I. STATEMENT OF THE FACTS OF THE CASE

1. On May 17, 2012, the Commission issued the May 17 Order launching an investigation pursuant to section 206 of the Federal Power Act to determine whether the formula rate protocols under the Midwest Independent Transmission System Operator, Inc’s (“MISO”) tariff are sufficient to ensure just and reasonable rates.²

2. The May 17 Order established paper hearing procedures intended to address whether MISO’s *pro forma* formula rate protocols and individual MISO transmission owners’ formula rate protocols are sufficient to ensure just and reasonable rates.³

3. In the May 17 Order, the Commission invited parties to submit initial briefs no later than 30 days after the publication of the notice in the *Federal Register*.⁴ Since such publication was completed on May 23, 2012, the deadline for filing initial briefs in this case is June 22, 2012.

¹ Order Initiating Investigation of Formula Rate Protocols and Establishing Paper Hearing Procedures, 139 FERC ¶ 61,127 (2012).

² May 17 Order, at P 1.

³ May 17 Order, at P 21.

⁴ May 17 Order, at P 23.

4. By Notice issued May 17, 2012 the Commission established that the refund effective date in this case will be the date of publication of the notice in the *Federal Register*. The notice was published in the *Federal Register* on May 23, 2012 making May 23, 2012 the refund effective date in this case.

5. The May 17 Order summarizes several parties' comments and protests in recent company-specific proceedings involving formula rate protocols.⁵

6. An increasing number of utilities are using historical and forward-looking formula rates to recover their transmission revenue requirement.⁶

7. Attachment O in MISO's tariff contains *pro forma* rate protocols which are applicable for transmission owners that choose not to obtain Commission approval for company-specific protocols and a number of current MISO transmission owners have company-specific protocols that have been appended to MISO's Attachment O.⁷ Certain MISO company-specific transmission owner protocols are more comprehensive than those of other MISO transmission owners and the MISO *pro forma* rate protocols.

8. Under the current *pro forma* rate protocol process: (1) each MISO transmission owner using the *pro forma* protocol annually completes the appropriate rate formula template and; (2) MISO reviews each completed template and the appropriate publicly available data (FERC Form No. 1, Rural Utilities Service Form No. 12, or Energy Information Administration Form No. 412).⁸ Once MISO has reviewed the templates for accuracy, it issues a letter to each

⁵ May 17 Order, at P 2 and P 3.

⁶ May 17 Order, at P 5.

⁷ May 17 Order, at P 1.

⁸ May 17 Order, at P 6.

transmission owner informing it that the rates and revenue requirements resulting from the template have been reviewed and approved by MISO.⁹

9. The MISO region is experiencing a period of dramatically increased transmission investment.¹⁰ Nationally, transmission costs have constituted an increasing percentage of the total cost of providing electricity to end-use consumers over the last few years.¹¹ National projections show increasing transmission investment.¹²

10. Attachment O was first submitted to the Commission as part of a 1998 filing by a group of transmission owners requesting authorization to establish the Midwest Independent Transmission System Operator.¹³

11. In the PJM tariff, numerous transmission owning members of PJM have transparent and comprehensive formula rate protocols, with challenge processes.

II. ARGUMENT

A. The MISO Formula Rate Protocols Have Become Deficient and Must Be Amended to Provide Integrity and Transparency to Ensure that the Charges Produced by the Formula Rates Are Just and Reasonable.

The OMS strongly supports the Commission's initiative to investigate whether the formula rate protocols under the MISO tariff are sufficient to ensure that the transmission

⁹ May 17 Order, at P 6.

¹⁰ Page 4 of the Executive Summary in the MISO MTEP 11 states:

The addition of new transmission projects in MTEP11 brings the total number of projects in Appendix A to 553, representing an expected investment of \$10.0 billion through 2021. When completed, the projects will result in approximately 6,600 miles of new or upgraded transmission lines. Since the first MTEP cycle closed in 2003, transmission projects recommended for approval total \$14.3 billion, of which \$4.3 billion is associated with projects already in service.

¹¹ Energy Information Agency, "Major Components of U.S. Average Electric Price, 2010", *available at*: http://www.eia.gov/energyexplained/index.cfm?page=electricity_factors_affecting_prices.

¹² <http://www.eei.org/newsroom/energynews/Pages/20111110.aspx>

¹³ See, Docket No. EC98-24, January 15, 1998 application of the Midwest ISO Participants filed under Section 203 of the FPA, for Commission approval of the transfer of operational control over their jurisdictional facilities to the Midwest ISO. Concurrently, in Docket No. ER98-1438-000, the Midwest ISO Participants filed under Section 205 of the FPA for Commission approval of the Midwest ISO Open Access Transmission Tariff and an Agreement Of Transmission Facilities Owners To Organize The Midwest Transmission System Operator, Inc.

owners' rate formulas produce just and reasonable charges.¹⁴ The Commission is correct that an increasing number of utilities are using formula rates to recover their transmission revenue requirement.¹⁵ As demonstrated by MISO's MTEP 11, the MISO region has moved into a period of dramatically increased transmission investment.¹⁶ Nationally, transmission costs have constituted an increasing percentage of the total cost of providing electricity to end-use consumers over the last few years.¹⁷ National projections show increasing transmission investment.¹⁸

The OMS also notes that Attachment O was first submitted to the Commission as part of a 1998 filing by a group of transmission owners requesting authorization to allow the MISO to be established as an independent transmission system operator and to implement an open access transmission tariff.¹⁹ In its September 16, 1998 order conditionally approving the establishment of the MISO and the proposed open access transmission tariff, the Commission did not specifically discuss the proposed Attachment O tariff language.²⁰ Rather, the Commission accepted transmission owners' filing as a whole and the Attachment O language was accepted in the context of the proposed MISO tariff.

¹⁴ The OMS also supports the Commission's decision to establish May 23, 2012 as the refund effective date in this case so that customers have the "maximum protection" as explained by the Commission in Paragraph 25 of the May 17 Order.

¹⁵ May 17 Order, at P 5.

¹⁶ Page 4 of the Executive Summary in the MISO MTEP 11 states:

The addition of new transmission projects in MTEP11 brings the total number of projects in Appendix A to 553, representing an expected investment of \$10.0 billion through 2021. When completed, the projects will result in approximately 6,600 miles of new or upgraded transmission lines. Since the first MTEP cycle closed in 2003, transmission projects recommended for approval total \$14.3 billion, of which \$4.3 billion is associated with projects already in service.

¹⁷ Energy Information Agency, "Major Components of U.S. Average Electric Price, 2010", available at: http://www.eia.gov/energyexplained/index.cfm?page=electricity_factors_affecting_prices.

¹⁸ <http://www.eei.org/newsroom/energynews/Pages/20111110.aspx>.

¹⁹ See, Docket No. EC98-24, January 15, 1998 application of the Midwest ISO Participants filed under Section 203 of the FPA, for Commission approval of the transfer of operational control over their jurisdictional facilities to the Midwest ISO. Concurrently, in Docket No. ER98-1438-000, the Midwest ISO Participants filed under Section 205 of the FPA for Commission approval of the Midwest ISO Open Access Transmission Tariff and an Agreement Of Transmission Facilities Owners To Organize The Midwest Transmission System Operator, Inc.

²⁰ *Midwest Independent Transmission System Operator, Inc.*, 84 FERC ¶ 61,231 (1998)

Given these circumstances and the developments described above, the initiation of the Commission's investigation into the MISO formula rate tariff protocols has come none too soon.

The Commission is correct in its observation that “the integrity and transparency of formula rates and particularly formula rate protocols are critically important.”²¹ The Commission states that its preliminary analysis leads it to conclude that “the MISO formula rate protocols may be deficient in several respects, and thus may lead to unjust and unreasonable rates.”²² The OMS asserts that given changing circumstances, the MISO formula rate protocols are deficient and that MISO's formula rate protocols need to be revised to provide integrity and transparency and to ensure that the charges produced by the formula rates of MISO transmission owners are just and reasonable.

The Commission correctly notes that MISO's tariff contains *pro forma* rate protocols which are applicable for transmission owners that choose not to obtain approval for company-specific protocols and that a number of current MISO transmission owners have company-specific protocols that have been appended to MISO's Attachment O.²³ The OMS urges the Commission to use the instant proceeding to establish just and reasonable *pro forma* protocols for the MISO tariff as well as to require that the company-specific protocols that are in MISO's tariff meet, at least, the minimum standards of the revised *pro forma* protocols without reducing elements of customer protections in the current protocol provisions that may, in some instances, already exceed the minimum standard.

In its May 17 Order, the Commission correctly summarizes the current *pro forma* Attachment O protocol process.²⁴ As the Commission explains, (1) each MISO transmission

²¹ May 17 Order, at P 5.

²² May 17 Order, at P 5, underlining added.

²³ May 17 Order, at P 1.

²⁴ May 17 Order, at P 6.

owner using the *pro forma* protocol annually completes the appropriate rate formula template and; (2) MISO reviews each completed template and the appropriate publicly available data (FERC Form No. 1, Rural Utilities Service Form No. 12, or Energy Information Administration Form No. 412) for accuracy.²⁵ In this case, the test for “accuracy” apparently assesses whether the transmission owner has correctly transcribed the relevant Form 1 data into the rate formula template. The Commission correctly notes that MISO may request additional data or documentation to ensure that the templates are properly completed and the transmission owner is required to provide the requested material to MISO in a timely fashion.²⁶ Finally, the Commission observes that, once MISO has reviewed the templates for accuracy, it issues a letter to each transmission owner informing it that the rates and revenue requirements resulting from the template have been reviewed and approved by MISO.²⁷ That is the entirety of the current *pro forma* Attachment O protocol process and constitutes the full extent of scrutiny that a transmission owner’s formula rate update receives. Using this minimalist verification process, the updated charges automatically begin to be levied on transmission customers.

The Commission notes that the company-specific Attachment O protocols, particularly for the companies having forward-looking formula rates, generally add a few elements to somewhat increase the transparency of the formula rate update process, including, in some cases, provisions for holding an annual customer meeting at which the transmission owner will explain the formula rate input projections and cost details and postings of formula rate true-up adjustments.²⁸ However, the OMS avers that these companies’ minor additions to the *pro forma*

²⁵ May 17 Order, at P 6.

²⁶ May 17 Order, at P 6.

²⁷ May 17 Order, at P 6.

²⁸ May 17 Order, at P 7.

protocols are no longer sufficient to ensure that the charges produced by these companies' formula rates are just and reasonable.

In its background discussion in the May 17 Order, the Commission cites to several recent cases which, among other things, prompted the Commission to initiate its investigation in this case.²⁹ Those cases involved various companies' filings seeking recovery of transmission rate incentives through formula rates.³⁰ The OMS agrees that it is critically important to ensure the integrity and transparency of formula rates and, particularly, formula rate protocols in cases where recovery of transmission rate incentives is being sought. However, those are not the only circumstances in which the integrity and transparency of formula rates and, particularly, formula rate protocols, are critically important. Rather, such integrity and transparency is critically important in all cases in which transmission costs are to be recovered from customers.

The discussion in the May 17 Order of the Commission's precedent and policy regarding formula rates further highlights the importance of having transparent and comprehensive formula rate update protocols. Specifically, the Commission explained:

Regarding formula rates, the Commission has stated that "the formula itself is the rate, not the particular components of the formula." [footnote omitted] Thus, periodic adjustments, typically performed on an annual basis, "made in accordance with the Commission-approved formula do not constitute changes in the rate itself and accordingly do not require section 205 filings." [footnote omitted] Because the formula rates for transmission service presently on file with the Commission do not typically require transmission owners to make a section 205 filing to update their annual transmission revenue requirement, safeguards need to be in place to ensure that the input data is the correct data, that calculations are performed consistent with the formula, that the costs to be recovered in the formula rate are reasonable and were prudently incurred, and that the rates are just and reasonable. [footnote omitted] The safeguard that has often been employed is formula rate protocols.³¹

²⁹ May 17 Order, at P 2.

³⁰ May 17 Order, at P 2.

³¹ May 17 Order, at P 9, underlining added.

The Commission further explained that the transmission owner bears the burden of demonstrating the justness and reasonableness of the charge resulting from its application of the formula.³² This burden of proof obligation extends to the formula rate protocol which is the process by which the charge is developed.

B. Three Categories of Formula Rate Protocol Elements Are Necessary to Ensure Just and Reasonable Rates as Explained by the Commission.

This Section of the Brief is organized into the three categories (or areas) of protocol elements that the Commission describes as “important tools for ensuring just and reasonable rates.”³³ These categories are: (1) scope of participation; (2) transparency; and (3) challenge procedures.

1. Scope of Participation

In the May 17 Order, the Commission explains that all interested parties must be able to participate in the review of the implementation of the formula rates and of the costs that would flow through the formula rate.³⁴ The formula rate protocols in MISO’s tariff, both the *pro forma* protocols as well as the company-specific protocols, fall well short of this requirement.

As noted above, the scrutiny given to a formula rate update under the *pro forma* protocols is limited to MISO’s review of the transmission owner’s calculations. In simple terms, the level of scrutiny that MISO is required to give a transmission-owning company’s formula rate update is to check the math. This is not enough to ensure that the charges flowing from the formula rates in the MISO tariff are just and reasonable.

³² May 17 Order, at footnote 12.

³³ May 17 Order, at P 10.

³⁴ May 17 Order, at P 11-12.

The concern regarding the lack of protocol provisions to enable interested parties to be informed of and participate in the process for formula rate inputs and true-ups is particularly relevant in the case of transmission projects that tend to span several transmission pricing zones or have their costs either spread across all of the MISO zones or allocated to parties outside of the MISO footprint. In such circumstances, ratepayers would be allocated costs and charged rates produced by a formula, without an opportunity to participate in the rate update process, which is the mechanism for flowing costs into rates. This concern applies to all instances of cost sharing across transmission pricing zones.

Notice is a fundamental element and prerequisite to the opportunity for interested parties to participate in the formula rate update process. The Commission identifies “notice” as the first, and most basic, element of the “reason for including formula rate protocols in formula rates for transmission service.”³⁵ Yet, even that basic element is absent from the rate protocols currently in the MISO tariff. While MISO’s transmission cost allocation methodologies spread transmission costs across the region—thus exponentially increasing the potential class of interested parties—the *pro forma* protocol in MISO’s Attachment O provides formal notice of proposed formula rate updates to no one.³⁶ This must be changed. Similarly, the company-specific formula rate protocols also fall short on the notice requirement.

“Review” is the second element cited in the Commission’s May 17 Order as a “reason for including formula rate protocols in formula rates for transmission service.”³⁷ Even if an interested party is notified of a transmission owner’s proposed formula rate update, there must be workable provisions for such parties to review the proposal. However, the current *pro forma*

³⁵ May 17 Order, at P 10.

³⁶ The OMS asserts that the after-the-fact posting of transmission rates on the MISO OASIS website does not constitute adequate notice.

³⁷ May 17 Order, at P 10.

protocol in MISO's Attachment O provides an opportunity to review the transmission-owner's proposed formula rate update only to MISO and no one else. This must be changed. Similarly, the review provisions in the company-specific formula rate protocols also need to include comprehensive review procedures.

In order to protect customers from incorrect, improperly calculated, imprudent or unreasonable costs, there needs to be a meaningful and transparent mechanism that ensures that all interested parties - customers, state regulators, *etc.*, are reasonably informed of rate input changes and true-ups and can adequately investigate and potentially challenge costs and formula rate inputs.³⁸ In order for formula rates to be just and reasonable, all interested parties must be given the opportunity to examine the rate inputs and calculations and challenge the reasonableness of the inputs and prudence of the costs. It is not sufficient to simply require the transmission owner to hold informational meetings. Nor is it sufficient to post frequently asked questions or post a populated rate formula on a web site or OASIS page. Rather, fundamental changes are needed to the formula rate protocols to facilitate the notification of potentially interested parties of rate update proposals and to establish meaningful procedures for review and the potential challenge of proposed updates and any associated true-ups. Without such fundamental changes, there can be no assurance that the formula rates used by transmission owners are producing just and reasonable charges for transmission customers.

2. Transparency

In the May 17 Order, the Commission describes transparency as sufficient "opportunity for interested parties to obtain and review the information necessary to understand and evaluate

³⁸ With forward-looking formula rates, transmission owners utilize forecasted or projected values for the inputs, and there may be subsequent true-up steps.

the implementation of the formula rate and the reasonableness of the resulting charges.”³⁹ The Commission notes that the current *pro forma* protocols in MISO’s Attachment O “give only MISO the opportunity to review the transmission owner’s completed formula rate template, publicly available reports, and any additional data or documentation that MISO requests to ensure the formula is correctly implemented.”⁴⁰ The *pro forma* formula rate updates are non-transparent for everyone else. The Commission states that transparency requires that interested parties must be provided “the information necessary to understand and evaluate the implementation of the formula rate for either the correctness of inputs and calculations or the reasonableness and prudence of the costs to be recovered in the formula rate.”⁴¹ The OMS agrees.

The Commission suggests that, in order to satisfy the transparency standard, the protocols must be revised to provide all interested parties information about the implementation of the formula rate “in sufficient detail and with sufficient explanation to demonstrate that each input to the formula is consistent with the requirements of the formula, [footnote omitted] without requiring interested parties to serve extensive information requests to understand the transmission owner’s implementation of the formula and verify its correctness.”⁴² The Commission further suggests that, to make the formula rate protocols just and reasonable, “formal discovery process and procedures” are needed to require the transmission owner to answer an interested party’s reasonable information requests.⁴³ The OMS agrees that all of these elements of transparency are necessary.

³⁹ May 17 Order, at P 14.

⁴⁰ May 17 Order, at P 14.

⁴¹ May 17 Order, at P 15.

⁴² May 17 Order, at P 15.

⁴³ May 17 Order, at P 15.

The Commission also suggests that transmission owners may need to “identify any changes in accounting policies, practices, and procedures that took effect during the calendar year which could impact the formula rate or the resulting rates under the formula rate.”⁴⁴ The OMS is concerned with the fact that Form 1 data is the primary data source for both forward-looking and historical formula rates and that Form 1 data is generally accepted as filed by the transmission owners and not reviewed for approval by the Commission. The data in each transmission owner’s annual FERC Form 1 that is filed with the Commission (but not reviewed for approval by the Commission), in concert *with* the company’s formula rate, ultimately produces the transmission charge. In the case of forward-looking formula rates, the transmission owner’s Form 1 data is used to reconcile actual and projected costs from the previous year. During this true-up process, the Form 1 data will essentially determine whether or not there will be refunds or offsets to subsequent charges to address any differences between projected and actual costs. Under these circumstances, unless there is a process by which the Form 1 data can be challenged, the resultant transmission charge cannot be judged as just and reasonable. Given this, all formula rate protocols should allow interested parties to challenge transmission owners’ FERC Form 1 data that are used as inputs into the formula rate.

Another concern is the just and reasonableness of the projections used in forward-looking formula rates. These projections are used as inputs, along with the FERC Form 1 data, and the forward-looking formula rate to establish the transmission charge. Transmission owners

⁴⁴ May 17 Order, at P 15. The Commission points out that attention to changes in accounting policies, practices, and procedures is particularly important “where those inputs reflect adjustments to account balances generally reported in the FERC Form No. 1, RUS Form No. 12, or EIA Form No. 412. For instance, formula rates may require: adjustments to administrative and general expense account balances for industry association membership dues, regulatory commission expenses, and advertising expenses; adjustments to taxes other than income taxes to determine those that should be functionalized on the basis of labor ratios and those that should be functionalized on the basis of plant ratios; adjustments to accumulated deferred income tax account balances to remove paper entries in those accounts or allocate the amounts reported in those accounts; adjustments to revenue accounts to determine amounts appropriately credited in the annual transmission revenue requirement; and adjustments to load or reservation data to determine inputs to rate divisors or allocators.” and May 17 Order, at footnote 15.

utilizing forward-looking formula rates only need inform interested parties what the projected inputs will be during an informational meeting and post them on their OASIS website. There is no provision for challenge, or involvement in adjustments, to projections by any other interested parties. Without any opportunity for interested parties to challenge or have input during the development of these forward-looking projections, the resultant forward-looking formula rate charges cannot be considered just and reasonable.⁴⁵ For those reasons, forward-looking formula rate protocols should provide an opportunity for interested parties to challenge, or be included in the development of the transmission owners' projections that are used as inputs into forward-looking formula rates.

Finally, since the Commission has ruled that transparency includes the provision of information sufficient for interested parties to assess the reasonableness and prudence of costs that are proposed to be flowed through the formula rate, the protocols must describe in detail the cost data that MISO and the transmission owners should be required to collect, compile and provide to interested parties. Particularly, as costs for new transmission investment rapidly increase, the transmission protocols must provide a meaningful forum to assess the prudence of costs. The opportunity for interested parties to challenge the prudence of costs can serve as a needed check on transmission owners' incentives to inflate their rate base. Reasonable measures for controlling costs in the context of new transmission investment are vitally important in a formula rate and CWIP environment where traditional tests of prudence, such as used and useful, are not applied.

⁴⁵ While it is true that the projections are trued-up to the actual FERC Form 1 values in subsequent years' updates, the accuracy of the projection is important so as to minimize inter-generational inequity issues because the charges are based on the projection for the period of time until the projection is trued up.

In this environment, the formula rate protocols currently in MISO's tariff (both *pro forma* and company-specific protocols) are inadequate to meet the Commission's transparency standards. In order to be just and reasonable, those protocols need to be significantly revised.

3. Challenge Procedures

The Commission notes that “the historical and forward-looking protocols in Attachment O of the MISO tariff do not contain specific provisions for parties to challenge a transmission owner's implementation of the formula rates.”⁴⁶ The Commission identifies only two avenues under the current process available to a transmission customer or other interested party to correct a transmission owner's formula rate update: (1) file a complaint with the Commission pursuant to section 206 of the FPA; or (2) resort to the generic dispute resolution procedures under Attachment HH of MISO's tariff.⁴⁷ However, the existence of only these two avenues is insufficient to render MISO's formula rate protocols as just and reasonable.

Reliance on a Section 206 complaint remedy imposes an exceedingly high informational hurdle on an interested party, provided that such party could even establish standing to bring such a complaint. In addition, reliance on Section 206 complaints would improperly shift the burden of proof concerning the justness and reasonableness of the formula rate update from the transmission owner or MISO, to the transmission customer (or other interested party). Shifting the burden of proof is improper because the burden to demonstrate the justness and reasonableness of the charges resulting from a formula rate properly lies with the transmission owner. The Commission has clearly explained how the burden of proof applies to formula rate disputes. Specifically, the Commission recently stated,

⁴⁶ May 17 Order, at P 18.

⁴⁷ May 17 Order, at P 18.

As we found in *AEP*, any challenge to the projected costs, True-Up Adjustment or Material Accounting Change would not require the complainant to bear the ultimate burden of proof. Rather, the Companies will continue to bear the burden of proof, i.e., to demonstrate the justness and reasonableness of the charges resulting from application of the formula rate.⁴⁸

A Section 206 complaint option as the only recourse for parties to protest a formula rate update is not only onerous and burdensome on the transmission customer, it also forces parties into a situation where formal litigation is the only means by which they are able to address charges that the customer believes to be unjust or unreasonable or unduly discriminatory. The Commission must, instead, direct MISO and the transmission owners to establish a process such that Section 206 complaints are the last avenue of challenge relief, not the only avenue. The lack of meaningful challenge processes in the formula rate protocols, paired with the increasing levels of transmission investment, would likely result in the Commission having to evaluate an increasing number of complaints.

Likewise, the generic dispute resolution process described in MISO's Attachment HH is ill-suited to deal with challenges to, or disputes over, formula rate updates. That process appears to be largely designed to deal with unusual or unique events and requires the use of committees and other procedural steps that are specifically tailored to each individual dispute. The practicality of relying on Attachment HH to resolve challenges concerning formula rate updates is questionable, in that formula rate updates are not unusual or unique events but, rather, routinely occur at least once a year for each transmission owner. Moreover, the rules and procedures under Attachment HH are not explicit or codified and therefore the dispute resolution process could be different for each case, depending largely on how the arbiter or judge charged with overseeing the resolution process decides to proceed. Indeed, a transmission owner facing multiple challenges to its formula rate update could be involved in a different process for each

⁴⁸ *PJM Interconnection LLC et al*, 139 FERC ¶ 61,068, at P 63 (2012).

challenge and receive a different outcome in cases sharing the same set of facts. As such, it would be more practical to develop a comprehensive set of formula rate protocols to deal with rate update challenges within the formula rate review process than to rely upon the generic dispute resolution process under Attachment HH that would effectively necessitate developing new processes every time a party may wish to challenge an element of a formula rate update.

The solution to these formula rate protocol deficiencies in the current MISO tariff is for the Commission to direct that detailed and comprehensive information provision, challenge and dispute resolution provisions be developed and implemented as part of the protocols. The OMS recommends that each transmission owner be required to file its annual rate update proposal as an informational filing with the Commission.

In addition, this rate update process must include sufficient time for a formal discovery process and procedures to require the transmission owner to answer a party's reasonable information requests. In the event that the transmission owner and the affected party cannot resolve a dispute, there must be recourse to a dispute resolution process overseen by a Commission Administrative Law Judge. Furthermore, at all stages, the burden of proof concerning the justness and reasonableness of the formula rate update must remain on the transmission owner or MISO and not be improperly shifted to the transmission customer (or other interested party) engaging in the challenge.

Absent Commission direction that detailed and comprehensive information provision, challenge, and dispute resolution provisions be developed and implemented as part of all formula rate protocols in the MISO tariff, the OMS recommends that each transmission owner be required to file its annual rate update proposal as a Section 205 filing with the Commission with the full complement of notice, intervention, and protest procedures entailed with that process.

C. Without Transparent and Comprehensive Formula Rate Protocols Specified in the MISO Tariff, MISO Transmission Customers and Other Interested Parties Will be Unduly Discriminated Against vis-à-vis Transmission Customers and Interested Parties in Other RTO Regions with Formula Rates and vis-à-vis Transmission Customers and Interested Parties Subject to Traditional Stated Rates.

1. Traditional Stated Rates

Customers subject to formula rates with insufficient challenge provisions in the formula rate protocols will be disadvantaged relative to other transmission customers taking transmission service in other regions under traditional stated rates. This is because, under stated rates, if a transmission provider made significant investments, it would likely submit a Section 205 filing with the Commission requesting a rate increase. The Commission's due process procedures would permit interested parties to intervene and request suspension of the proposed rate increase. The matter would likely be set for hearings or settlement procedures under the Commission's rules. Under those procedures, customers would be afforded discovery rights and the ability to challenge the prudence of the company's expenditures and other rate components as well as the just and reasonableness of the resulting charge. Protections comparable to these which would exist under a traditional stated rate approach do not currently exist in the protocols for the formula rate approach in the MISO tariff. This must be changed.

2. Other Regions with Formula Rates

The OMS is aware that formula rate protocols used by transmission owners in other regions are, in many cases, more comprehensive and transparent than the protocols currently in place in the MISO tariff. For example, numerous transmission owner members of PJM have transparent and comprehensive formula rate protocols, including challenge processes in place. In 2008, Commonwealth Edison Company ("ComEd") adopted a formula rate and associated

protocols as part of its conversion from stated rates to formula rates.⁴⁹ Other PJM members that have adopted formula rates have similar protocols. Although they are not identical, the formula rate protocols share common features such as processes that allow concerned parties to challenge the rate inputs (including prudence challenges), formal discovery procedures, discovery dispute resolution procedures, and annual information filing requirements.

In addition, the OMS notes that other entities in other regions proposing to develop transmission projects that have formula rate treatment have in place rate update protocols, including mechanisms for stakeholders to challenge inputs into the formula rate.⁵⁰ In some of those proceedings, the Commission has taken it upon its own initiative to establish processes for transmission owners to engage with stakeholders to improve the filed formula rate protocols.⁵¹

While the OMS does not necessarily oppose or support the use of formula rates, over time and as experience with formula rate processes has grown, a good deal of consensus regarding best practices for formula rate update protocols has developed. The OMS urges the Commission to recognize these evolving best practices and to consider using that case history and experience as a baseline to develop minimum transparent and comprehensive formula rate update protocols that will ensure that transmission customers and other interested parties in the MISO region are reasonably informed of rate input changes and true-ups and can adequately investigate and challenge costs to be recovered under the formula rate approach.

Over time, the disparity in formula rate protocol safeguards and customer protections has increased for customers of MISO transmission owners as compared to customers of transmission

⁴⁹ *Commonwealth Edison Company and Commonwealth Edison Company of Indiana, Inc.*, 122 FERC ¶ 61,030, (2008).

⁵⁰ *Tallgrass Transmission LLC and Prairie Wind Transmission LLC*, 125 FERC 61,248(2008)(*hereinafter* “Tallgrass”)

⁵¹ Tallgrass, at 91-92 and *Green Power Express LP*, 127 FERC ¶ 61,031, (2009) (*hereinafter*, “Green Power Express”), at P 102.

owning members of other RTOs. As one of the first RTOs to have implemented formula rates, the result of this increasing disparity has been to further render the MISO formula rate protocols outdated and unduly discriminatory. Therefore, the Commission's initiative to establish a process by which proposed amendments to the MISO formula rate protocols can be evaluated and implemented is needed at this time. The amendments should build on the best practices that have been developed over time in other regions.

D. In Addition to Ensuring Sufficient Protocols, the Commission Has a Separate and Independent Obligation as the Relevant Regulatory Commission to Ensure that the Charges Produced by Formula Rates Are, and Remain, Just and Reasonable.

The OMS appreciates the Commission's response to an actively changing electricity industry with this initiative to investigate whether MISO's formula rate protocols provide interested parties with a sufficient level of notice, participation, transparency, challenge and dispute resolution opportunities such that those interested parties can protect their own interests within the formula rate environment. The OMS also recognizes the Commission's established position that that "the formula itself is the rate, not the particular components of the formula."⁵² Some might interpret the Commission's position in this regard to mean that, once the Commission has approved a company's Section 205 formula rate filing, the Commission has no regulatory responsibility for the transmission charges that subsequently flow from the application of that formula. However, that is clearly not the Commission's interpretation. For example, the Commission clearly recognizes that, in the context of formula rates, where the formula itself is the rate, safeguards need to be firmly in place to ensure that the charges that flow from the formula are just and reasonable.⁵³ The Commission identifies effective formula rate protocols as

⁵² May 17 Order, at P 9.

⁵³ May 17 Order, at P 9.

one safeguard needed to ensure just and reasonable results from the formula rate.⁵⁴ Protocols are designed to enable interested parties to protect their interests in the context of a transmission owner formula rate environment.

Comprehensive and transparent rate protocols are a necessary, but not necessarily sufficient condition for ensuring the justness and reasonableness of formula rates. However, even if transparent and comprehensive formula rate protocols are in place, the Commission still has an obligation under the Federal Power Act to ensure that the charges flowing from the formula rate are, and remain, just and reasonable. That Commission obligation cannot be fulfilled merely by ensuring that interested parties have the opportunity to protect their individual interests by utilizing the formula rate protocol procedures. In addition to ensuring that comprehensive and transparent formula rate protocols are present in MISO's tariff, the Commission must take additional steps to independently ensure the continued just and reasonableness of charges imposed on transmission customers in the formula rate context. There are several approaches that the Commission could employ to fulfill its obligation in this regard. First, the Commission could direct its Staff to participate in the annual formula rate update processes of each of the MISO transmission owners. The rules for FERC Staff participation could be set forth in the formula rate protocols. Second, the Commission could commit to conducting audits on each MISO transmission owner's FERC Form 1 submittal. The OMS understands that, in the past, the Commission's audits of the FERC Form 1 submittals were more common than is currently the case. Third, the Commission could commit to conducting an after-the-fact audit on the charges produced by each transmission owner's annual formula rate update and the process that produced those charges. The OMS understands that the Commission is authorized by statute to undertake audits but does not currently do so each year for each

⁵⁴ May 17 Order, at P 9.

transmission-owning company. Fourth, the Commission could commit to conducting a thorough review of each transmission owner's annual formula rate informational filing against pre-established criteria and publish the results of its findings.

Finally, if the Commission chooses not to direct the development and inclusion of comprehensive review and challenge provisions in the formula rate protocols of the MISO tariff, then the Commission must require each MISO transmission owner to file its annual rate update as a formal Section 205 filing with the Commission.

III. FINDINGS AND CONCLUSIONS

The OMS finds that MISO's current formula rate protocols have become deficient and concludes that MISO's formula rate protocols must be revised to provide integrity and transparency and to ensure that the charges produced by the formula rates of MISO transmission owners are just and reasonable and not unduly discriminatory.

As described in this Initial Brief, the OMS recommends that the Commission direct the MISO and the MISO transmission owners to amend both the *pro forma* and individual company formula rate tariff protocols to: (1) require that the annual updates of formula rate inputs and true-ups be submitted to the Commission as informational filings subject to comment by interested parties; (2) provide formal notice of each annual update to all interested parties; (3) require that sufficient information be provided in the annual updates to allow interested parties to confirm the calculations and understand changes made since the previous year's update; (4) allow interested parties to serve information requests on the transmission owner to enable thorough analysis of the proposed changes; (5) create a process for interested parties to challenge the proposed input data and the prudence of costs proposed to be input into the formula; and (6) establish a formal dispute resolution process with Commission Staff oversight for disputes

between interested parties and the transmission owner. During all stages of the process, regarding the justness and reasonableness of the charges that will flow from the formula rate, the burden of proof must not be shifted from MISO and the transmission owners where it rightly belongs.

If the Commission chooses not to direct the development and inclusion of such comprehensive and transparent formula rate protocol provisions in the MISO tariff, then the OMS recommends that the Commission require each MISO transmission owner to file its annual formula rate update as a formal Section 205 filing with the Commission so that interested parties would be provided with all of the safeguards entailed in Section 205 proceedings.

The OMS submits this brief because a majority of the members have agreed to generally support them. Individual OMS members reserve the right to file separate comments regarding the issues discussed in these comments. The following members generally support those comments:

Illinois Commerce Commission
Indiana Utility Regulatory Commission
Iowa Utilities Board
Michigan Public Service Commission
Minnesota Public Utilities Commission
Missouri Public Service Commission
Montana Public Service Commission
North Dakota Public Service Commission
South Dakota Public Utilities Commission
Wisconsin Public Service Commission

The Kentucky Public Service Commission and the Manitoba Public Utilities Board did not participate in this brief.

The Indiana Office of Utility Consumer Counselor, the Iowa Office of Consumer Advocate, and the Minnesota Department of Commerce, as associate members of the OMS, participated in this brief and generally support it.

Respectfully Submitted,

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Dated: June 20, 2012

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Des Moines, Iowa, this 20th day of June, 2012.

William H. Smith, Jr.