

UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION

Midwest Independent Transmission	)	
System Operator, Inc., and the MISO	)	Docket No. ER13-187-000
Transmission Owners	)	Docket No. ER13-187-001

**NOTICE OF INTERVENTION AND COMMENTS  
OF THE ORGANIZATION OF MISO STATES**

Pursuant to Rules 211 and 214 of the Federal Energy Regulatory Commission’s (“Commission”) Rules of Practice and Procedure, 18 C.F.R. §§ 385.211 and 385.214(a)(2), the Organization of MISO States (“OMS”) respectfully submits the following comments on the October 25, 2012, compliance filing (“Compliance Filing”) by the Midwest Independent Transmission System Operator, Inc. (“MISO”) and the MISO Transmission Owners (collectively, “Filing Parties”) in compliance with Order Nos. 1000, 1000-A, and 1000-B. On November 1, 2012, the Deputy Secretary of the Commission issued a Notice setting December 10, 2012, as the deadline for comments and protests in the above-captioned dockets.

**I. Notice of Intervention**

Pursuant to Rule 214(a)(2) of the Federal Energy Regulatory Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.214(a)(2), OMS files its Notice of Intervention in the above-captioned proceedings. Service of all pleadings, documents, and communications in this matter should be made on the following:

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## **II. Background**

These two filings from the Midwest Independent Transmission System Operator (“MISO”) and the MISO Transmission Owners comprise the response to the regional transmission planning and cost allocation requirements of Order Nos. 1000, 1000-A, and 1000-B. The Filing Parties intend for the changes to take effect with the start of the next full MISO Transmission Expansion Plan (MTEP14) cycle on June 1, 2013.

OMS is a non-profit, self-governing organization of representatives from each state with regulatory jurisdiction over entities participating in the Midwest ISO. The purpose of the OMS is to coordinate regulatory oversight among the states; to make recommendations to the Midwest ISO, the Midwest ISO Board of Directors, the Commission, other relevant government entities and state commissions as appropriate; and to intervene in proceedings before the Commission to express the positions of the OMS member agencies.

## **III. The OMS Opposes the *Mobile-Sierra* Arguments Made by MISO and the MISO TOs that Are Signatories to the Compliance Filing**

In Order 1000, and 1000-A FERC requires MISO to remove the federal right of First Refusal from its tariffs. FERC’s stated reason is to promote competition. In response to the Commission’s directive, in the Transmittal letter (Letter at p 29-40) of its Order 1000 Compliance filing, MISO, supported by the MISO Transmission Owners (“TOs”), conditionally<sup>1</sup> argues that the MISO Transmission Owners’ Agreement (“TOA”) obligates MISO to assign construction responsibility for a reliability project, or one needed to meet market demands, to the incumbent TO, in whose service territory a project is to be built. The Filing Parties further state the TOA obligates the incumbent TO to construct the project. The Filing Parties interpret this language, and invite the

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<sup>1</sup> MISO conditions its tariff on FERC’s acceptance of its Mobile Sierra argument. If FERC rejects MISO’s Mobile Sierra claims, MISO suggests alternate tariff language.

Commission to interpret that language, as constituting a Right of First Refusal (“ROFR”) for incumbent Transmission Owners to construct needed projects.

Not only do the Filing Parties urge FERC to accept this language as a ROFR, they further suggest the TOA is in the class of documents protected by the *Mobile-Sierra* doctrine. *United Gas Pipeline Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956) (“*Mobile*”); *Federal Power Comm’n v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) (“*Sierra*”). This, the Filing Parties suggest, means the Commission may not direct revisions to the TOA unless it finds the current provisions create a serious public harm. Finally, the Filing Parties argue the Commission can find no serious public harm regarding the ROFR because of MISO’s success with getting transmission built and its experience with allowing participation by non-incumbent transmission providers in the development of such projects. The Filing Parties conclude that since the ROFR provision poses no serious harm to the public interest, MISO need not comply with the Order No. 1000 requirement to eliminate the ROFR language.

The OMS has significant concerns with the argument raised by the Filing Parties that the *Mobile-Sierra* doctrine nullifies any modifications to the TOA as it relates to existing transmission construction rights, absent a showing that the action meets a higher standard of review. MISO Compliance Filing at 29-41. The OMS is concerned with both the substance of the arguments raised as well as the stakeholder process applied to arrive at the arguments.<sup>2</sup>

**A. The Mobile-Sierra Doctrine Does Not Apply To the Changes Proposed Here**

Aside from process concerns discussed below, the OMS disagrees with the broad application of *Mobile-Sierra* that the Filing Parties seek in the Compliance Filing. The Filing Parties accurately identify the *Mobile-Sierra* doctrine stating that the United States Supreme Court has held that FERC must assume that “the rate set out in a freely

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<sup>2</sup> The OMS notes that the *Mobile-Sierra* arguments have no impact on the revisions to the TOA to implement the increased role for states and the OMS in the transmission planning process. Those modifications were agreed-to by the Transmission Owners and therefore *Mobile-Sierra* cannot apply to these provisions. Further, OMS is aware that the TOA identifies the signatories’ opinion of the application of the *Mobile-Sierra* doctrine to the contents of the agreement. TOA, Article V, Section I. Again, however, the application of the doctrine to the requirements of Order 1000 was not raised in this stakeholder process.

negotiated wholesale energy contract meets the ‘just and reasonable’ requirement” which may be overcome only if FERC finds that the “contract seriously harms the public interest.” MISO Compliance Filing at 31 (citing *Morgan Stanley Capital Group, Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 532-33 (2008)). Specifically, when quoting the case law, the Filing Parties recognize that the doctrine applies to contractually negotiated rates. See, e.g., MISO Compliance Filing at 32 (citing *Morgan Stanley*, 554 U.S. at 545-46 (“Therefore, only when the *mutually agreed-upon contract rate* seriously harms the consuming public may the Commission declare that it not to be just and reasonable.”)(emphasis added) (also citing *NRG Power Mktg., LLC v Me. Pub. Utils. Comm’n*, 130 S. Ct. 693, 696-97 (to retain the vitality of the doctrine, it must control FERC and “challenges to contract rates brought by non-contracting parties...”)(emphasis added).

Despite the recognition that *Mobile-Sierra* relates to contractual rates, the Filing Parties take a leap in logic to apply *Mobile-Sierra* to anything and everything in the TOA. See, Compliance Filing at 31 (“the *Mobile-Sierra* doctrine limits the Commission’s ability to modify or abrogate a valid contract negotiated among sophisticated utility parties, such as the Transmission Owners Agreement.”; *Id.* at 32 “The MISO Transmission Owners Agreement is protected by the *Mobile-Sierra* doctrine...”). This is a leap in logic that cannot stand.

Indeed, the United States Supreme Court has not taken this leap. In *NRG Power Mktg., LLC* the Supreme Court expanded the doctrine to include third parties impacted by the rates negotiated by contract. 130 S. Ct. at 701. However, the Court remanded the issue of whether *Mobile-Sierra* covered prescriptions of general applicability in addition to contractually negotiated rates. *Id.* The objecting parties raised the question of whether the auction rates and transition payments at issue in the case were “prescriptions of general applicability” and therefore not covered by *Mobile-Sierra*. *Id.* The Court avoided answering the question, finding that this issue was not decided by the Court of Appeals, and therefore not properly before the Supreme Court. The case was remanded to the Court of Appeals. *Id.*

The Court of Appeals remanded the case to FERC. *Maine Public Utilities Com’n v. Federal Energy Regulatory Comm’n*, 625 F. 3d 754, 760 (D.C. Cir. 2010). FERC

determined that the rates at issue (auction revenue rates) were not contract rates. *Devon Power, LLC*, 134 FERC ¶61,208 (2011) *order denying reh'g*, 137 FERC ¶61,073 (2011). In other words, the Filing Parties' proposed expansion of the *Mobile-Sierra* doctrine is a conclusion that courts have not made.<sup>3</sup>

Nonetheless, the Filing Parties argue that the transmission construction rights outlined in the TOA are subject to the higher *Mobile-Sierra* standard, which, in their view, FERC has not met. The OMS believes that the construction rights and obligations set forth in the TOA are more akin to rules of “general applicability” than they are “contractually negotiated rates.” Indeed, the Compliance Filing fails to identify how the construction rights set forth in the TOA would have an impact on rates or why they need to be subject to the higher *Mobile-Sierra* standard. Given this, *Mobile-Sierra* does not appear to apply.<sup>4</sup>

Expanding the *Mobile-Sierra* doctrine to apply to anything that is put in an agreement goes far beyond the underpinnings of the doctrine, which is the use of contracted rates to remove uncertainties and promote stability in the electricity market. *See NRG Power Marketing LLC*, 130 S. Ct. at 699-700; *see also Morgan Stanley*, 554 U.S. at 545 (citing *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 479 (2002)) (the doctrine is grounded in “the commonsense notion that ‘[i]n wholesale markets, the party charging the rate and the party charged [are] often sophisticated businesses enjoying presumptively equal bargaining power, who could be expected to negotiate a ‘just and reasonable’ rate as between the two of them.’”) In other words, once two parties agree on the “dollars and cents” of a supply arrangement, FERC cannot modify the benefits or

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<sup>3</sup> MISO argues that FERC has effectively made this finding with respect to the TOA. Compliance Filing at 32 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 122 FERC ¶61,090 at P 47 n.1 (2008)). Further review of the cited footnote reveals another MISO leap of logic. While the cited case identifies FERC’s agreement that *Mobile-Sierra* applied to the TO Agreement, it is clearly cited in the context of the *rate* at issue in that case, namely the rate structure for identified services during the six-year transition period. *Midwest Indep. Transmission Sys. Operator, Inc.*, 122 FERC ¶61,090 at P 47 (2008). This statement, cited in a footnote, cannot be taken to be a generic FERC policy applied to every component of the TOA.

<sup>4</sup> Further, it is very clear that the doctrine applies to a “freely negotiated wholesale energy contract.” *Morgan Stanley Capital Group, Inc.*, 554 U.S. at 532-33. The TOA does not appear to be such an agreement. For example, new members are required to “sign the agreement” as is. In other words, there does not appear to be much room for negotiation for new members. *See Becoming A MISO Member*, available at: <https://www.midwestiso.org/StakeholderCenter/Members/Pages/BecomingaMember.aspx>

detriments of the bargain reached, since that would make it impossible for parties to actually rely on those agreements.

In the current context, the rationale underlying the doctrine is inapplicable. The Filing Parties argue that any construction rights set forth in the TOA are subject to *Mobile Sierra* review. However, they fail to make the connection as to how construction rights are the types of “dollars and cents” issues that must be subjected to a higher standard to provide stability in the marketplace. The Filing Parties have failed to identify how contractually agreed-upon construction rights provide market stability in pricing such that they should be subjected to the higher *Mobile-Sierra* standard.

The Filing Parties’ proposed extension of *Mobile-Sierra* may have severe consequences since it would impose significantly higher standards to FERC’s jurisdiction over issues of general policy. The Filing Parties’ application of *Mobile-Sierra* would encourage transmission owners to simply put all policy issues into their transmission owner agreements, virtually removing the ability for FERC to set policies that benefit the public interest. Additionally, applying *Mobile-Sierra* so broadly could have significant impacts on the value of an RTO and its independence from market participants. In Order 2000, the Commission expressed the need for an RTO to be independent from its market participants and stated a willingness to provide independent RTOs that can ensure fair representation of viewpoints “some degree of deference” on certain issues.<sup>5</sup> The application of *Mobile-Sierra* combined with the process used (or lack thereof) to develop the argument in this particular filing raise significant concerns about how this bedrock principle of RTOs is being applied.

For these reasons, the OMS submits that the Filing Parties’ extension of the *Mobile-Sierra* doctrine is contrary to the purpose of the doctrine and requests that FERC refuse to unnecessarily expand the *Mobile-Sierra* doctrine as advocated by the Filing Parties.

#### **B. The Mobile-Sierra Doctrine Arguments Were Not Raised In the Stakeholder Process**

The OMS is also concerned that the *Mobile-Sierra* arguments, which are a substantial portion of the filing, were not discussed with MISO stakeholders. The Filing

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<sup>5</sup> *Regional Transmission Organizations*, 89 FERC ¶ 61,285, (1999) (“Order 2000”), at 99 and 152.

Parties raise the concept that Order 1000 compliance was the subject of “an intensive stakeholder process” involving numerous meetings and forums for discussion. MISO Compliance Filing at 5. However, the *Mobile-Sierra* argument was never seriously raised in the various stakeholder forums relating to the Order 1000 compliance filing.<sup>6</sup>

The OMS is concerned that an issue this significant was not discussed during the stakeholder process. Knowing that the Filing Parties were planning to reach such a conclusion would likely have changed the way stakeholders approached issues relating to Order 1000 compliance. In order to comply with the open transparent Order No. 890 process, MISO should have included a discussion of the *Mobile-Sierra* arguments in its stakeholder meeting.

#### **IV. The Enhanced Role of State Commissions and State Committees in Transmission Planning and Transmission Cost Allocation**

OMS generally supports the enhanced role for state commission and state regional committees proposed by MISO. However, as discussed below, OMS does have some concerns and proposes some modifications.

##### **A. The Commission Has Recognized the Unique Role of the State Regulatory Commissions in Order 1000 Compliance Processes**

The Commission has recognized and acknowledged the important and unique<sup>7</sup> role of state commissions and state committees, such as the OMS, in implementing the transmission planning and transmission cost allocation goals of Order 1000. FERC affirms that state regulators play a crucial role in transmission planning and cost allocation and that the role of state regulators is unique and distinctly different from the roles played by other stakeholders in transmission planning.<sup>8</sup> As a result, FERC supports state regulators having a strong role in the development of Order 1000 compliance plans and it “encourage(s) proposals that seek to establish a formal role for state commissions

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<sup>6</sup> To be sure, *Mobile-Sierra* was raised in Orders 1000-A and B and filings related to those Orders. Indeed, MISO raised these issues before the FERC in the development of Order 1000. However, *Mobile-Sierra* and its application to the changes proposed in the Compliance Filing were not discussed during the MISO stakeholder process surrounding the compliance filing currently before FERC.

<sup>7</sup> Order 1000-A at P 291

<sup>8</sup> Order 1000-A at P 293

in the regional transmission planning process.”<sup>9</sup> FERC reasonably concluded that the differences between state utility regulators and other stakeholders may well lead to a regional transmission planning process to treat state utility regulators differently than other stakeholders.”<sup>10</sup>

Although FERC declined to dictate a particular role for state regulatory commissions, the Commission expressed a willingness to consider proposals where state committees were given a decision-making role in the regional transmission planning and cost allocation processes. The Commission cited positively to the Entergy Regional State Committee’s (“ERSC’s”) authority under Entergy’s transmission tariff to add a project to Entergy’s transmission plan upon unanimous vote of the state committee members.<sup>11</sup>

The Commission clarified its observation on this point by stating:

We decline, however, to mandate veto rights for state committees, but do not preclude public utility transmission providers from proposing such mechanisms on compliance if they choose to do so.<sup>12</sup>

Although the Commission did not dictate a role for state commissions in an Order 1000 compliance filing, it is clear that the Commission envisions a process that provides state commissions a formal role that is distinct and different from the role of other stakeholders and enables state commissions (and the OMS) to act in conjunction with MISO while providing state commissions an opportunity to make decisions about which projects will be placed in the transmission plan and how costs of such projects will be allocated.

**B. MISO, in the Context of Integrating the Entergy Companies, Recognizes and Proposed an Enhanced Role for Regulators**

In addition to the distinct role of states envisioned by Order 1000, the Commission should bear in mind the additional circumstances under which the OMS proposals regarding planning and enhanced governance authority were developed. Coinciding with MISO’s process to address Order 1000 compliance, in early 2012, MISO

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<sup>9</sup> Order 1000-A at P290

<sup>10</sup> Order 1000-A at P293

<sup>11</sup> Order 1000 at Footnote 389

<sup>12</sup> Order 1000 at Paragraph 502, emphasis added

began exploring the integration of the Entergy Companies into MISO. On February 13, 2012, a meeting was held between OMS and the ERSC, to discuss the role of regulators based on the assumption/presumption that the Entergy Operating Companies would become members of the MISO. In his opening remarks, OMS President Robert Kenney highlighted the multiplicity of factors that were the drivers for the discussion of “an enhanced role in the planning and cost allocation processes in the form of the ability to direct the RTO with respect to Section 205 filings” as a way of recognizing the unique state responsibility. Stating that “no one of which should be viewed with primacy,” the factors were: (1) Order 1000’s emphasis on regional and interregional planning and cost allocation and the enhanced state role contemplated therein; (2) the Entergy Operating Companies’ joining MISO and the ERSC’s expectations regarding that change of control; and (3) the evolution of a growing and still young RTO.

Over the following months, OMS developed proposals on an enhanced OMS role in the MISO planning process and enhanced authority under Section 205 of the Federal Power Act. In some form, the OMS proposal relating to transmission planning has been incorporated into both the MISO Order 1000 compliance filing and the proceeding before the Arkansas Public Service Commission related to the integration of Entergy Arkansas into MISO.

### **C. MISO’s Proposal Relating to State Regulators**

#### **1. Establish the OMS Committee**

In its Order 1000 Compliance filing, MISO proposes to establish the OMS Committee, composed of the members of the Organizations of MISO States established pursuant to the bylaws of the Organizations of MISO States, having the responsibilities and rights defined in Section I.B of Attachment FF of the Tariff and associated Business Practices Manual. The proposed tariff further provides that the OMS Committee has the opportunity to provide input into the transmission planning, resource adequacy, and transmission cost allocation approach and processes, and may report periodically to a Transmission Provider Board.

This section prescribes that MISO will set forth in the Transmission Planning Business Practices Manual the “manner in which” the OMS Committee “shall provide its assessment.” MISO may make whatever changes it wants to the Business Practices

Manual which describes the OMS Committee input into the MTEP process provided that MISO gives the OMS Committee 60 days' notice of the change. The Business Practices Manual is not filed with the Commission, and MISO does not need Commission approval to change it. MISO proposes to lock in the “general procedures” with respect to the OMS Committee input into the MTEP until June 1, 2015, unless otherwise mutually agreed to by the parties ... .”<sup>13</sup> At the end of the two year period MISO and stakeholders will “assess the success” of the OMS Committee’s input procedures and provide suggestions for improvement.

MISO’s Business Practice Manuals contain detailed information regarding markets and operating procedures of MISO. The method by which the OMS Committee provides input may be included in MISO’s Business Practices Manuals, similar to the processes described for other committees, such as the Planning Advisory Committee. It should be modified and clarified in the tariff and Business Practice Manual that the OMS Committee will be an autonomous and self-governing committee within MISO and any modifications that may impact the ability of the OMS Committee to provide input require approval of the OMS Committee.

## **2. Enhanced Role for States**

MISO states in its filing that “Order No. 1000-A declined to specify the role of states in the regional planning process, which it left up to the compliance development process to identify. According to the Commission, the state commissions, either singly or jointly, are in the best position to define their role in a particular region.”<sup>14</sup>

### **a. Codify Role of States in MISO Planning Process**

MISO proposes tariff changes to “codify” the role of the OMS Committee in MISO’s transmission planning, resource adequacy, and transmission cost allocation processes under Attachment FF and the Transmission Owners Agreement. Included in the amendments are provisions that specifically provide for input into planning principles and objectives, scope elements, modeling inputs or assumptions, and cost benefit analyses for projects that are not proposed strictly for reliability purposes. The proposed tariff amendments also codify the requirement that MISO will provide a prompt and clear

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<sup>13</sup> It is presumed here that the term “general procedures” refers to the tariff language describing the OMS Committee.

<sup>14</sup> Order 1000-A, pp 294-295

response to the OMS Committee in response to issues raised. Moreover, the amendments provide for a process by which the OMS Committee may request that MISO reconsider a transmission project submitted for regional cost allocation in the MTEP under certain circumstances. Finally, these amendments provide the OMS Committee with the opportunity to request and receive reasonable assistance from MISO in developing its input into the MTEP.

The “OMS Proposal for Enhanced Planning Authority,” adopted August 16, 2012, was attached to the testimony of MISO’s witness, Jennifer Curran, as Exhibit No. MISO-3. It outlines a process developed by the OMS with respect to MISO’s current regional transmission planning process. These planning process elements were drafted in consultation with, and with feedback from, MISO and MISO stakeholders. The development of these process elements took into account the context extant in July and August of 2012. Principal factors in that context were the deliberations and then-ongoing state proceedings regarding Entergy’s proposal to join MISO. The purpose of the paper was to have MISO commit to codifying the role of OMS and the individual state commissions have been playing in MISO’s regional transmission planning process. The purpose of the sought-after codification was to formalize the OMS and state commission role that had evolved over time and to assure the Entergy state regulators of what they may expect in this regard should they choose to authorize utilities in their states to join MISO.<sup>15</sup> MISO explains that the purpose of the tariff modifications submitted with its October 25 Filing in this regard is to “codify the role” of OMS and the state commissions in MISO’s current transmission planning and transmission cost allocation processes.<sup>16</sup>

Under MISO’s current approach to transmission planning, States and OMS may provide advice during MISO’s annual transmission planning process, the same as all other stakeholders. Nothing in the OMS’s paper would change that.

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<sup>15</sup> In early 2012, the OMS did pursue actual enhanced authority within MISO’s transmission planning and cost allocation processes. However, that initiative was dramatically scaled back in the following months as feedback from other sectors within MISO was received and the OMS re-focused its initiative on achieving MISO codification of the states’ role in existing MISO planning processes.

<sup>16</sup> October 25 Filing, at 16

**b. OMS's "Yellow Light" Provision.**

The potential exception in MISO's filing that goes beyond providing advice and considers an enhanced authority for OMS is Subsection 5 in the planning process section which has become known as the "yellow light" provision. Subsection 5 would provide an opportunity for OMS to raise a "yellow light" which could trigger reconsideration by MISO Staff of a project that would receive regional cost allocation in the MTEP. Upon the raising of such a yellow light by OMS, MISO Staff would have to provide OMS with a "substantive and meaningful" response to the OMS's concerns before proceeding on to obtain MISO Board of Directors approval for that project in the MTEP. Even under current practices, nothing prevents OMS from raising such a yellow light. However, the new element of OMS's August 16 paper is that now MISO Staff would be required to provide OMS with a "substantive and meaningful" response to the concern raised, whereas, under current practices, there is no such requirement for MISO to respond. While MISO Staff could dismiss the concern, the "substantive and meaningful" response would still need to be provided.

The yellow light is limited and narrow in its applicability. For example, all of the following conditions must hold before a yellow light could be raised by OMS:

- The time window in which OMS may raise its yellow light is limited to the period between the close of the planning year process and a time prior to the Planning Advisory Committee meeting "where the PAC will consider a motion regarding sending the MTEP to the Board,"
- OMS members and/or their designated staff must have "participated consistently through the process,"
- The project must be "receiving regional cost allocation,"
- The project must not be a baseline reliability project "below 345 kV,"<sup>17</sup>
- The project or alternative must not have been vetted through the Business Case Development stage;
- If the project or alternative had been vetted through the Business Case Development stage, then, "after a request for updated projected costs by

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<sup>17</sup> MISO's proposed tariff language in Attachment FF, Section I.B would limit this even further by excluding all baseline reliability projects.

OMS,” its projected cost for MTEP approval “has increased by 25 percent or more since the project was evaluated in the Business Case Development phase.”

- OMS must supply to MISO staff a statement of its reasons for requesting such reconsideration.

In its August 16th paper, the OMS characterized the set of conditions in which a yellow light may be raised by OMS as a “rare circumstance.” For example, the Business Case Development stage generally takes place toward the end of MISO’s annual transmission planning process so it is very unlikely that a project’s estimated cost will have increased 25% or more between that time and the close of the planning year process which is when OMS may raise its yellow light.

Although this MISO filing is consistent with the OMS original proposal, as noted above, the proposal was drafted and approved by the OMS with several purposes in mind including (1) responding to Order 1000 and (2) facilitating the Entergy integration. OMS encourages the Commission to review the provisions of the proposal and determine if they are consistent and acceptable with the enhanced role envisioned by FERC.

### **c. Enhanced Filing Rights for State Regulatory Agencies**

MISO has an outstanding proceeding before the Arkansas Public Service Commission. In that proceeding, MISO submitted, “Proposal for Enhanced OMS Authority for Determining Cost Allocation Methodologies to Be Filed Pursuant to Section 205 of the Federal Power Act.” In his compliance testimony before the Arkansas Commission,<sup>18</sup> MISO’s Clair Moeller states that this proposal “provides an avenue for the level of regulatory involvement in transmission planning and transmission cost allocation consistent with that contemplated by the [Arkansas] Commission.” The proposal sets forth a process by which the OMS would be able to request that MISO file alternative tariff provisions when MISO proposes changes to its regional transmission cost allocation methodologies involving all MISO transmission project types except Baseline Reliability Projects. In the Arkansas proceeding, MISO has provided evidence

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<sup>18</sup> [https://www.misoenergy.org/Library/Repository/Tariff/State%20Filings/2012-08-31%20Docket%20No.%2010-011-U\\_AR\\_Compliance%20Testimony%20of%20Clair%20J.%20Moeller%20\(Order%2068\).pdf](https://www.misoenergy.org/Library/Repository/Tariff/State%20Filings/2012-08-31%20Docket%20No.%2010-011-U_AR_Compliance%20Testimony%20of%20Clair%20J.%20Moeller%20(Order%2068).pdf)

that the 205 Rights Proposal has the support of a majority of the MISO Transmission Owners and states that the implementation of the 205 Rights Proposal will occur through the filing of revisions to Appendix K to the TOA with FERC to be effective upon the integration of Entergy's transmission, generation and load into MISO's markets.

However, the OMS notes that the 205 Rights Proposal, dated August 31, 2012, submitted by MISO in the Arkansas proceeding has significant changes from the 205 Rights Proposal adopted by OMS on August 16, 2012.<sup>19</sup> Perhaps most troubling is MISO's addition in item 2 of the phrase "in which MISO concludes to make a change or changes in methodology." The OMS fears that this phrase can be used to neutralize any 205 filing rights otherwise granted by the proposal to the OMS.

On October 26, 2012, the Arkansas Public Service Commission issued Order No 72.<sup>20</sup> In that order the Arkansas Commission states that "clearly MISO's governance proposals do not yet fully satisfy" the conditions of the original Arkansas order. The Arkansas Commission acknowledged the assistance the FERC provided in the establishment and approval of the governance authority provided by the Southwest Power Pool ("SPP") RTO to the SPP Regional State committee and the formation of the Entergy Regional State Committee.<sup>21</sup> Additionally, the Arkansas Commission also cites FERC Order 1000 as setting requirements for the states' role in future transmission planning and transmission cost allocation reform.

The Arkansas Commission states that it "encourages ongoing discussions focused on further enhancements as outlined by the Arkansas Commission in Order Nos. 54 and 68."<sup>22</sup> The Arkansas Commission further states that it "would welcome the assistance of FERC in the effort to further enhance the MISO/OMS governance process."<sup>23</sup>

OMS recognizes MISO's integration of the OMS Proposal for Enhanced Planning Authority into the MISO compliance filing (Jennifer Curran testimony and Exhibit MISO-3) to codify OMS's role in the transmission planning process. However, as noted

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<sup>19</sup> "OMS Proposal for Enhanced Authority for Determining Cost Allocation Methodologies to be Filed Pursuant to Section 205 of the Federal Power Act," adopted unanimously Aug. 16, 2012 with two abstentions.

<sup>20</sup> Docket No. 10-011-U, Issued on October 26, 2012

<sup>21</sup> Docket No. 10-011-U, Order No. 72, p. 25

<sup>22</sup> Docket No. 10-011-U, Order No. 72, p. 23

<sup>23</sup> Docket No. 10-011-U, Order No. 72, p. 26

above, an additional document was adopted at the August 16, 2012, OMS Board of Directors Meeting, “the OMS Proposal for Enhanced Authority for Determining Cost Allocation Methodologies to be filed Pursuant to Section 205 of the Federal Power Act.” As stated in that document, the proposal synthesizes and harmonizes the proposal set forth in the testimony of MISO’s Clair Moeller before the Arkansas Public Service Commission, a proposal made by the Public Service Commission of Wisconsin dated June 7, 2012 and comments made by various parties. The proposal specifies a process under which OMS can request, and MISO would agree, to file amendments to its cost allocation methodology. As stated above, this document was the result of negotiation and feedback of parties. The MISO Order 1000 compliance filing does not include the OMS document or include recognition of such OMS authority.

OMS supports continuing the discussion on this issue. Particularly, OMS supports the ideas expressed by the Arkansas Commission in Order 72 and MISO’s proposals therein. What MISO is proposing in the Arkansas proceeding is the first step to codify the role of state regulatory agencies consistent with Order 1000. As noted by the Arkansas Commission and the OMS, these steps need to be reviewed not solely as a means to integrate the Entergy Companies into MISO, but also in light of the Commission’s requirements under Order 1000. OMS supports a process to further clarify these roles and enhanced authorities, however, notes that the process should be concluded either before the effective date of the MISO compliance rules with the beginning the start of the next applicable planning cycle or at another fixed time as agreed upon.

## **V. Scrutiny of Costs**

MISO scrutiny of costs must include sufficient reevaluation, on-going cost review, and other cost containment measures, which must be included as part of MISO’s compliance filing tariff.

In order to be clear about the need for transmission project cost scrutiny in the proposed MISO Developer Selection Process, OMS has attached the “General Process Flow” slide from the MISO “Right of First Refusal Task Force” presentation made on

September 24, 2012.<sup>24</sup> (Appendix OMS-1) This slide shows the different stages of the proposed MISO Developer Selection Process, from the first stages of determining which projects may be eligible for the proposed Developer Selection Process to the final stage of reevaluation of approved projects.

OMS's first concern is the way in which cost estimates would be collected from transmission developers in the "Developer Selection" stage, referred to below as the Developer Selection Process (as the term is defined in the proposed Compliance Filing). In its compliance filing, MISO takes a reasonable and necessary step in its cost review process by requesting updated cost estimates from developers in the Developer Selection Process, (Transmittal letter, at page 57):

As part of the selection criteria, costs will be scrutinized in the same manner whether a project is proposed by an incumbent or nonincumbent. For this purpose, MISO proposes to require developers to submit cost estimates in the following manner: 1) estimated total capital cost of the project by facility, including estimates for contingencies and overhead; 2) estimated annual revenue requirements for the first 40-years of the project's in-service life to be calculated in accordance with Attachment MM of the Tariff for Multi-Value Projects and Attachment GG of the Tariff for Market Efficiency Projects; and 3) supporting detail on the annual allocation factors used to estimate the annual revenue requirements, including operations and maintenance, general and common depreciation expense, taxes other than income taxes, income taxes, and return. By requiring all of the above from both incumbents and nonincumbents, MISO will be able to evaluate project proposals consistently regardless of whether they are submitted by incumbents or nonincumbents. [footnote omitted]

While OMS agrees that the measures MISO has proposed, which require a more rigorous cost control process, are necessary, these measures are not sufficient measures to assure consumers pay just and reasonable rates. To assure prudent cost containment, OMS also recommends MISO further strengthen its tariff by adding the following steps to the cost estimation process proposed in its compliance filing:

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<sup>24</sup><https://www.midwestiso.org/Library/Repository/Meeting%20Material/Stakeholder/ROFR/20120924/20120924%20ROFRTT%20MISO%20Presentation.pdf>

**A. MISO Should Require the Cost Estimate that Developers Submit for Transmission Projects Be Broken down into the Multiple Categories Listed in Appendix OMS-2.**

MISO's proposal for what would be included in a cost estimate for a project chosen in a Developer Selection Process is incomplete, as described in proposed Attachment FF Section VIII.D.5:

5. Cost Estimates. Proposed cost estimate data must be based on the reasonably descriptive facility design proposals submitted in the New Transmission Proposal and will include, at a minimum:

- (1) Estimated project cost for each proposed New Transmission Line Facility and/or New Substation Facility; and
- (2) Estimated annual revenue requirements for the first 40 years the facilities included in the New Transmission Proposal will be in service.

The Commission should direct MISO to require all entities submitting bids in the Developer Selection Process, regardless of whether a state or MISO is choosing the transmission developer, to include the categories from the SPP Cost Estimation Report Tool<sup>25</sup> in all bids. These categories are listed in Appendix OMS-2.

Not only will inclusion of these categories in cost estimates make bids more directly comparable, but a requirement to include all the information from categories in Appendix OMS-2 will also give the party who is choosing a transmission developer specific, uniform, and necessary additional information to make a more informed decision. By requiring MISO to make these changes, the Commission will assure a more robust process than is required by MISO's suggested language in proposed Attachment FF Section VIII.D.5.

Further, requiring this specific information will make conducting an analysis of any future changes to the estimated cost of the project more straightforward and consistent. For example, if a transmission project's cost of obtaining right of way has changed, interested stakeholders would be able to review the original cost estimate to determine the reason for the cost change (for example, what width of right of way was in the original cost estimate).

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<sup>25</sup> This Tool can be found online at <http://www.spp.org/publications/SCERT%20Version%201.2.xls>

**B. To Assure More Accurate Cost Estimates in the Transmission Developer Selection Process, MISO Should Require Bidders to Produce Detailed Cost Estimates for Two Possible Routes for Any Transmission Project.**

In order to ensure accurate cost estimates, entities proposing bids in the Developer Selection Process should be required to provide bids for two separate line routes, similar to the procedure followed in Wisconsin. Preparing two estimates for these different line routes will give MISO and stakeholders confidence that the bidder has fully considered an alternative in case its preferred route for a transmission project is not feasible.

**C. To Assure Timely Review of Project Costs, After the MISO Board Approves a Transmission Project, MISO Should Require the Cost Estimate for All Cost Shared Projects and Any Project Greater than \$25 M to Be Updated Quarterly, Not Just at “Milestones.”**

MISO has taken tentative steps to collect cost estimates and other project status update information from its Transmission Owners on projects previously approved by the MISO Board for cost allocation. MISO currently posts quarterly status reports on its website.<sup>26</sup> Transparency is a critical feature of transmission project approval and monitoring. MISO is not currently archiving its project status reports, which reports the cost estimates of projects after the MISO Board has approved the project for cost allocation purposes, and is only posting the most current status report. The Commission should direct that MISO be required to post all quarterly status reports on its website on a going forward, not just the current quarterly status report. This will allow stakeholders to have a better understanding of how cost estimates for projects change over time, and will increase the transparency of the MISO planning process. The MISO planning process does not stop at MISO Board approval of a transmission project, and all actions after MISO Board project approval should be held to the same level of transparency as actions before MISO Board project approval.

In its Compliance Filing, MISO has proposed a change to its cost tracking system in Attachment FF Section I.A.11, to require a developer to update project costs only “upon solicitation from MISO and upon reaching pre-designated milestones in the project

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<sup>26</sup> <https://www.misoenergy.org/Planning/TransmissionExpansionPlanning/Pages/MTEPStudies.aspx>, link on this page listed as “Quarterly Status Reports for most recently approved Appendix A”

implementation process.” (Compliance filing transmittal letter at p.57) MISO will report any updated information quarterly:

11. Status of Recommended Facilities: Upon solicitation from the Transmission Provider and upon reaching pre-designated milestones in the project implementation process, the responsible Transmission Owner or Selected Transmission Developer shall report the status of all projects recommended for implementation in the MTEP. Status reports shall, at a minimum, include: (i) changes to the schedule and to the estimated project cost; (ii) an explanation of the causes of, or reasons for, any such changes; and (iii) changes in project status (i.e., under construction, in service, or withdrawn). The Transmission Provider shall report such progress to the Transmission Provider Board on a quarterly basis, or as otherwise directed by the Transmission Provider Board.

For the cost estimation process to be meaningful, Transmission Owners and Selected Transmission Developers should be required to submit updated cost estimates on a regular basis, not just when certain “milestones” are hit. Specifically, to assure adequate and timely review of project costs, after MISO approves a transmission project, MISO should require the developer to update its cost estimate for all cost shared projects and any project greater than \$25 M on a quarterly basis, not just at “milestones.”

In the Compliance Filing, MISO fails to discuss exactly when those milestones would occur, or even to list what these project “pre-designated milestones” would be. The lack of specificity creates an unpredictable situation making it impossible for the Commission or any stakeholder to know how effective any project cost tracking would be. This deficiency creates a procedure that is inconsistent and possibly arbitrary. If the Commission accepts MISO’s proposal on “pre-designated milestones,” the Commission should direct MISO to make a Compliance Filing specifically identifying what those pre-designated milestones are.<sup>27</sup>

Using the sole cost-based reevaluation criteria offered by MISO in its Compliance Filing (discussed further later), if a hypothetical Market Efficiency Project has had its cost estimate rise an amount where reevaluation is triggered, it is essential for the analysis to occur as soon as possible, before additional money is spent on the project. If the increased cost estimate is not reported in a timely manner, as may occur with MISO’s

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<sup>27</sup> The timing and number of milestones would be too critical to leave to a future proceeding or for inclusion in a MISO Business Practice Manual.

incomplete proposed “milestone” requirement, it will most likely be too late to protect ratepayers from unjust and unreasonable rates, because this additional money spent towards the project may be stranded investment (if the reevaluation outcome is to cancel the project), and ratepayers are harmed unnecessarily.

This hypothetical example shows the importance of two things – (1) obtaining a precise cost estimate of a project as early in the process as possible is essential, to limiting the need for future project reevaluation; and (2) receiving regular cost estimates is crucial in preventing “problem projects” from reaching a “point of no return” before significant time and money are spent on them.

There is a significant flaw in the MISO cost reporting and project tracking process, which the Commission must address. OMS acknowledges that MISO has taken steps in the stakeholder process to improve its cost estimation process, for example, the October 25, 2012, presentation made to the Planning Subcommittee.<sup>28</sup> Notably, in this presentation MISO admits the current flaws in its cost reporting and project tracking process. On page 2 of its presentation MISO acknowledges that “this discussion is not intended to cover any action that should be undertaken for projects with large cost increases,” recognizing the seriousness of the fact that there is no stakeholder process to address MISO approved projects with large cost increases. Page 5 of the presentation states:

**Upon achieving each of these milestones, Transmission Owners would be required to submit updated project information.**

– Intermediate status updates would be encouraged but not mandatory

This same MISO presentation, on page 5, suggests only three “pre-designated milestones” where a project’s cost would be updated:

- MTEP approval / developer selection
- Long lead materials
- Pre-construction

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<sup>28</sup><https://www.midwestiso.org/Library/Repository/Meeting%20Material/Stakeholder/PSC/2012/20121023/20121025%20PSC%20Item%2008%20Project%20Status%20Reporting.pdf>

Unfortunately, while it recognized that its process fails to address this flaw, in its Compliance filing, MISO takes inadequate steps to remedy the flaw. The Commission should order MISO to require Transmission Owners to update their costs on a quarterly basis. If the Commission accepts MISO's proposal, TOs may only be required to update transmission project cost estimates twice after project approval.<sup>29</sup> This would result in wholly insufficient project cost tracking that could severely impact ratepayers. MISO's project cost tracking system must be more than mere "window dressing", and provide for meaningful cost review. Ratepayers should not be asked to write a virtually blank check for transmission projects at any amount of cost.

Based on the above, OMS strongly recommends the Commission direct MISO to require that quarterly cost estimates be provided by Transmission Owners, to permit meaningful and timely reevaluation of transmission projects. Additionally, MISO should permit stakeholders to submit questions concerning cost changes greater than 20% of all cost shared projects and all other projects greater than \$25M to the Transmission Owner responsible for the project. MISO should require Transmission Owners to provide, within 20 days, written answers to those questions.

**D. In Order to Give Meaning to Cost Estimates After Project Approval, OMS Recommends the Commission Direct that MISO Require All Projects whose Cost Estimates Differ by More than 20% from their Cost Estimate at the Time of Approval to Undergo Reevaluation and / or Further Cost Review.**

In MISO's proposed reevaluation approach, if a project needs to be reevaluated because of changes to cost increases, schedule delays, or "deviation from selected transmission developer qualifications", there are five possible reevaluation outcomes listed in proposed Attachment FF, Section IX.C:

**C. Reevaluation Outcomes**

Based on all the required analysis described in subparagraphs a and b of this section, the Transmission Provider may decide to (i) make no change to the Open Transmission Project; (ii) reassign the Open Transmission Project to a different Qualified Transmission Developer; (iii) cancel the Open Transmission Project (iv) implement a reliability mitigation plan, in

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<sup>29</sup> OMS also acknowledges the triennial Multi Value Project review discussed in Section VII of Attachment FF of the existing MISO Tariff, which uses updated project costs, as another place where MVP project cost estimates may be updated.

coordination with the affected Transmission Owner(s); or (v) such other remedy or solution as may be appropriate under the circumstances, including a suitable combination of two or more of the foregoing courses of action.

OMS acknowledges MISO's cost estimate-based reevaluation approach for Market Efficiency Projects and Multi Value Projects (Transmittal Letter at p. 59, and proposed Attachment FF, Section IX) is a modest step in terms of cost containment. This proposed reevaluation approach requires that if a Market Efficiency Project has reached a cost estimate where the benefit-to-cost ratio is less than 1.25, the project will be reevaluated. This proposed reevaluation approach also requires that if an economically justified Multi Value Project portfolio has a benefit / cost ratio less than one after project cost increases, the project will be reevaluated.

However, Attachment FF Section IX.A., subsection labeled "Grounds for Variance Analysis", is silent on how any other cost increase would trigger a reevaluation for an "Open Transmission Project" (the filing's term for Market Efficiency Projects and Multi Value Projects), and there is no cost estimation trigger for reevaluation of any other project type, such as Baseline Reliability Projects. OMS submits that MISO lacks sufficient cost-estimation triggers and recommends that numerous cost estimation-based grounds exist for reevaluation of projects that may become too expensive.

In this regard, the Commission should direct MISO to establish more cost estimate-based reevaluation triggers. All MISO Projects that are cost shared or are estimated to cost greater than \$25 M should have a reevaluation trigger related to new cost estimates of 20% or more from their cost estimate at time of MISO approval – otherwise, there would be little or no reason to track costs.<sup>30</sup> For example, if a project built for reliability purposes had a significant cost increase estimate of over 20%, that new cost estimate should trigger a reevaluation. Any reevaluation for a reliability project would only be done if there was sufficient time for the reevaluation before the "need date" of a project, which means developers must be required to report cost estimates frequently.

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<sup>30</sup> Additionally, once a project has undergone reevaluation, that project should be eligible for reevaluation again if its cost estimates increase 20% more from the cost estimate at the time of reevaluation.

Additionally, projects included in future Multi Value Project ("MVP") portfolios should be subject to potential reevaluation.<sup>31</sup> OMS is concerned that there is no cost-estimation-based reevaluation trigger for MVP portfolios built using MVP criterion 1, which are MVPs built for public policy purposes. Under MISO's proposed tariff language, MVPs built based on MVP Criterion 1 could have their project cost estimates increase by 100% or more and MISO's tariff would not trigger any reevaluation to investigate whether going forward with that project is still good public policy, when the cost may significantly outweigh the benefits. The Commission should direct MISO to include cost increases of 20% or more of MVP portfolio projects based on MVP criterion 1 as a trigger for project reevaluation.

While it may be unlikely that an MVP that was part of a portfolio may be cancelled as part of a reevaluation, it is possible in rare situations when there are significant changes to the cost estimate of a MVP and before significant money has been spent. In that circumstance it may be prudent to investigate whether alternate transmission projects exist to fit the needs of that MVP portfolio that could be substituted for the reevaluated MVP. For example, an MVP project chosen with a cost estimate based on a design going through an environmentally sensitive area could be rerouted to avoid such an area, thus causing significant cost increases. This "reroute" could involve the selection of an entirely different project, probably near the reevaluated Multi Value Project.

While it is entirely possible that no changes would occur as a result of reevaluation of a Baseline Reliability Project or an MVP, it is a worthwhile process so MISO and stakeholders have an opportunity to understand why the project cost estimation has increased, and to determine whether there is a better way to estimate future project costs, perhaps causing fewer future project reevaluations. The Commission should direct MISO to further investigate the causes for transmission project cost estimation increases for reevaluations based on cost estimation increases, and prepare a report for stakeholders on why the project cost estimate increased. The transparency of

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<sup>31</sup> If MISO expanded its proposed reevaluation approach to include all types of MVPs, then it is the OMS's understanding that, notwithstanding MISO's proposed section 1.477a of Attachment FF, this proposal would not apply to MVP portfolios that have already been approved for reasons beyond economics.

this “further cost review” will give stakeholders greater confidence that MISO has adopted an adequate project cost estimation tracking system.

The Commission has indicated process transparency is important. The Commission should also direct MISO to prepare a similar report for stakeholders after any reevaluation for schedule delays or “deviation from selected transmission developer qualifications” in order to improve the transparency of the MISO planning process.

Additionally, at the time of significant cost increases, MISO should ask the question, with input from OMS and other stakeholders, of whether a project is still needed. For example, when the recent economic recession hit and load forecasts dropped dramatically, no re-examination was conducted to check if transmission projects previously approved with established in-service dates would still be needed by the forecasted in-service dates, or even needed at all. If circumstances change, such as the siting of a new generator in a location whose need was to be addressed by a new transmission facility in the MTEP, MISO does not re-examine the continued need for the transmission facility and lets it be added to rate base regardless of the lack of an actual need.

PJM's recent experience demonstrates the importance of having a comprehensive project re-evaluation process to ensure that previously approved projects remain needed. Recently, PJM officially cancelled two major transmission projects (PATH and MAPP) whose collective cost estimate exceeded \$3 billion. These projects were approved by the PJM Board in the 2007 timeframe. Subsequent events rendered them unnecessary and they were appropriately cancelled, saving transmission customer billions of dollars. It is disappointing that MISO is not proposing to address these more comprehensive project re-evaluation issues in its October 25 Filing. It seems appropriate that MISO would expand its project re-evaluation proposal to address these kinds of broader issues.

If the Commission does not direct MISO to consider projects with costs estimates increasing by 20% for reevaluation, or does not direct Public Policy justified Multi Value Projects be eligible for reevaluation, the Commission should still direct all cost shared projects and any other project with a cost estimate greater than \$25 million to undergo a “further cost review” if their cost estimate increases by 20% from the time of project approval or its last reevaluation. Even if the five reevaluation outcomes are not possible,

it is still good planning to understand why projects have had their cost estimates significantly increase.

**E. MISO’s Proposed Reevaluation Process Should Be More Inclusive of Stakeholders, Especially Regarding which Reevaluation Option Is Chosen.**

MISO’s proposed reevaluation procedure, (Compliance Filing beginning at p. 57) and in proposed Attachment FF Section IX, is a good first step towards a healthy and robust reevaluation process. In Order 1000, and prior FERC Orders, one of FERC’s primary goals in transmission planning is transparency.<sup>32</sup> MISO’s Compliance filing lacks stakeholder involvement and sufficient transparency to ensure that proper decisions are made and regular reevaluation occurs.

OMS recommends the Commission direct MISO to establish a new stakeholder group or utilize an existing stakeholder group that would perform a function similar to the SPP Project Cost Working Group to make reevaluation recommendations and to review project cost estimates of reevaluated projects. This group would provide a recommendation on which of the above five reevaluation options MISO should pursue. OMS suggests there is an element of subjectivity to any reevaluation. For example, it may be highly unlikely that a transmission project that is 75% completed would be recommended to be cancelled by such a stakeholder group, and such a project may have reevaluation outcome (i), no change, as the most likely option. In contrast, a transmission project just approved for cost allocation by the MISO Board that has had a significant cost increase may be much more likely to receive a different reevaluation outcome recommendation.

This “art” of project reevaluation shows the need for understanding why there was a cost increase, or schedule delay, or “deviation from selected transmission developer qualifications” that caused the reevaluation in the first place. Different causes for reevaluation may prompt different reevaluation outcomes.

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<sup>32</sup> E.g., Order 1000 Para 330: “The Commission encourages public utility transmission providers to consider ways to minimize disputes, such as through additional transparency mechanisms, as they identify enhancements to regional transmission planning processes necessary to comply with this Final Rule.”

**F. MISO’s Proposed Reevaluation Process Should Differentiate Between the Changes in Cost of Projects that Have and Have Not Been Through the Developer Selection Process.**

OMS is concerned that the proposed MISO Reevaluation process based on cost increases does not differentiate between elements of a transmission project eligible for a bid (i.e., have lost their ROFR) and those elements of a transmission project that would not be eligible for a bid (i.e., those that would retain a ROFR).

The definition of Open Transmission Project in proposed attachment FF states that it will contain both new and current transmission facilities:

***1.477a Open Transmission Project Version: 0.0.0 Effective: 12/31/1998***

A Market Efficiency Project or Multi-Value Project contained in MTEP Appendix A that has been approved by the Transmission Provider Board and may contain one or more New Transmission Facilities, subject to Section VIII.A of Attachment FF of this Tariff.

However, the Reevaluation section of MISO’s proposed Attachment FF does not differentiate between the new and current transmission facilities in determining what cost increases trigger a reevaluation:

**1. Cost Increases**

Any project cost increase which reduces the benefit-cost ratio of an economically-driven Open Transmission Project to less than the required benefit-to-cost threshold, as defined in Section II.B.1.e or Section II.C.7 of this Attachment FF of the Tariff.

OMS is concerned about the possibility of a hypothetical Open Transmission Project that would be a combination of (1) a new transmission line or other new transmission facilities; and (2) upgrades by an incumbent Transmission Owner on its existing facilities.<sup>33</sup> If this entire hypothetical project were a Market Efficiency Project, MISO would need to be able to determine the cause of cost increases. MISO must be able to track whether the incumbent working on its own facilities was the cause of cost increases or whether construction of the new facilities caused the cost increase to trigger a reevaluation. OMS suggests that costs of the incumbent upgrading their own facilities should not trigger a reevaluation based on that portion of the project’s cost increases.

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<sup>33</sup> Upgrades to existing facilities are one of the exceptions to the ROFR listed in FERC Order 1000 paragraph 319.

The Commission should direct MISO to (1) track costs of any Open Transmission Project in a way to determine whether upgrades to existing facilities or new transmission facilities are enough to trigger a reevaluation; and (2) determine that only cost increases of new facilities be eligible to trigger such a reevaluation.

## **VI. The Interaction of FERC-Approved Return on Equity and the Competitive Bids in the MISO Process**

An additional concern of OMS is how MISO's proposed competitive bidding process will interact with FERC-approved returns on equity ("ROE"). A robust and competitive bidding process should result in a number of developers competing not only on their abilities to construct a project, but also on their cost estimates, which include an ROE. The OMS seeks confirmation that the ROE for potential transmission developers will be capped at the level submitted in the MISO or state process. In other words, the originally-submitted ROE should remain with the project, even if it is reassigned to an affiliate, or if the developer is purchased or merged with another entity.

The OMS also seeks clarification from FERC as to how FERC-approved ROEs interact with the new competitive bidding process contemplated by MISO. Should developers file at FERC first to obtain an ROE before they submit a project into the MISO process? May a developer voluntarily commit to a lower ROE in its bid? Should developers file at FERC as a transmission developer and obtain a "market rate" ROE, which would only be determined in an RTO bidding process? The OMS is concerned that an ROE submitted in the MISO bidding process may be subsequently changed by FERC. If a developer voluntarily submits a lower ROE as part of its bid, the developer should be held to that submitted ROE, even if a higher ROE has been granted by FERC. The OMS seeks clarification and confirmation that FERC would uphold the lower ROE submitted in a developer's bid and not allow or grant a higher ROE as part of its transmission rate incentive policy.

## **VII. Affiliate Issues**

- A. In Order to Make the Developer Selection Process Meaningful, Companies that Are Chosen in that Process Should Not Be Allowed to**

**Transfer the Right and Obligation to Construct a Project to an Affiliate Unless Certain Conditions Are Met.<sup>34</sup>**

Based on connection to their transmission facilities, MISO Transmission Owners currently have an obligation to build a transmission project approved by the MISO Board. The MISO TOA describes what has been interpreted (by MISO and MISO Transmission Owners) as a possible ROFR to construct and own transmission projects which interconnect to a Transmission Owner's current transmission network. Moreover, the MISO Transmission Owners currently can transfer the right to build any project approved by the MISO Board to an affiliate without any stakeholder or MISO Staff review. This ability in the MISO TOA was implemented when the above facility-based obligation was put into effect.

FERC Orders 1000, 1000-A, and 1000-B discuss the elimination of the ROFR, with some limited exceptions. MISO has proposed a Developer Selection Process to choose who will build a transmission project without a ROFR. In the proposed process, this selection of a developer may be made by either a state or by MISO. (See the Compliance Filing, page 55).

OMS views this as a significant change in the method of selecting the developer who has the right to construct a transmission project. This significant change should bring with it a change in the current ability for a Transmission Owner to transfer the right to build a project, previously assigned only to it based on geography, to an affiliate. Outside of any other position taken by OMS on how the developer selection process should be performed, the decision made by the developer selection process should be respected, and affiliate transfers of projects which have gone through the Developer Selection Process should be prohibited without a demonstration that (1) ratepayers will be held harmless by the transfer; and (2) the transfer is in the public interest.

Absent these demonstrations, only the transmission developer selected by the Developer Selection Process should be allowed to construct the transmission project

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<sup>34</sup> This section is not intended to address the right to transfer ownership of an already constructed transmission project. Further, nothing in these comments or this proposal is intended to abrogate, preempt or otherwise supplant state law requirements. Specifically, the proposal identified in this section would have no impact on any state law requirements relating to transactions between affiliates. For example, if transfers between affiliates are specifically subject to state commission approval, any tariff modifications made to implement this proposal would not change requirements under state law.

awarded through such a process. If an affiliate of an existing Transmission Owner wishes to own and construct a transmission project, the ideal procedure would be for that affiliate to participate in the Developer Selection Process. The affiliate of an existing Transmission Owner directly participating will allow the party choosing the transmission developer to be more fully aware of what party is to construct the project and make the transmission developer decision with the best information possible.

As MISO states in its transmittal letter on page 60,

The goal of the MISO selection process is to ensure that the transmission developer who is most efficiently able to implement, operate, maintain, and restore a given transmission project is selected.

Thus, MISO's Compliance Filing would continue to allow a Transmission Owner to transfer the right to construct a transmission project to an affiliate, even if the right to build the project was earned through a Developer Selection Process. The only limitation is that the affiliate is able to construct and own the transmission project. The Commission should direct MISO to prohibit such transfers absent the two evaluations listed above.

MISO's proposal (Attachment FF, Section IX.A.3) of when to reevaluate a transmission project based on a possible change in the project developer is as follows:

**3. Deviation from Selected Transmission Developer Qualifications**

Material changes in the condition and characteristics of the Selected Transmission Developer, as described in its accepted New Transmission Proposal.

Material changes in this subsection may include, but are not limited to, any delegation or assignment not described in the New Transmission Proposal of project responsibilities to another entity, including affiliates, or a partner that is either previously undisclosed, or disclosed but assigned to or designated for different responsibilities or failure to conform to the terms described in the Selected Transmission Developer's accepted New Transmission Proposal.

If this section is triggered by a "delegation or assignment not described in the New Transmission Proposal of project responsibilities" to an affiliate, the proposed tariff language limits the project reevaluation to the issue of whether the affiliate is "qualified" to build the project, as described in proposed Attachment FF Section IX.B.3:

### **3. Deviation from Selected Transmission Developer Qualifications**

As necessary based upon the Variance Analysis, the Transmission Provider shall perform an analysis to determine if the Selected Transmission Developer remains qualified to construct, implement, operate, maintain, and/or restore the Open Transmission Project.

In order for the Developer Selection Process to have the most meaning, the Commission should direct either the state or MISO to choose the specific transmission developer to construct the transmission project, and not designate any other entity absent the two evaluations above. If a Transmission Owner proposes its affiliate construct and own a specified transmission project, it would result in a significantly better Developer Selection Process if that fact were disclosed during the Developer Selection Process. That way, the party making the transmission developer decision, either MISO or the state, can take into account any advantages or disadvantages of another entity constructing the project. It may be possible that the affiliate has a significantly stronger or weaker case to make to be the transmission developer chosen for a specific project than the incumbent TO, due to differences in the ability of the affiliate to raise capital or differences between the incumbent and the affiliate's ROE and capital structure. Allowing an entity awarded a Transmission Project through the Developer Selection Process to essentially nullify the selection by transferring the Transmission Project to an affiliate absent the two evaluations above subverts the purpose of the Developer Selection Process.

Additionally, OMS questions how, in the language in proposed Attachment FF Section IX.B.3, a different entity, such as an affiliate, "remains qualified" if MISO or the state choosing the transmission developer has never determined the affiliate to be qualified.

The Commission should direct MISO to adopt language which clearly states that projects won by a competitive bid cannot be transferred to any other entity without clear demonstration of the requirements discussed above. Absent these demonstrations, if the Transmission Owner wishes to transfer the right to build a project where the TO was chosen through the Developer Selection Process to an affiliate, the affiliate should have to enter and be chosen through a new Developer Selection Process.

**B. MISO Should Follow Through on its Commitment Not to Allow Two Affiliated Companies to Submit Separate Bids and only to Allow One Bid per Entity, Unless One Bid Is a Fixed Cost Bid.**

In the stakeholder process before this compliance filing, MISO proposed at the July 30, 2012, ROFR Task Team Meeting to not allow affiliated companies to submit separate bids for the same transmission project, and to only allow each entity or holding company to submit one bid for the transmission project.<sup>35</sup> OMS can find neither a written withdrawal of that proposal in subsequent meeting materials nor the contents of the proposal itself within the Compliance Filing tariff language describing the Developer Selection Process.

The Commission should direct MISO to follow through on its commitments and include both of those commitments within a future Compliance Filing.

OMS supports a single exception to this policy – if the holding company were willing to submit one “fixed cost bid” (only able to recover the costs of that bid); and one “non-fixed cost bid” (to be able to recover other prudent costs above that bid). The Commission should direct MISO to include this exception along with the two above commitments in its Compliance Filing.

**VIII. Multi-Transmission Owner Zones, Request for Clarity/Clarification**

In FERC Order 1000-A, para 424, as cited in pages 41-42 of MISO’s Transmittal Letter, the Commission stated:

In general, any regional allocation of the cost of a new transmission facility outside a single transmission provider’s retail distribution service territory or footprint, including an allocation to a ‘zone’ consisting of more than one transmission provider, is an application of the regional cost allocation method and that new transmission facility is not a local transmission facility. . . . However, we recognize . . . that special consideration is needed when a small transmission provider is located within the footprint of another transmission provider. For instance, a regional cost allocation method might allocate costs to an area consisting of one transmission provider that has within its borders one or more smaller utilities that largely depend on its transmission system but nevertheless own a little transmission of their own, so that they too are transmission providers. This situation is not necessarily ‘a zone consisting

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<sup>35</sup> <https://www.midwestiso.org/Library/Repository/Meeting%20Material/Stakeholder/ROFR/20120730/20120730%20ROFRTT%20Presentation.pdf>, slide 103

of more than one transmission provider’ as this term is used in this order. If the cost of a new transmission facility is allocated entirely to an area consisting of one transmission provider that has one or more smaller transmission providers within its borders, this might qualify as a local cost allocation, not a regional cost allocation. [footnote deleted]

On page 47 of the Transmittal Letter, MISO makes such a request, that in its 11 pricing zones with multiple transmission owners, costs solely allocated within that transmission zone will be considered “local cost allocation”:

For all of these reasons, a transmission project whose costs are allocated exclusively to a single MISO pricing zone is appropriately characterized as a local project even if the pricing zone consists of more than one Transmission Owner.

At this time, OMS takes no position on the “waiver” request itself. OMS asks the Commission to clarify when and to whom the waiver applies. Specifically whether any MISO approval of the “waiver” applies only to the eleven (11) of twenty-four (24) current MISO pricing zones with more than one transmission owner,<sup>36</sup> or that the “waiver” applies to any of the thirteen (13) MISO pricing zones currently with one transmission owner if, in the future, another transmission owner constructs and owns a project within that zone.

## **IX. Upgrades to Existing Facilities**

MISO’s filing makes clear that upgrades to existing transmission facilities will not trigger the competitive processes set forth elsewhere in the Compliance Filing. Put another way, incumbent transmission owners will retain a right of first refusal for upgrades to their existing facilities. This exemption for upgrades is specifically identified in Orders 1000 and 1000-A.

Application of this exemption becomes difficult when, as is often the case, an “upgrade” involves a combination of fixes to facilities in existing rights-of-way as well as the construction of new facilities. To address upgrades that include some elements of new facilities, MISO proposes to categorize a project as an “upgrade” (and exempt from the competitive process) if the portion of new facilities does not exceed 20 contiguous

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<sup>36</sup> As described in page 44 of the MISO Transmittal Letter

miles in length. MISO Compliance Filing (Part 1 of 2) at 48; Attachment FF, Section VIII.C.1.1.1.

The OMS recognizes the need to address situations where an upgrade includes some elements of new development. Requiring a competitive process for upgrades that include any new right-of-way could yield absurd results and may stifle needed work. Recognizing that some allowance is needed to accommodate these situations, the OMS has reservations about the standard proposed by MISO. A 20-contiguous-mile standard may be administratively efficient since it may be easier to administer than other alternatives. However, this standard could lead to the possibility for gaming that could ultimately exempt large transmission projects from the competitive process.

The OMS's concern is largely centered on the use of the word "contiguous" in the tariff filing. Proposed Attachment FF Section VIII.C.1.1.1. (a project remains an upgrade provided "the new transmission line sections are less than twenty (20) contiguous miles in total length..."). Application of this standard could allow a developer to divide up a project so that a small portion of the line is an existing line, provided that the new portions were less than 20 contiguous miles.

If a 20-mile-standard is a reasonable threshold, the OMS believes the standard should be set at a total of 20 miles of new transmission line, regardless of whether those miles are contiguous or not. At the least, the OMS requests that FERC modify the MISO Compliance Filing to remove or clarify the continuity element.<sup>37</sup>

This issue may be better clarified by adopting a more robust standard. While MISO identifies that a standard based only on a percentage of new facilities threshold may lead to some absurd results (MISO Compliance Filing at 48), MISO does not discuss a standard that applies *both* a mileage and percentage threshold that could avoid absurd results. FERC may want to consider an alternative threshold that would count as an upgrade: (1) any upgrade that consists of five (5) miles or less of facilities in new rights-

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<sup>37</sup> The OMS recognizes and appreciates that this standard has gone through a number of iterations, including a proposal to increase the new portion of an upgrade to as much as 40 miles. *See*, Order 1000 Right of First Refusal, Stakeholder Comments and Tariff Modifications, presentation to the Right of First Refusal Task Force (September 24, 2012) Available at: <https://www.midwestiso.org/Library/Repository/Meeting%20Material/Stakeholder/ROFR/20120924/20120924%20ROFR/TT%20MISO%20Presentation.pdf>

of-way,<sup>38</sup> or (2) the new rights-of-way involved in the upgrade are less than 25% of the total mileage of the line, but the new portions would never exceed a total of twenty (20) miles. This approach would maintain upgrade status for relatively small projects (any with less than 5 miles of new right-of-way) and would address the concern that 25% of a project could be large (i.e., 25% of 200 miles if 50 miles) since the 20-mile cap would apply.

At the very least, FERC should clarify the threshold proposed by MISO to ensure compliance with the goals of Order 1000. The OMS believes that alternatives exist that would better balance between the competitive benefits of FERC's Order 1000 approach and the need for development efficiency.

## **X. Conclusion**

OMS appreciates the opportunity provided by the Commission to comment on the Order 1000 compliance filings of MISO and the MISO Transmission Owners. The OMS submits this request because a majority of the members have agreed to generally support it. Individual OMS members reserve the right to file separate pleadings regarding the issues discussed herein. The following members generally support this request:

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  
Wisconsin Public Service Commission

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<sup>38</sup> This would mean that a 25-mile upgrade that has 5 miles of new right-of-way would be considered an upgrade and not subject to the competitive process. This would also apply to a 10-mile project that has 5 miles of new rights-of-way. While these two examples consist of the same amount of mileage, they account for very different percentages of the lines (20% in the 25-mile example and 50% in the 10-mile example). However, the OMS believes that this outcome is consistent with Order 1000 in that it removes from the competitive process projects that are generally smaller in dollar amount.

The Kentucky Public Service Commission, the Manitoba Public Utilities Board, and the South Dakota Public Utilities Commission abstained from voting on this pleading.

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 these comments and generally support these comments.

Respectfully Submitted,

*William H. Smith, Jr.*

William H. Smith, Jr.

Executive Director, Organization of MISO  
States

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Tel: 515-243-0742

Dated: December 10, 2012

#### CERTIFICATE OF SERVICE

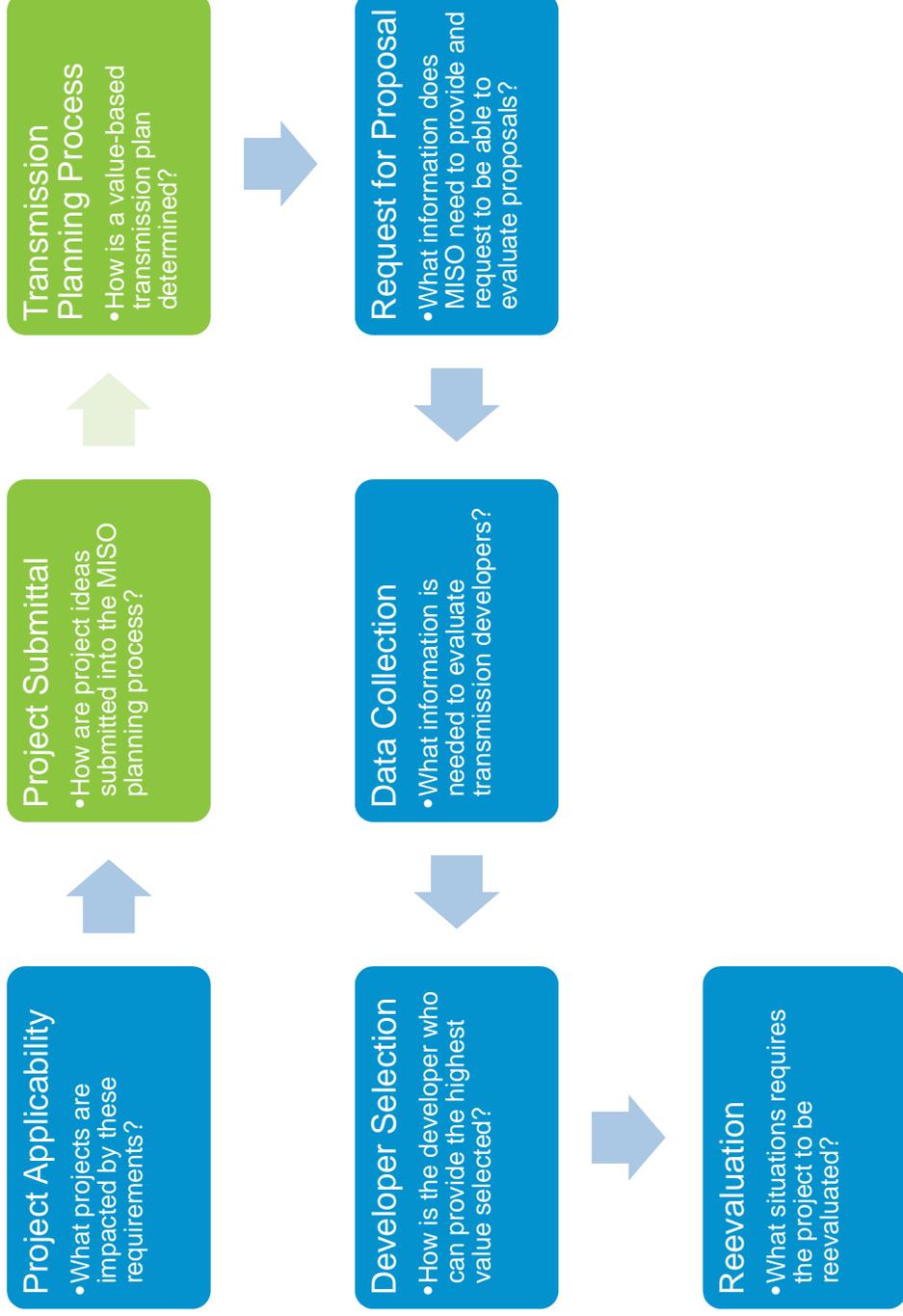
I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Des Moines, Iowa, this 10th day of December, 2012.

*William H. Smith, Jr.*

William H. Smith, Jr.

# General Process Flow



OMS Appendix 2 – SPP Cost Estimation Reporting Tool (SCERT) Cost Categories

- The name of the company providing the cost estimate
- The date the cost estimate was finalized
- Total Project Cost Estimate

Line Costs	Current Year \$
Engineering Labor	
Construction Labor	
Right-of-Way	
Reactive Compensation (Labor & Materials)	
Material	
<b>Line Sub-Total</b>	<b>\$0</b>

Station Costs	
Engineering Labor	
Construction Labor	
Site Property Rights	
Reactive Compensation (Labor & Materials)	
Material	
<b>Station Sub-Total</b>	<b>\$0</b>

Summary Info	
Line Sub-Total	\$0
Station Sub-Total	\$0
AFUDC	
Contingency	
<b>Total Project Cost Estimate</b>	<b>\$0</b>
<b>Miscellaneous Cost Info</b>	
<b>CWIP (Y/N)</b>	
<b>Internal Escalation Rate</b>	

Line Assumptions	
Number of Circuits	
<b>Line Length</b>	New Line (Miles)
	Reconductor (Miles)
	Voltage Conversion (Miles)
<b>Termination Points</b>	To Bus Name
	To Bus Number
	From Bus Name

	From Bus Number
<b>Conductor</b>	Type
	Size (kcmil)
	Voltage (kV)
	Ampacity
	Rating (MVA)
	Number of Conductors per Phase
<b>Structure</b>	Configuration
	Foundation Type
	Material
	NESC Assumptions
	Dead Ends (Qty)
	Tangents (Qty)
	Storm Structures (Qty)
	Running Corners (Qty)
	Underbuild (Y/N)
<b>Shield Wire</b>	Number
	Type
	Size
<b>Right-of-Way</b>	Width (ft)
	Acquisition
	Clearing Requirements
<b>Design Criteria</b>	Weather Loading
	Live Line Maintenance
	Unbalanced Structural Loads
<b>Permitting</b>	Traffic Control Requirements
	FAA Requirements
<b>Environmental</b>	Study Requirements
	Wetland Requirements/Mitigation
	Threatened and Endangered Species Mitigation
	Cultural/Historical Resource Requirements
	Type of Terrain
	Switch Requirements
	Legal Requirements
	Geotechnical Assumptions
	Special Material Requirements
	Preliminary Line Route (Rough location when practical)
	Access Road Requirements
	Distribution/Joint Use Requirements