

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

Midwest Independent Transmission System Operator, Inc.)	Docket Nos. ER13-187-000
)	ER13-187-001

**REQUEST FOR CLARIFICATION AND REHEARING
OF THE ORGANIZATION OF MISO STATES**

Pursuant to Rule 713 of the Federal Energy Regulatory Commission’s (“Commission”) Rules of Practice and Procedure, 18 C.F.R. §385.713, the Organization of MISO States, Inc. (“OMS”) hereby submits the following Request for Clarification and Rehearing of three issues arising from the Commission’s Order on Compliance Filings and Tariff Revisions issued on March 22, 2013, in the above-captioned docket (“March 22 Order”).¹ On December 10, 2012, the OMS filed an intervention and comments in this docket and therefore is a party to this case.

I. BACKGROUND

On October 25, 2012, the Midwest Independent Transmission System Operator, Inc. (“MISO”) and a subset of the MISO transmission owners made a compliance filing pursuant to the directives contained in the Commission’s Order Nos. 1000, 1000-A and 1000-B (“October 25 Filing”).² Therein, MISO stated that, with the exception of a few aspects of transmission planning and the development of a competitive selection process due to the elimination of federal rights of first refusal for projects selected in the regional plan for the purposes of cost allocation, the current versions of MISO’s tariff and the Transmission Owners Agreement were already

¹ *Midwest Independent Transmission Operator, Inc.* 142 FERC ¶ 61,215, (2013).

² *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, 136 FERC ¶ 61,051 (2011), *order on reh’g*, Order No. 1000-A, 139 FERC ¶ 61,132, *order on reh’g and clarification*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012).

largely compliant with the requirements of Order Nos. 1000, 1000-A, and 1000-B.³ With respect to the process for projects subject to state right of first refusal statutes, MISO stated that it would respect all applicable state or local laws or regulations granting a right of first refusal (“ROFR”) to an incumbent transmission owner. In such cases, MISO proposed to directly assign to the incumbent transmission owner any transmission project within the scope and in accordance with the terms of any applicable state or local laws or regulations granting such a right of first refusal, without conducting a competitive developer selection process.⁴

On December 10, 2012, the OMS filed a notice of intervention and comments in response to MISO’s October 25 Filing. Herein, the OMS requests clarification and rehearing of the Commission’s March 22 Order on three issues, as described below.

II. STATEMENT OF ISSUES FOR REHEARING

- a. The removal of MISO’s proposed state right of first refusal exemption from MISO’s developer selection process would result in inefficient use of resources and potential delay in transmission development, contrary to FERC’s stated goal in Order No. 1000 of more efficient regional transmission planning.**
- b. The Commission’s requirement that MISO remove the proposed state right of first refusal exemption from its developer selection process is arbitrary and capricious, in that such removal would violate one of the core stated principles of Order No. 1000.**
- c. The terms and conditions for transference of selected developer bids to successors, including affiliates and subsidiaries, are unclear and require further definition.**

III. DISCUSSION

- a. The removal of MISO’s proposed state right of first refusal exemption from MISO’s developer selection process would result in inefficient use of resources and potential delay in transmission development, contrary to FERC’s stated goal in Order No. 1000 of more efficient regional transmission planning.**

³ October 25 Filing, at 4-5.

⁴ October 25 Filing, at 55.

In the October 25 Filing, MISO proposed adding a provision to Attachment FF of the MISO tariff that would recognize state or local right of first refusal statutes. MISO justified its proposal on the basis that it would be more efficient to recognize the impact of state or local right of first refusal statutes in the selection of a transmission developer through the MISO competitive developer selection process at the beginning of the process, rather than going through the selection process and have the selected developer not be eligible due to state or local statutes.⁵

The March 22 Order partially rejected MISO's proposal, based on the finding that MISO's inclusion of the state and local right of first refusal in the MISO tariff creates a federal right of first refusal.⁶ The Commission directed MISO to remove MISO's proposed provision from its tariff stating that "Order 1000 does not permit a public utility transmission provider to add a federal right of first refusal for a new facility based on state law."⁷

However, the Commission also stated that it is "not necessarily impermissible [for MISO] to consider the effect of the state regulatory process at appropriate points in the regional transmission planning process."⁸ The Commission stated that, in its competitive developer selection process, MISO may take into consideration "the particular strengths" of an incumbent transmission developer and that the incumbent transmission developer "is free to highlight such strengths" to support its bid.⁹ The Commission also noted that Order No. 1000 requires MISO to "establish a date by which state approvals to construct must have been achieved that is tied to when construction must begin to timely meet the need that the project is selected to address" and

⁵ October 25 Filing, at 50.

⁶ March 22 Order, at P 205.

⁷ March 22 Order, at P 205.

⁸ March 22 Order, at P 206.

⁹ March 22 Order, at P 206.

that this element might be a particular strength of the incumbent.¹⁰ Finally, in Order No. 1000, the Commission acknowledged that, “there may be restrictions on the construction of transmission facilities by non-incumbent transmission providers” in states that have right of first refusal statutes, thus suggesting that the incumbent transmission owner may have “particular strengths” in such circumstances.¹¹

Under MISO’s developer selection proposal, the time involved to submit bids, evaluate all developers, and select the winning developer is roughly one year after the MISO Board of Directors has approved a transmission project. If, after that year, a developer were chosen and then rejected by the state, there could, in some cases, be potential delay in building the transmission project, as a second developer would have to be chosen. While the OMS acknowledges the Commission’s attempt to consider state enacted right of first refusal laws within the developer selection process, as described in the cited passages above, the OMS is nonetheless concerned that by requiring MISO to remove the state right of first refusal language as MISO has filed it could ultimately lead to an inefficient use of MISO and non-incumbent developer resources and possibly delay needed transmission development if bids are submitted into the MISO process from developers that would ultimately be ineligible to develop the project due to state law. This possibility of unnecessary delay and possible inefficiency would conflict with a primary goal of Order No. 1000, which as discussed in Commissioner Clark’s dissent to the March 22 Order, is “to speed along the development of needed electric transmission projects in an efficient manner.”

In light of the discussion above, the OMS requests further clarification, specifically about whether the Commission has considered the resulting impact on resources and potential delay in

¹⁰ March 22 Order, at P 207.

¹¹ Order No. 1000, at P 287.

transmission development of requiring the removal of MISO's proposed automatic state right of first refusal exemption from MISO's competitive developer selection process. Further clarification would provide needed information to MISO and the states to reach balance between MISO's planning process and state autonomy when moving into this new competitive bidding process for selecting the best transmission developer to meet identified transmission needs.

The OMS also asks the Commission to clarify the intent of the language in Order Paragraph 206: "...it is not necessarily impermissible [for MISO] to consider the effect of the state regulatory process at appropriate points in the regional transmission planning process."¹² Because of the opaqueness of this language, it is unclear when the "consideration" is to occur. The language could suggest that MISO is free to establish a process in which the effect of a state or local right of first refusal could be considered well before the MISO developer selection process even begins, i.e., after a transmission project is approved in MTEP, but before MISO submits the related request for proposal. Following this interpretation further, MISO could propose to handle state and local right of first refusal statutes as a possible exemption to Order 1000's right of first refusal elimination requirement, similar to MISO's proposed exemption for Baseline Reliability Projects or upgrades to the existing systems. If this is allowable under the Commission's rulings, the Commission should so clarify the language of Order Paragraph 206.

To the extent that the Commission fails to provide sufficient clarification, the OMS in the alternative requests rehearing. Specifically, the Commission should reconsider and rehear the impact of requiring the removal of the state right of first refusal section from MISO's proposal on (1) resources of all involved in the developer selection process (including MISO, state and local commissions and agencies, the developers themselves, and other interested stakeholders),

¹² March 22 Order, at P 206.

(2) delaying necessary transmission development, as it is contrary to the Commission's stated goal in Order No. 1000 of more efficient regional transmission planning.

- b. The Commission's requirement that MISO remove the proposed state right of first refusal exemption from its developer selection process is arbitrary and capricious, in that such removal would violate one of the core stated principles of Order No. 1000.¹³**

The OMS requests clarification and rehearing of the Commission's decision regarding removal of the state right of first refusal exemption from MISO's developer selection process. The Commission must recognize both the existence of state right of first refusal statutes and that the Commission cannot over-ride such state statutes. The OMS does not consider the recognition of states' jurisdiction in this area to be the establishment of a federal right of first refusal as FERC contends. The Commission's decisions regarding these proposals leave unclear how MISO will administer its regional transmission planning process while respecting state laws that limit eligibility to construct transmission facilities within the state. While the Commission's stated goal is to encourage more efficient and cost-effective transmission planning through development of a non-discriminatory, participatory transmission planning process for incumbent and non-incumbent providers, it remains unclear, given the Commission's rejection of these aspects of MISO's proposal, how the MISO Board's selection can be made in a manner that does not abridge state law or state autonomy as asserted in state-enacted right of first refusal laws.

The Commission's holding effectively places an RTO Board's selection of a developer for a regional transmission project potentially in direct conflict with a state's authority to autonomously regulate its public utilities, which will likely lead to increased litigation between developers selected by the RTO and incumbents asserting state-granted rights to construct projects. Such an outcome can hardly be squared with Order No. 1000's express and repeated

¹³ The Michigan Public Service Commission does not join in this section.

focus on “more efficient and cost-effective” transmission development. Thus, the Commission’s rejection of these proposals represents a substantial departure from the policy articulated in Order No. 1000, and is arbitrary and capricious.

By rejecting MISO’s proposals, the Commission is requiring a process in which the RTO is allowed to trespass upon state regulatory authority to certify developers, a right preserved in § 201(a) of the FPA, by selecting a developer that is not eligible under state or local laws. Nowhere in the FPA, other than in limited situations involving the Commission’s backstop siting authority in National Interest Electric Transmission Corridors, may the Commission grant certifications to any entity to construct a transmission facility.¹⁴ By rejecting MISO’s language respecting state and local authority and the right of states to determine the transmission developer, the Commission’s order infringes on these rights, exceeding its authority under the FPA. Throughout Order Nos. 1000 and 1000-A, the Commission claims that its intent is not to preempt the exercise of state authority over matters directly within the state’s jurisdiction.¹⁵ In fact, in Order No. 1000, the Commission “acknowledge[d] that there may be restrictions on the construction of transmission facilities by nonincumbent transmission providers under rules or regulations enforced by other jurisdictions,” and stated, “[n]othing in this Final Rule is intended to limit, preempt, or otherwise affect state or local laws or regulations with respect to construction of transmission facilities. . . .”¹⁶

¹⁴ This is in distinct contrast to the authority given to the Commission in the Natural Gas Act.

¹⁵ *See, e.g.*, Order No. 1000 at P 107 (“We acknowledge that there is longstanding state authority over certain matters that are relevant to transmission planning and expansion, such as matters relevant to siting, permitting, and construction. However, nothing in this Final Rule involves an exercise of siting, permitting, and construction authority. . . [W]e see no reason why this Final Rule should create conflicts between state and federal requirements.”), P 227 (“[W]e note that nothing in this Final Rule is intended to limit, preempt, or otherwise affect state and local laws or regulations with respect to construction of transmission facilities, including but not limited to authority over siting or permitting of transmission facilities.”), and P 253 n.231 (“This Final Rule does not require removal of references to such state or local laws or regulations from Commission-approved tariffs or agreements.”).

¹⁶ Order No. 1000 at P 287.

However, the Commission's holding in the March 22 Order turns these conclusions upside down; first, by ignoring that certain states within MISO have adopted right of first refusal statutes that limit eligibility to construct transmission facilities within the state, and then by mandating that MISO engage in a competitive process to select a transmission developer that may never be authorized to construct the facility under such state laws. Such a result ultimately leads state regulators acting under a state right of first refusal law to be forced to choose between complying with state law (and potentially risking litigation over cost-sharing) or violating the law by adopting MISO's choice of a non-incumbent developer.¹⁷ Either way, the result is likely litigation, leading to *less* efficient and *more* costly transmission development. Such coercion, not contemplated by the FPA, amounts to an unconstitutional intrusion upon state police powers in violation of the Tenth Amendment.

The Commission's purported focus on encouraging more efficient and cost-effective transmission planning is beneficial. However, the Commission ultimately should be indifferent to whether the selected transmission developer is a merchant developer or an incumbent in a state or locality with right of first refusal laws, assuming all other relevant criteria (technical, managerial and financial resources) are equivalent.

Therefore, the OMS requests that, in order to ensure that the Commission-mandated MISO transmission planning process under Order No. 1000 complies with the dual goals of

¹⁷ This issue may be ripe for rehearing or clarification. The OMS assumes the following hypothetical outcome under the March 22 Order. Assume that the MISO Board selects a developer for an open transmission project in a state that has a right of first refusal law. However, assume that the selected developer is *not* the incumbent Transmission Owner. The relevant state authority would be required to follow state law and deny the non-incumbent and award the project to the incumbent. Since the incumbent was not selected by the MISO Board, the practical outcome of this situation is that that litigation would ensue regarding the developer selection and whether the project would be subject to any cost-sharing arrangements in the MISO tariff. If this hypothetical is incorrect, this issue requires rehearing for stakeholders to better understand the impacts of the March 22 Order. Regardless, this issue warrants clarification by the Commission.

encouraging efficient and cost-effective transmission development without infringing on “longstanding state authority”¹⁸ over developer certification, the Commission should grant rehearing of its order, allow MISO to reinstate provisions that reflect state right of first refusal laws,¹⁹ permit a state to select the developer of facilities to be built within its state,²⁰ and clarify that MISO’s transmission planning process must adhere to any state-imposed limitations on developer selection where such limitations exist.

c. The terms and conditions for transference of selected developer bids to successors, including affiliates and subsidiaries, are unclear and require further definition.

In its comments filed in response to MISO’s October 25 Filing, the OMS raised many concerns about how successor transfers, including affiliate and subsidiary transfers of projects awarded through MISO’s Developer Selection Process would occur, as well as how costs for all transmission projects would be tracked. The Transmission Owners Agreement (TOA) does impose on assignees the obligations that incumbent Transmission Owners (“TOs”) bear under the TOA (TOA Article 9, Appendix B). Further the TOA (Article 6) states the TO has the responsibility to build any project that MISO assigns to that TO for construction, so all provisions would apply to a TO assignee. Additionally, Article 6 of Appendix B to the TOA says the Designated TO must carry out the duties to support the planning process. These provisions should adequately protect consumers in the event a TO assigns its construction obligations to an affiliate or other entity.

What is less clear is the situation in which a non-incumbent developer, who is not a TO, is awarded the right to build a project and seeks to assign that construction obligation to an

¹⁸ Order No. 1000 at P 107.

¹⁹ See *Midwest Indep. Transmission Sys. Operator, Inc. and the MISO Transmission Owners*, 142 FERC ¶ 61,215, at PP 205-207 (2013).

²⁰ *Id.* at PP 351-354.

affiliate or other entity. There is nothing in the TOA or tariff that requires an assignee of the non-incumbent Selected Transmission Developer to comply with MISO's tariff. To the extent that a non-incumbent Selected Transmission Developer assigns its construction obligations to an affiliate or other entity, the assignee is not bound by the reporting and other requirements placed on a TO during the construction period. During the time a non-incumbent is building a project, it is not obligated to sign the TOA and become a TO.

The Commission's Order on MISO's Order No. 1000 compliance filing does not adequately address the issue raised in the OMS's comments in this docket of whether ratepayers are held harmless when a Selected Transmission Developer transfers its obligation to construct a transmission project to an assignee. Further the Commission's response is unclear as to how consumers remain protected in the event of the award of a project to a non-incumbent Selected Transmission Developer that seeks to assign its construction obligations to an affiliate or other entity. While Article IX of the proposed Tariff would allow MISO to ensure that the assignee satisfies the qualifications to be a Qualified Transmission Provider, it does not ensure that the assignee will comply with the reporting and other obligations imposed on Selected Transmission Developers under Article I.C.11 and Article VIII of the Tariff. It is in the public interest for the Commission to require MISO to assure that all MISO Selected Transmission Developers shall comply with all reporting requirements.

In this regard, the proposed definition of "Selected Transmission Developer" does not include any successor entities or assignees:

1.599a Selected Transmission Developer

The Qualified Transmission Developer *selected by the Transmission Provider or the applicable state(s)*²¹ to construct, implement, own,

²¹ Any Commission decision on whether states or MISO can choose the Selected Transmission Developer has no impact on these concerns, as long as the Developer is still being selected.

operate, maintain, repair and restore one or more New Transmission Facilities, pursuant to Attachment FF of this Tariff. [Emphasis added]

In order for MISO to manage transmission projects, the definition of “Selected Transmission Developer” should also include any entity, including an affiliate, subsidiary or assignee, to which a Selected Transmission Developer transfers its obligation to construct a project.

To assure transparency and adequate oversight of projects awarded to a Selected Transmission Developer and in light of the discussion above, the OMS requests the Commission either: (1) clarify that any obligations of a “Selected Transmission Developer,” including to: (a) complete a required Project Status Report; (b) report changes in the “Status of Developer Qualifications”; and (c) submit to a Variance Analysis, will also be required for any successor entity, including affiliates and subsidiaries; or (2) in the alternative grant rehearing requiring MISO to file tariff language mandating that any successor of a “Selected Transmission Developer” be subject to the same filing requirements, including the obligations to: (a) complete a required Project Status Report and (b) report changes in the “Status of Developer Qualifications”; and (c) submit to a “Variance Analysis.”

Finally, in Paragraph 388 of its March 22 Order, the Commission suggests that a review of the comparability of characteristics and qualifications as between the Selected Transmission Developer and the successor entity acts as a safeguard, but this wording is silent on whether obligations, such as providing project status reports, continue in the event of an assignment of construction obligations. Paragraph 388 provides:

We find that MISO’s proposal to allow for reevaluation of any change in the Selected Transmission Developer’s *characteristics and qualifications acts as a sufficient safeguard in the event a bid is transferred to another developer.* We find that MISO’s treatment of ROEs in the planning process remains the same as

in its previously approved planning process, and we therefore find these concerns outside the scope of this proceeding. [Emphasis added]

In Paragraph 388 the Commission finds MISO's reevaluation of the characteristics and qualifications of the successor entity to be an adequate safeguard. The Commission does not say how this provision holds ratepayers harmless, or how this provision is in the public interest. Specifically, it remains unclear whether the reporting obligations of TOs apply to non-TO Selected Transmission Developers or to the successor entity. Thus, in terms of these obligations, the Commission's response is insufficient, in that it does not ensure sufficient protections for consumers in the event that a non-incumbent Selected Transmission Developer assigns its construction obligations to an affiliate or other entity. The Commission should grant rehearing on this issue and direct MISO for transparency's sake to clearly state that the obligations of a successor entity are the same as the originally successful Selected Transmission Developer.

In light of the discussion above and of the proposed definition of Selected Transmission Developer, the OMS requests that, in rehearing, the Commission require MISO to file additional language that clearly states that any entity, including affiliates and subsidiaries, to which a project is transferred, has the same obligations and responsibilities as the Selected Transmission Developer. This could be done by changing the definition of Selected Transmission Developer by adding the italicized language below:

1.599a Selected Transmission Developer

The Qualified Transmission Developer selected by the Transmission Provider or the applicable state(s), *or any entity to which a Selected Transmission Developer transfers its awarded project (successor entity)*, to construct, implement, own, operate, maintain, repair and restore one or more New Transmission Facilities, pursuant to Attachment FF of this Tariff.

IV. CONCLUSION

This request for clarification and rehearing is generally agreed to by a majority of OMS members. Individual OMS members reserve the right to file separate pleadings regarding the

issues discussed in this filing. To the extent necessary to preserve the OMS's rights under 16 U.S.C. § 8251, § 313 of the FPA, this pleading constitutes a request for rehearing, but this pleading otherwise seeks clarification from FERC to resolve the OMS's concerns raised herein.

Wherefore, for the reasons explained above, the OMS seeks clarification and requests that FERC grant this Request for Rehearing.

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 comments regarding the issues discussed in these comments. The following members generally support those comments:

Indiana Utility Regulatory Commission
Iowa Utilities Board
Louisiana Public Service Commission
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
Public Utility Commission of Texas
Wisconsin Public Service Commission

The Kentucky Public Service Commission, the City of New Orleans, the Manitoba Public Utilities Board and the Mississippi Public Service Commission abstained from voting on this pleading. The Illinois Commerce Commission does not concur with this pleading.

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

Respectfully Submitted,

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Dated: April 22, 2013

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 Washington, D.C., this 22nd day of April, 2013.

William H. Smith, Jr.
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