

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

Midcontinent Independent System Operator, Inc.))	Docket No. ER13-2379-000
Midcontinent Independent System Operator, Inc., (Northern Indiana Public Service Company))))	Docket No. ER13-2376-000
Midcontinent Independent System Operator, Inc. (Vectren)))	Docket No. ER13-2375-000
Entergy Services, Inc.)	Docket No. ER13-948-000
ITC Holdings Corp., <i>et al.</i>)	Docket No. ER12-2681-002
Midwest Independent Transmission System Operator, Inc., <i>et. al.</i>))	Docket No. EL12-35-000

COMMENTS OF THE ORGANIZATION OF MISO STATES

Pursuant to Rule 211 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“Commission”), 18 C.F.R. § 385.211, the Organization of MISO States (“OMS”) respectfully submits the following comments in the above-captioned dockets in response to the filings submitted to the Commission by the Midcontinent Independent System Operator, Inc. (“MISO”),¹ the MISO Transmission Owners (“MISO TOs”), Vectren Energy Delivery of Indiana, Inc. (“Vectren”), Northern Indiana Public Service Company (“NIPSCO”), Entergy Services Inc. (“Entergy”) and the ITC Midsouth Operating Companies (“ITC Midsouth”) on September 13, 2013.

¹ MISO states that it submitted the filing to comply with the May 16 Order and solely in its role as administrator of the Tariff. See, September 13 Filing, at 2.

The OMS filed a Notice of Intervention and Motion for Extension of the Date for Comment on September 20, 2013, and therefore, is a party to these proceedings.

I. SUMMARY OF THE OMS'S POSITION AND RECOMMENDATIONS

The Commission has found that the current MISO formula rate protocols are not just and reasonable and do not ensure just and reasonable rates.² Accordingly, the Commission directed MISO and its transmission owners to submit revised formula rate protocols.³ The proposed revisions submitted to the Commission by the filing parties on September 13 include protocols for transmission owners (“TOs”) using both forward-looking projections and historical data, respectively, to derive their formula transmission charges. The OMS makes the following observations and recommendations concerning these filings.

The effective date of January 1, 2014 requested by the TOs must be rejected and the refund effective date of May 23, 2012, that was established by the Commission in the May 17 Order⁴ and confirmed in the May 16 Order,⁵ must be respected. The Commission has found that the formula rates that have been in use since May 23, 2012, are unjust and unreasonable. Therefore, the Commission should apply the newly approved protocols retroactively to the period between May 23, 2012 and January 1, 2014 to the extent possible.

The OMS proposes several modifications to the update/true-up timelines proposed in the companies' September 13 Filings. In particular:

- (1) The TOs should be required to provide notice of the formula rate update/true up posting and the open public meeting;

² *Midwest Indep. Transmission Sys. Operator, Inc.*, 143 FERC ¶ 61,149 (2013) at P 1 (“May 16 Order”).

³ May 16 Order, at P 1.

⁴ *Midwest Indep. Transmission Sys. Operator, Inc.*, 139 FERC ¶ 61,127 (2012) at P 25 (“May 17 Order”).

⁵ May 16 Order, fn 10.

- (2) The TOs should be required to hold their informational meetings within 30 days of posting their annual update/true-up, but no earlier than 10 days following such posting;
- (3) The Commission should require a joint meeting and joint information exchange process that incorporates all of the TOs charging shared transmission project costs;
- (4) The deadline for submitting informal challenges should not close before the deadline for the TO to respond to information requests closes; and
- (5) The informational report described by the Commission in its May 16 Order should be divided into two parts: one part to be submitted to the Commission at the beginning of the update/true-up process and another to be submitted at the end of the protocol process.

The transmission owners using forward formula rate protocols do not propose a uniform practice with respect to the extent that the protocol process would apply to the cost projection phase. The OMS supports the process proposed by NIPSCO in this regard and recommends that the Commission direct the other transmission owners to modify their proposals so that the protocol process will cover the forward cost projection phase.

The Commission cannot rely entirely on Interested Parties to insure that formula rates are just and reasonable. The burden to review the annual formula rate submissions does not rest with Interested Parties alone. While interested parties do have a role in raising issues about the justness and reasonableness of the formula rate charges, the Commission has the ultimate responsibility for that determination. Accordingly, Commission Staff should be explicitly included in the term “Interested Party” and the Commission should encourage or require Commission Staff to participate in the MISO TOs’ update/true-up process.

The OMS proposes several modifications to the challenge processes included in the companies’ proposed protocols. Specifically:

- (1) The proposed protocol language unreasonably limits the scope of information that may be requested by Interested Parties and the challenges that they may make and the OMS proposes a corrective modification;
- (2) The proposed protocols contain language requiring all formal challenges to “be filed under and satisfy all requirements established under 18 C.F.R. § 385.206.” Such a requirement would conflate the filing requirements for complaints under Section 206 of the Federal Power Act and the standard for formal challenges under the formula rate protocol process, with the result being an improper shifting of the burden of proof. Accordingly, the OMS recommends that the Commission direct MISO and the TOs to delete reference to 18 C.F.R. § 385.206 as the filing requirement standard applicable to formal challenges; and
- (3) The Commission should direct MISO and the TOs to remove from their proposed protocols, any language requiring that Interested Parties first file an informal challenge with the TO before filing a formal challenge with the Commission.

The OMS provides two recommendations concerning the information exchange process:

- (1) MISO and the TOs should modify the formula rate protocols to explicitly include provisions regarding procurement methods and cost control methodologies; and
- (2) The Commission must reconcile the treatment of confidential data and the need to provide information to interested parties. In addition, the protocols should include an explicit provision permitting confidential information to be used as the basis for formal challenges.

The proposed protocols would have the formula rate charges become final after the protocol period ends for a given rate year. The OMS recommends instead, that the protocols be modified so that if an error is found in the current year’s formula rate update/true up, and that error is subsequently determined to also exist in either of the last two years’ formula rate update/true up, then that error can be corrected and trued-up for those two years as well. Such a provision would limit the review and challenge of past updates to just the input that is in continuing error, while still providing necessary ratepayer protection.

The proposed protocols contain language that implies that MISO “approves” the formula rate updates. Given that MISO’s role is essentially limited to verifying the TOs’ calculations, the Commission should direct MISO to delete or modify the language characterizing its role as “approving” TOs’ formula rate updates.

The Commission instructed that the protocols must provide for identification of any reorganization or merger transaction and explain the effect of the accounting for such transactions on inputs to the formula rate. However, the filing parties propose to limit their compliance with this Commission directive only to reorganizations or mergers that require submission of a filing under section 203 or 205 of the Federal Power Act. The OMS recommends that the Commission direct the filing parties to delete this qualification so that the protocols will address all reorganizations or mergers, not just those required to be filed under section 203 or 205 of the FPA.

II. BACKGROUND

On May 17, 2012, the Commission issued an order in Docket No. EL12-35-000 that initiated an investigation of formula rate protocols under the MISO tariff, pursuant to section 206 of the Federal Power Act⁶ to determine whether those protocols are sufficient to ensure just and reasonable rates.⁷ In particular, the Commission instituted a paper hearing process to investigate MISO’s formula rate protocols in three areas: scope of participation, transparency and challenge procedures.⁸ The May 17 Order also established a refund effective date “at the earliest date possible, which will be the date the notice of initiation of the investigation in Docket No. EL12-

⁶ 16 U.S.C. § 824e, (2006)

⁷ May 17 Order, at P 1.

⁸ May 17 Order, at P 8.

35-000 is published in the *Federal Register*.”⁹ Such notice was issued in the *Federal Register* on May 23, 2012, establishing that date as the refund effective date in this case.¹⁰

For the twelve months following the May 17 Order, parties to this proceeding filed briefs, reply briefs, and other pleadings with the Commission. In particular, the OMS filed its Initial Brief on June 20, 2012 and its Reply Brief on July 12, 2012.

On May 16, 2013, the Commission issued an *Order on the Investigation of Formula Rate Protocols* finding that the MISO *pro forma* formula rate protocol and the individual company formula rate protocols are insufficient to ensure just and reasonable rates. The Commission directed MISO and the individual MISO transmission owners with formula rate protocols on file with the Commission to file revised formula rate protocols by July 15, 2013.¹¹

On June 5, 2013, MISO and the MISO TOs submitted to the Commission a *Motion for Extension of Time and Request for Expedited Action* (“June 5 Motion”). Therein, they requested a 60-day extension of the compliance filing deadline established by the May 17 Order, to September 13, 2013. Their Motion stated that MISO and the MISO TOs request the additional time to “coordinate with each other” and express a goal of “developing uniform or reasonably consistent protocols for both historical and forward-looking formula rates.”¹²

On June 11, 2013, the OMS filed its *Response of the Organization of MISO States to Motion for Extension of Time and Request for Expedited Action of the MISO Transmission*

⁹ May 17 Order, at P 25. On May 17, 2012, the Commission also issued, in Docket No. EL12-35-000, a separate *Notice of Initiation of Proceeding and Refund Effective Date* that states that, “The refund effective date in Docket No. EL12-35-000, established pursuant to section 206(b) of the FPA, will be the date of publication of this notice in the Federal Register.”

¹⁰ May 16 Order, fn 10.

¹¹ May 16 Order, at P 1.

¹² June 5 Motion, at 3. It is notable that the protocols actually filed by the MISO Transmission Owners on September 13, 2013 are not “uniform,” although the Transmission Owners may argue that they are “reasonably consistent.”

Owners and Midcontinent Independent System Operator, Inc. (“OMS Response”). Therein, the OMS expressed no opposition to the requested extension, but recommended that “MISO and its individual transmission owners should use the additional time for meaningful consultation with their retail regulatory agencies, and with other stakeholders, to shape acceptable protocols consistent with the Commission’s order.”

On June 12, 2013, the Commission issued a *Notice of Extension of Time* extending the filing deadline to September 13, 2013. The Commission stated that its decision to grant the extension was based on consideration of the Filing Parties’ stated intent to use the extra time “to develop a compliance proposal that is most beneficial to MISO, its transmission owning members, customers and other stakeholders.”¹³

On September 13, 2013, the companies submitted their filings, as described below.

On September 13 and September 16, the Commission issued separate Notices setting October 4 as the comment deadline in the above-captioned proceedings.

On September 20, 2013, in the above-captioned proceedings, the OMS filed a Notice of Intervention and Motion for Extension of the Date for Comment. On September 26, 2013, the Commission issued a *Notice of Extension of Time* extending the comment deadline to October 18, 2013.

III. SUMMARY OF THE SEPTEMBER 13 FILINGS

The May 16 Order found that the current MISO formula rate protocols are not just and reasonable and do not ensure just and reasonable rates. The Commission directed MISO and its transmission owners to submit revised formula rate protocols. In response to the Commission’s

¹³ Docket No. EL12-35, *Notice of Extension of Time*, June 12, 2013, at 1.

direction, MISO and the majority of its TOs submitted a filing in Docket No. ER13-2379-000 (“MISO/TOs Filing”) that proposes two types of protocols. The first type of protocol applies to TOs using historical data in deriving their revenue requirement, but do not have a company-specific Attachment O formula rate template. This is referred to as the *pro forma* protocol. The second type of protocol is company-specific and applies to TOs that use a forward-looking rate formula template.

In Docket No. ER13-2375-000, Vectren and MISO submitted revisions to the Vectren forward-looking formula rate protocol found in Attachment O of the MISO tariff (“Vectren Filing”).

In Docket No. ER13-2376-000, NIPSCO and MISO submitted revisions to the NIPSCO forward-looking formula rate protocol found in Attachment O of the MISO tariff (“NIPSCO Filing”).

In Docket No. ER13-948-000, Entergy submitted a letter informing the Commission of the Entergy Operating Companies’ intention to adopt the proposed *pro forma* protocol submitted by MISO and the MISO TOs in Docket Nos ER13-2379-000 for companies using a historical test-year.¹⁴ (“Entergy Filing”)

In Docket No. ER12-2681-002, ITC Midsouth submitted a filing stating that the ITC Midsouth Operating Companies will utilize forward looking formula rate protocols that are essentially identical to the forward looking formula rate protocols filed by MISO and the MISO TOs in Docket No ER13-2379-000 for ITC’s existing MISO operating companies.¹⁵ (“ITC Midsouth Filing”)

¹⁴ Entergy Filing, at 1.

¹⁵ ITC Midsouth September 13, 2013, Filing in Docket No. ER12-2681-002, at 3.

In Docket No. EL12-35, the Michigan South Central Power Agency submitted a filing stating that, while it is one of the TOs listed in the caption of the May 16 Order, it does not have any protocols to revise at this time. Montezuma Municipal Light & Power and Tipton Municipal Utilities filed a letter committing to comply with the formula rate protocols in the MISO/TOs Filing, as they may be adopted or modified by the Commission. Finally, Muscatine Power & Water filed a letter informing the Commission that they intend to continue to utilize the MISO *pro forma* formula rate protocols as they may be adopted or modified by the Commission.

The OMS has not confirmed whether all of the transmission-owning companies having a compliance obligation pursuant to the Commission's May 16 Order have submitted protocols to comply.¹⁶

IV. COMMENTS

A. The Effective Date of January 1, 2014, as Proposed by the Transmission Owners, Must Be Rejected and the Refund Effective Date of May 23, 2012, That Was Established by the Commission in the May 17 Order and Confirmed in the May 16 Order Must Be Respected.

In the May 17 Order, the Commission recognized that in a case such as this where the Commission institutes a Section 206 investigation on its own motion, Section 206(b) of the Federal Power Act ("FPA"), requires that the Commission establish a refund effective date that is no earlier than the date of publication of the notice of the Commission's initiation of its investigation in the Federal Register, and no later than five months after the publication date.¹⁷ The Commission also stated that consistent with its general policy of providing maximum protection to customers, the refund effective date in this case would be set at the earliest date possible, which was to be the date the notice of the initiation of the investigation in Docket No.

¹⁶ The OMS urges the Commission to obtain such confirmation from the appropriate party or parties.

¹⁷ May 17 Order, at P 25; 16 U.S.C. § 824e(b).

EL12-35-000 is published in the Federal Register.¹⁸ Footnote 10 of the May 16 Order notes the fact that the May 17 Order established a refund effective date and makes clear that the applicable refund effective date for the compliance protocols ordered by the Commission is May 23, 2012.

The MISO/TOs, NIPSCO and Vectren filings all request an effective date of January 1, 2014, for the proposed tariff changes to the MISO protocols.¹⁹ The MISO/TO Filing parties contend that, given MISO's current annual formula rate update process and the time required for the information exchange and challenge procedures, it will not be possible to implement the new protocols prior to that date.²⁰ The MISO/TO Filing parties further assert that if the Commission issues an order within sixty days of the September 13 filing (e.g., by November 13, 2013), all procedural dates provided in the revised protocols for the 2012 and 2013 cycles (other than the January 31, 2014 informational filing date) would have passed and that it would be impossible to apply the procedures and deadlines in the new protocols, as proposed, prior to the annual update and true-up to occur June 1, 2014.²¹ Furthermore, MISO/TOs state that, because the informational filing will be made after the end of the time period allowed for parties to review the updates and for TOs to respond to information and document requests, the first informational filing cannot be submitted until January 31, 2015.²² The NIPSCO Filing makes a similar argument, stating that with a January 1, 2014 effective date, the formula rate protocols will be applicable for the first subsequent annual update/true-up. The Vectren Filing provides no explanation or rationale for its request to set an effective date of January 1, 2014. All of the

¹⁸ May 17 Order, at P 25.

¹⁹ MISO/TOs Filing, at 19, NIPSCO Filing, at 7 and Vectren Filing, at 5.

²⁰ MISO/TOs Filing, at 20.

²¹ MISO/TOs Filing, at 20.

²² MISO/TOs Filing, at 20.

filings assert that the proposed effective date would be “consistent with” the Commission’s notice requirements in 18 C.F.R § 35.3.²³

The OMS acknowledges the procedural peculiarities which prevent MISO and the MISO TOs from going back in time to take specific actions on specific dates as described in the MISO/TOs and NIPSCO Filings in support of the requested effective date of January 1, 2014. However, the Commission properly established the refund effective date of May 23, 2012, pursuant to the requirements of Section 206 of the FPA. Indeed, the purpose of these proceedings is to correct the flawed formula rate protocols that the Commission found to be unjust and unreasonable as currently constituted.²⁴ Under Section 206 of the FPA, whenever the Commission determines a rate, charge, or classification, or any rule regulation, practice or contract affecting such rate, charge or classification to be unjust and unreasonable, the Commission must fix by order the just and reasonable rate. By setting May 23, 2012 as the refund effective date, the Commission established that date as the date that the “fixed” protocols are to be effective.²⁵

MISO and its TOs cannot ignore the refund effective date that the Commission properly established pursuant to its authority and its obligation under FPA Section 206.²⁶ Accepting the Filing Parties’ proposed effective date of January 1, 2014, without acknowledgment of the period between May 23, 2012 and December 31, 2013, would not provide “maximum protection to

²³ MISO/TOs Filing, at 19, NIPSCO Filing, at 7 and Vectren Filing, at 5.

²⁴ May 16 Order, at P 1.

²⁵ *See, San Diego Gas & Elec. Co.*, 127 FERC ¶ 61,191 (2009) (“San Diego Gas Order”) (Commission explicitly rejects argument that section 206(a) only allows the Commission to order prospective changes in existing rates and tariffs as of the date an existing rate, tariff or charge is found be unjust and unreasonable, i.e. as of the date of a Refund Order. Commission finds that a “common sense application of sections 206(a) and (b) taken together, as intended by Congress, is that the Commission resets the just and reasonable rate as of the refund effective date.”)

²⁶ *See, San Diego Gas Order*, at P 21, 23 and 28.

customers” from the unjust and unreasonable formula rate protocols currently in the MISO tariff, but would effectively equate to a Commission acceptance of those unjust and unreasonable rates for the locked in period.²⁷ Accordingly, the Commission cannot, without imposing additional measures, accept the January 1, 2014 effective date requested by the Filing Parties. Rather, the Commission must acknowledge the May 23, 2012 refund effective date which was properly and correctly established in the Commission’s May 17 Order. To do otherwise would permit the charges produced and levied by the formula rate process between May 23, 2012 and December 31, 2013 to be unjust and unreasonable due to the deficiencies identified by the Commission in MISO’s formula rate protocols with respect to scope of participation, transparency and challenge procedures. The Commission cannot simply overlook that unjust and unreasonableness due to the timing and process issues cited by the filing parties.

A potential solution to this conundrum would allow Interested Parties, after the update/true-up posting for the first rate year established under the new protocols, to also have the ability to make information requests on the two immediately prior years’ formula rate updates and information as applicable to any formula rate charges billed on or after the refund effective date of May 23, 2012. Furthermore, Interested Parties should have the ability to make both Informal and Formal Challenges to the annual updates for which charges were levied under the formula rate on or after May 23, 2012. The timeline for the information exchange and challenge process for the applicable previous rate years could run concurrently with the timeline for the immediately applicable rate year.

Given that the time period between May 23, 2012 and December 31, 2013 has specifically been determined to have unjust and unreasonable formula rate protocols in effect, it

²⁷ May 17 Order, at P 25.

is both appropriate and reasonable to apply as much of the new formula rate protocol process as possible to the formula rate updates used to produce charges billed during that period (regardless of whether such charges were levied as a result of the revenue requirement projection process for utilities using a forward-looking formula rate template or as a result of the rate update process employed by utilities using the historical formula rate template). Taking such steps would not constitute retroactive ratemaking because notice was provided by the Commission in the form of establishment of the refund effective date.²⁸ Moreover, this solution would give meaning to the Commission's establishment of the refund effective date and would provide customers with some protection, while acknowledging that the Commission's goal of "maximum protection to customers" may not be possible for the locked in period. On the other hand, to ignore the Commission's properly established refund effective date and to set January 1, 2014 as the effective date for the new protocols would not provide customers any protection with respect to transmission charges levied under the formula rates between the period of May 23, 2012 and December 31, 2013.

B. Recommended Modifications to the Proposed Protocol Process Timeline.

1. The TOs or MISO Should Be Required to Provide Notice of the Formula Rate Update/True Up Posting and the Open Public Meeting.

In its Initial Brief, the OMS explained that "Notice is a fundamental element and prerequisite to the opportunity for interested parties to participate in the formula rate update process."²⁹ The Commission identifies "notice" as the first, and most basic, element of the "reason for including formula rate protocols in formula rates for transmission service."³⁰

²⁸ See, San Diego Gas Order, at P 28 and 33.

²⁹ OMS Initial Brief in Docket No. EL13-35, at 10.

³⁰ May 17 Order, at P 10.

Yet, the proposed protocols make no provision for notifying potentially interested parties of the formula rate update/true up postings. Rather, the TOs propose in the protocol language only to “cause such information to be posted on the MISO website and OASIS.”³¹

With respect to the transmission owners’ annual rate update meeting, the proposed protocol states only that “The Transmission Owner shall provide notice on MISO’s internet website and OASIS of the time, date, and location of the Annual Meeting.”³²

In its Initial Brief, the OMS stated that “after-the-fact posting of transmission rates on the MISO OASIS website does not constitute adequate notice.”³³

The OMS recommends that the Commission direct MISO and the TOs to amend their proposed protocols to provide notice to potentially interested parties. In particular, the OMS recommends that notice of an annual formula rate update/true up be provided within ten days of such posting and notice of the annual open meeting provided no less than seven days prior to such meeting. Mere posting does not constitute notice. Consequently, the OMS recommends that the Commission require MISO to provide electronic notice of each transmission owner’s formula rate update/true-up.³⁴ MISO proposes to define “Interested Party” as including, but not limited to, “customers under the Tariff, state utility regulatory commissions, OMS, consumer advocacy agencies, and state attorneys general.”³⁵ Accordingly, the OMS recommends that each of those parties be electronically served notice of formula rate update/true ups and annual meetings. In addition, any other party attending a transmission owner’s annual meeting or any

³¹ MISO/TOs Filing, Exhibit I Section II.B.

³² MISO/TOs Filing, Attachment O/Formula Rate Protocols, at Section II.E.

³³ OMS Initial Brief in Docket No. EL13-35, at fn 36.

³⁴ The OMS notes that MISO routinely gives electronic notice of each filing it submits to the Commission to all “Tariff Customers, MISO Members, Member Representatives of Transmission Owners and Non-Transmission Owners, the MISO Advisory Committee participants, as well as state commissions within the Region.”

³⁵ MISO/TOs Filing, Attachment O/Formula Rate Protocols, at Section II.E.

other party asserting status as an Interested Party should be added to the service list for subsequent notices.³⁶

2. The TOs Should be Required to Hold their Informational Meetings within 30 Days of Posting their Annual Update/True-up, But No Earlier than 10 Days Following Such Posting.

The OMS is concerned that under several of the proposed protocols, there is too much time between the dates that the annual update/true-up must be posted and when the TOs must hold their informational meetings. For example, pursuant to the proposed MISO/TOs timeline, the TOs must post their update/true-up by June 1 of each year, but are not required to hold their informational meeting until October 1.³⁷ Under that timeline, Interested Parties could be required to wait, at the TO's discretion, up to 120 days to clarify their understanding of the contents of the TO's annual update/true-up and to discuss at an open meeting any concerns that they may have regarding a TO's annual update/true-up. This 120 day lag is a problem because, while the proposed timeline does allow Interested Parties to submit information requests to the TOs after the update/true-up is posted, Interested Parties may not fully understand the update/true-up until after the informational meeting and then may have new or additional questions or concerns.

If a TO waits until October 1 to hold its informational meeting, the period for Interested Parties to seek information necessary to allow them to understand or challenge the update/true-up would effectively be dramatically shortened. The information exchange period ends on

³⁶ The Commission has approved such notice requirements in other formula rate protocols. For example, Attachment H-14A of PJM's tariff is the formula rate protocol for the AEP East Companies. Section 1.b. of Attachment H-14A requires the company to give "notice to Interested Parties that an open stakeholder meeting will be held" (Section 1.f(i)) and requires the company to "send an e-mail or other electronic communication to all Interested Parties that have previously requested such notification through procedures to be established by AEP that informs the recipient that the Annual Update is available . . .".

³⁷ MISO/TOs Filing, at 4.

October 1 - the latest date that a TO may hold its open informational meeting. As such, a TO could hold its informational meeting on October 1 and not be obligated to provide any additional information, should questions arise during the open meeting, because the information exchange period will have officially ended. If an Interested Party is able to submit an information request between when the open meeting concludes and before the information exchange period ends, the proposed timeline allows up to 15 days for the TOs to provide the requested information to an Interested Party. Assuming the TO takes the full 15 days to provide the requested information, the timeline would leave Interested Parties with only approximately two weeks to process the information and determine if an informal challenge is warranted; and sixty days to craft a formal challenge to submit to the Commission. Thus, by delaying the holding of the open meeting, a TO could dramatically affect an Interested Party's rights, not only with respect to information requests, but the subsequent informal and formal challenge processes as well.

In addition, the proposed information exchange protocols in the MISO/TOs Filing and the NIPSCO Filing require that the parties making informational requests "make a good faith effort to submit consolidated sets of information and document requests that limit the number and overlap of questions to the maximum extent practicable."³⁸ While such a provision will simplify the TO's task of providing the information to Interested Parties, it places an unrealistic burden on Interested Parties, given the number of transmission customers and other potentially interested parties for each TO. As a practical matter, it is highly unlikely that individual Interested Parties will know any of the following information necessary to coordinate information requests before the Annual Meeting:

- (1) the identity of all other Interested Parties;

³⁸ Section III.A of Exhibit I and Exhibit II of the MISO/TOs Filing and Section IV.E of the NIPSCO Filing.

- (2) if other Interested Parties share any of their concerns; or
- (3) which, if any, other Interested Parties share their same concerns.

The TOs' expectation that Interested Parties coordinate information requests becomes even more impractical given that the number of potentially Interested Parties will increase exponentially when the costs of a project that is shared across the MISO footprint are evaluated. Finally, and to the main point of this section, requiring Interested Parties to consolidate their data requests becomes even more unworkable the closer the TO holds its informational meeting to the end of the informational exchange period.

For all these reasons, the deadline for TOs to hold their open informational meetings must not be too close to the end of the information exchange period.

The OMS is also concerned that a TO not schedule the open meeting too soon after the formula rate update/true up is posted. If interested parties do not have sufficient time to review the posted materials, they will not be able to ask informed questions at the open meeting.

Given these two constraints, the OMS recommends that the Commission require the TOs to hold their informational meetings no later than 30 days after posting their update/true-up and no earlier than 10 days of such posting. Holding the informational meeting within that 20 day period will provide sufficient time for Interested Parties to analyze the update/true-up, formulate questions, meet with the TO to discuss the update/true-up and any concerns that they may have and then spend the rest of the information exchange period exchanging information with the TO to address any remaining concerns that they may have with the update/true-up. As explained above, holding the open meeting earlier in the process would not provide sufficient time for review of the posted materials and allowing TOs to wait until closer to the end of the information exchange period to hold their informational meeting unfairly shortens the exploratory period for

Interested Parties. A lack of information flow between the TO and Interested Parties will likely result in an increase in the number of informal challenges with the TO and complaints that ultimately end up before the Commission. Accordingly, the Commission should require all the TOs using formula rates to hold their informational meetings within 30 days of posting their update/true-up, but no earlier than 10 days of such posting.³⁹

Finally, it is unrealistic to expect Interested Parties to coordinate their information requests. As such, the OMS recommends that the Commission delete the provisions obligating Interested Parties to coordinate their information requests, particularly if the Commission chooses not to adopt the OMS's recommendation that TOs hold their public meeting within thirty days of the posting date.

3. The Commission Should Require a Joint Meeting and Joint Information Exchange Process that Incorporates all of the TOs Charging Shared Transmission Project Costs.

MISO's transmission cost allocation rules feature transmission cost sharing for Multi-value projects ("MVP"), market efficiency projects ("MEP"), and some baseline reliability projects (BRP"). In particular, one hundred percent of MVP costs are shared regionally (including on energy imports other than those to the PJM region) and the costs of MEPs of 345 kV and above are 20 percent regionally shared, with the remainder shared amongst floating sub-regions. BRP cost sharing is dependent on the date of project approval, voltage level and other

³⁹ There is precedent for the time period proposed by OMS for the TO's annual informational meeting. For example, Attachment H-14A of PJM's tariff is the formula rate protocol for the AEP East Companies. Attachment H-14A requires AEP to hold its stakeholder meeting "no earlier than ten (10) business days from the date of posting of the Annual Update and no later than June 25 [30 days after the date of posting]." (Section 1.f(i)). Similarly, Commonwealth Edison's protocol, Attachment H-13B of PJM's tariff requires that "The Annual Meeting shall take place no sooner than ten (10) days after posting of the notice and no later than thirty (30) days after the Publication Date." (Section 1.e)

characteristics. So, while investments in these projects are undertaken by particular transmission owners, at least some of their costs are borne broadly.

Traditionally, prior to transmission cost sharing, a transmission customer concerned about transmission costs could focus on its local transmission owning utility, and ignore all others. With regional cost sharing, assuring the reasonableness of each transmission owner's costs for shared cost projects is important to each transmission customer in the MISO region and, to the extent they bear MVP costs, customers in other regions.

Under these circumstances, the OMS recommends that a joint open informational meeting be held each year where all transmission owners charging shared project costs could explain to all interested parties how these costs are reflected in the formula rate update/true up. Such a joint and centralized meeting would streamline the review that an interested customer would otherwise have to undertake by separately participating in each MISO TO's annual meeting.

Adopting this recommendation for a joint centralized annual open meeting to review the charges (including prudence) for all cost shared transmission projects would not otherwise affect the material that would be covered in each individual TO's open meeting.⁴⁰ Similarly, the information exchange and challenge process could proceed under the rules established for each TO in the Attachment O protocol. For ease of administration, it may be convenient for MISO to host or otherwise facilitate such a joint centralized meeting.

⁴⁰ Regardless of whether or not the Commission adopts the OMS's recommendation for a centralized open meeting for shared transmission project costs, but especially if the Commission does not adopt such recommendation, the OMS urges the Commission to require each TO to enable teleconference call-in capability for its annual meeting.

4. The Deadline for Submitting Informal Challenges Should Not Close Before the Deadline for the TO to Respond to Information Requests Closes.

Section III.B of the MISO/TOs proposal requires the TO to respond to all information and document requests by December 1. At the same time, Section IV.A. requires Interested Parties to notify the TO by November 1, in writing, of any specific Informal Challenges. On November 1, the window of opportunity closes for an Interested Party to submit an Informal Challenge. The OMS is concerned about that date because if information is withheld by the TO until after that date, the Interested Party could have its informal challenge rights foreclosed. This concern is particularly acute if the Commission accepts the TOs' proposal to forbid parties from filing a formal challenge unless it is preceded by an informal challenge (discussed in Section IV.E.3 below). For these reasons, the OMS recommends that the Commission require the TOs to keep the window for submitting informal challenges open until at least two weeks after the TO has responded to all information requests.

5. The Informational Report Described by the Commission in its May 16 Order Should be Divided into Two Parts: One to be Submitted to the Commission at the Beginning of the Rate Update/True-up Process and Another to be Submitted at the End of the Protocol Process.

With respect to informational filings, the Commission's May 16 Order states:

[W]e will require that MISO's formula rate protocols include a requirement that transmission owners make annual informational filings of their formula rate updates with the Commission. [Footnote]⁴¹

This informational filing must be made following the time period allowed for parties to review the updates and for transmission owners to respond to

⁴¹ Except as provided otherwise in the utilities' tariffs or protocols, the Commission will consider these informational filings to be just that, informational. Challenges to the implementation of the formula rates or to the formula rates themselves should be made through the challenge procedures discussed below or in a separate complaint, as appropriate.

information and document requests, and must include any corrections or adjustments made during that period.⁴²

In compliance with this directive, the TOs propose to submit their informational filings to the Commission on January 31, following the completion of the protocol process for a particular year.

The OMS notes the Commission's statement that "staff reviews informational filings that the Commission requires be made"⁴³ and the Commission's statement that the annual informational filings will promote broad participation by interested parties, "including the Commission."⁴⁴ Nevertheless, the OMS is concerned that, if the notice to the Commission Staff about a TO's formula rate update/true up comes only at the end of the protocol process when the TO provides its informational report, then the Commission Staff review that the Commission has promised, and the Staff participation that the Commission has suggested, may not be as robust or as informed as it otherwise would be if Commission Staff participated in the protocol process for the TO's formula rate update/true up concurrent with the other interested parties.

Consequently, the OMS recommends that the informational report described by the Commission in its May 16 Order be divided into two parts: one to be submitted to the Commission at the beginning of the TO's formula rate update/true-up process and another to be submitted at the end of the protocol process. The report submitted at the beginning of the process would include the five items enumerated by the Commission in Paragraph 92 of the May 16 Order, as well as any other information reasonably necessary for the Commission Staff to

⁴² May 16 Order, at P 92, emphasis added.

⁴³ May 16 Order, at P 88.

⁴⁴ May 16 Order, at fn 56.

understand the TO's formula rate update/true up.⁴⁵ The report submitted at the end of the protocol process would cover the other items discussed by the Commission, namely, any corrections or adjustments made during that protocol period and notes regarding any aspects of the formula rate or its inputs that are the subject of an ongoing dispute under the challenge procedures.⁴⁶

Dividing the informational filing report in this way would be most useful to interested parties and would provide information about rate update/true-up postings to the Commission Staff in a timely way to enable their participation as well as providing the after-the-fact information the Commission needs to assess whether the protocol process for that TO for that rate year has worked. At the same time, it poses no additional burden (other than an additional electronic filing) to the TO, because the TO would be required to submit the same information to the Commission in any event.

C. The Commission Should Reject the TOs' Proposal to Exclude the Forward Formula Rate Projection Process from the Protocol Process and the Commission Should Direct MISO and the TOs to Amend their Filings Accordingly.⁴⁷

In its Initial Brief, the OMS expressed concern regarding the protocol process for rate projections by TOs using a forward formula rate process. In particular, the OMS stated:

⁴⁵ OMS originally made this recommendation in its Initial Brief at 17 stating, "The OMS recommends that each transmission owner be required to file its annual rate update proposal as an informational filing with the Commission."

⁴⁶ There is precedent for the two-stage informational filing process that OMS is recommending. For example, Attachment H-14A of PJM's tariff is the formula rate protocol for the AEP East Companies. Attachment H-14A requires AEP to submit its informational filing to the Commission on the date that the rate update is posted. (Section 1.b). In addition, if any changes need to be made to the annual update, as a result of the protocol process or otherwise, AEP will "file a correction to the Annual Update with the FERC as an amended informational filing describing the change(s) and the cost impact, and provide a copy of the amended informational filing to PJM for prompt posting by PJM." (Section 4.a). The OMS recommends that the Commission adopt a similar policy for the MISO TOs.

⁴⁷ [The Public Service Commission of Wisconsin does not join in this section of the Comments.](#)

Another concern is the just and reasonableness of the projections used in forward-looking formula rates. These projections are used as inputs, along with the FERC Form 1 data, and the forward-looking formula rate to establish the transmission charge. Transmission owners utilizing forward-looking formula rates only need inform interested parties what the projected inputs will be during an informational meeting and post them on their OASIS website. There is no provision for challenge, or involvement in adjustments, to projections by any other interested parties. Without any opportunity for interested parties to challenge or have input during the development of these forward-looking projections, the resultant forward-looking formula rate charges cannot be considered just and reasonable. [footnote omitted] For those reasons, forward-looking formula rate protocols should provide an opportunity for interested parties to challenge, or be included in the development of the transmission owners' projections that are used as inputs into forward-looking formula rates.⁴⁸

In its May 16 Order the Commission noted the OMS's concern⁴⁹ as well as a transmission customer's similar statement of concern regarding TOs' forward cost projections.⁵⁰

The customer explained that

interested parties have no means of testing whether such projections and the resultant charges are just and reasonable unless the Commission requires discovery procedures and challenge rights to be put in place. Absent such a requirement, inaccurate projections may force transmission customers to serve as an unwilling source of working capital.⁵¹

Despite these expressions of concern noted by the Commission, the MISO TOs that use a forward formula rate approach have not proposed a uniform practice regarding application of the protocol process to the annual rate projections.

The MISO/TO Filing explains their protocol proposal with respect to forward formula rate projections follows:

while the protocols filed here to comply with the May 16 Order address the calculation of the actual net revenue requirement and True-Up Adjustment for Transmission Owners that use a forward-looking Attachment O, the Filing Parties

⁴⁸ OMS Initial Brief in Docket No. EL12-35, at 13-14.

⁴⁹ May 16 Order, at P 54.

⁵⁰ May 16 Order, at P 47.

⁵¹ May 16 Order, at P 47.

are not submitting any substantive revisions to the provisions of these company-specific Attachment Os that relate to the derivation of the Transmission Owner's projected net revenue requirement. [footnote omitted] Individual Transmission Owners' existing Commission-approved protocols for the development of their projected net revenue requirement remain largely unchanged. Instead, the newly filed protocols apply to the determination of the actual net revenue requirement and True-Up Adjustment.⁵²

Review of the various companies' proposed treatment of forward formula rate projections under the protocols reveals these differences. For example, MidAmerican's Attachment O formula rate protocol process excludes forward formula rate projections entirely. In contrast, the Ameren transmission companies (ATXI and AIC), as well as the ITC Holdings Corporation companies (ITC and METC), permit AIC, ATXI, ITC, and METC to explain and clarify its projected net revenue requirement and provide interested parties with the opportunity to seek information and clarifications from AIC, ATXI, ITC, and METC regarding the projected net revenue requirement. But, ATXI, AIC, ITC, and METC exclude all references to formula rate projections in the "Information Exchange Procedures" and "Challenge Procedures" sections of their proposed Attachment O protocols. Finally, forward formula rate projections are included in, and covered by, each of the sections of NIPSCO's Attachment O protocols dealing with open meetings, information exchange procedures and challenge procedures.

MISO and the MISO TOs justify their proposal to exclude forward formula rate projections from the protocol process. MISO and the MISO TOs provide the following rationale in an attempt to defend their position with respect to excluding forward formula rate projections from the protocols:

As the actual net revenue requirement after the Annual True-Up is based on actual data from the Applicable Forms, [footnote omitted] instead of projected data, and

⁵² MISO/TOs Filing, at 7-8, emphasis added.

represents the total costs that are ultimately collected from transmission customers, it is just and reasonable to apply the new protocols only to the actual net revenue requirement and True-Up Adjustment. Applying the new protocols to the calculations based on actual data will help reduce the burden on transmission customers, Transmission Owners, and the Commission, by avoiding disputes over projected costs or cost support that is only preliminary in nature, when the costs and rate impact may turn out to be different once the actual net revenue requirement and Annual True-Up is calculated.

....

Additionally, transmission customers and Transmission Owners will continue to be protected because to the extent that charges resulting from the projected net revenue requirement result in either an over- or undercollection of the Transmission Owner's actual net revenue requirement, that difference will be reflected in a later year's net revenue requirement with the appropriate interest.⁵³

The Commission should reject these rationalizations for excluding the forward cost projection process from coverage of the protocols. As the OMS pointed out in its Initial Brief, "the accuracy of the projection is important so as to minimize inter-generational inequity issues because the charges are based on the projection for the period of time until the projection is trued up."⁵⁴

The concern with the lack of transparency in projected rate inputs goes beyond potential intergenerational inequities. There is an inherent incentive for TOs to inflate projected rate inputs. For example, a TO could inflate projections to increase cash flow and then adjust expenditures during the course of the year to avoid the over collection penalty. In short, as long as overall expenditures for the year reconcile, there would be no over-recovery at the time of true-up. As such, the interest assessed on over-recoveries in the true-up never becomes an issue and is therefore inadequate to curb the incentive to inflate projected rate inputs. A lack of transparency in projected rate inputs makes it difficult for federal and state regulators and other

⁵³ MISO/TOs Filing, at 7-8, emphasis added.

⁵⁴ OMS Initial Brief in Docket No. EL12-35, at fn 45.

stakeholders to compare projections to actual expenditures in a meaningful way. This is a greater concern in jurisdictions that are not entirely vertically integrated. In these instances, O&M expenses are only reviewed in Attachment O through the existing formula rate process, which the Commission has determined does not result in just and reasonable rates. Any operational expenses and capital upgrades for TOs under Commission jurisdiction face little to no direct review by federal or state regulators. For example, the Michigan PSC has approved \$68 million in capital costs as part of state certificate of public convenience and necessity proceedings out of approximately \$2 billion of capital investments since 2003 in transmission included in charges to Michigan ratepayers. The MISO/TOs' reference to charging the "appropriate" interest rate on overcharges and undercharges, respectively, does not address these concerns. Furthermore, while it is important to try to establish interest rates for overcharges and undercharges so as to maximize utilities' incentives to accurately project costs, sole reliance on such mechanisms as a method to protect ratepayers would be misplaced. As the OMS explained in its Initial Brief, "Without any opportunity for interested parties to challenge or have input during the development of these forward-looking projections, the resultant forward-looking formula rate charges cannot be considered just and reasonable."⁵⁵

The TOs' purported concern about an alleged additional burden being placed on transmission customers and the Commission if the TOs' forward projections are made subject to the formula rate protocol process rings hollow. There would be no additional burden. Nor would the TOs shoulder any additional jeopardy. Indeed, application of the protocol process to the TO's forward projections would provide an additional opportunity for the TO to consider

⁵⁵ OMS Initial Brief in Docket No. EL12-35, at 13-14.

potential concerns of interested parties (particularly as to prudence) before subsequently proceeding to incur the expected costs.

For those reasons, the OMS recommends that the Commission direct MISO and all TOs using the forward formula rate process to revise their Attachment O protocols to make the formula rate projection step subject to all aspects of the protocol process: posting, open meeting, information exchange, challenge process, and informational filing.⁵⁶ The protocol process proposed by NIPSCO in this regard represents a good approach from which to start.

D. Commission Staff Should Explicitly Be Included in the Term “Interested Party” and the Commission Should Encourage or Require the Commission Staff to Participate in the MISO TOs’ Update/True-Up Process.

While the update/true-up process will allow Interested Parties to identify errors and questionable inputs in the TOs’ formula rates, the burden to review the annual formula rate submissions does not rest with Interested Parties alone. While interested parties do play a role in raising issues about the justness and reasonableness of the formula rate charges, the Commission has the ultimate responsibility for that determination. As such, the Commission cannot rely entirely on interested parties to fulfill the Commission’s obligation of ensuring that the charges resulting from the formula rates are just and reasonable. Accordingly, the OMS recommends that Commission Staff be explicitly included in the term “Interested Party” and that the Commission encourage or require Commission Staff to participate in the MISO TOs’ update/true-up process.

In its Initial Brief, the OMS explained,

⁵⁶ There is precedent for requiring the MISO TOs to revise their proposed protocol to cover the forward cost projections as well as the true-up process. For example, Attachment H-14A of PJM’s tariff is the formula rate protocol for the AEP East Companies. Attachment H-14A provides that AEP’s Annual Review Procedures will cover “whether inputs to the true-up and projected ATRR are correct, prudent, and otherwise appropriate cost and revenue credits.” (Section 2.b).

Comprehensive and transparent rate protocols are a necessary, but not necessarily sufficient condition for ensuring the justness and reasonableness of formula rates. However, even if transparent and comprehensive formula rate protocols are in place, the Commission still has an obligation under the Federal Power Act to ensure that the charges flowing from the formula rate are, and remain, just and reasonable. That Commission obligation cannot be fulfilled merely by ensuring that interested parties have the opportunity to protect their individual interests by utilizing the formula rate protocol procedures. In addition to ensuring that comprehensive and transparent formula rate protocols are present in MISO's tariff, the Commission must take additional steps to independently ensure the continued just and reasonableness of charges imposed on transmission customers in the formula rate context.⁵⁷

As the OMS pointed out in its Initial Brief, Commission Staff participation in the update/true-up processes of each of the MISO TOs could help the Commission fulfill its obligation to ensure that the charges flowing from the formula rate are, and remain, just and reasonable.⁵⁸

E. Recommended Modifications to the Proposed Challenge Process.

1. The Protocols Should Be Modified So That They Do Not Unreasonably Limit the Scope of Information Requests and Challenges That Interested Parties May Make.

The proposed protocols arbitrarily limit the scope of information requested by Interested Parties and challenges that may be made by Interested Parties. For example, in the MISO/TOs Filing, Section III of both Exhibit I and Exhibit II details the information exchange procedures between the TO and Interested Parties. Section IV of both Exhibit I and Exhibit II details the challenge procedures. Likewise, in NIPSCO Filing, Section V of the proposed protocols details the challenge procedures. Both filings state:

Such information and document requests shall be limited to what is necessary to determine:

- (1) the extent or effect of a Material Accounting Change;

⁵⁷ OMS Initial Brief in Docket No. EL13-35, at 21.

⁵⁸ OMS Initial Brief in Docket No. EL13-35, at 21.

- (2) whether the Annual Update fails to include data properly recorded in accordance with these protocols;
 - (3) the proper application of the formula rate and procedures in these protocols;
 - (4) the accuracy of data and consistency with the formula rate of the charges shown in the Annual Update;
 - (5) the prudence of actual costs and expenditures; and
 - (6) the effect of any change to the underlying Uniform System of accounts or the Applicable Form.
- (underlining added)

In the MISO/TOs Filing, these same six criteria are detailed in Section IV.D, which is prefaced with the statement that “Informal and Formal Challenges shall be limited to...”.

TOs should not be allowed to unreasonably limit the scope of information sought by Interested Parties and the basis on which an informal or formal challenge can be made by an Interested Party. As the Commission noted in the May 16 Order, TOs frequently possess the information necessary for an Interested Party to succeed in a complaint before the Commission, but retain discretion in providing that information and that such formal challenge procedures will ensure that a transmission owner’s possession of this information does not become, in practice, a means of including inappropriate costs in its annual update and collecting unjustified charges.⁵⁹ In order for informal and formal challenge procedures to be effective, Interested Parties will need to be granted significant leeway in regards to the information they seek from the TOs. Furthermore, given the interests of the TOs in this situation, the determination of whether or not an Interested Party’s concern is unreasonable or outside the scope of the update/true-up, should be determined by the Commission, not the TO.

If the TOs’ intent with the limiting language is to address concerns that Interested Parties are going to attempt to undermine the rate formula itself⁶⁰ through excessive data requests

⁵⁹ May 16 Order, at P 120.

⁶⁰ As contrasted with the charges that flow from such formula.

outside the scope of the formula rate update/true-up, the OMS notes Section IV. K of both Exhibit I and Exhibit II in the MISO/TOs filing, which already provides sufficient protection against such concerns. Specifically, Section IV.K states:

No party shall seek to modify the formula rate under the Challenge Procedures set forth in these protocols and the Annual Update shall not be subject to challenge by anyone for the purpose of modifying the formula rate. Any modifications to the formula rate will require, as applicable, a Federal Power Act section 205 or section 206 filing.

The OMS acknowledges the Commission's practice and precedent that it is the formula itself that constitutes the rate.⁶¹ The OMS's focus in these comments remains on the protocols by which the formula rate charges are developed and on those charges.

For all of the reasons discussed above, the Commission should require the removal from the proposed protocols of the language unreasonably limiting information requests and informal/formal challenges. Specifically, the OMS recommends that the phrase, "Such information and document requests shall be limited to what is necessary to determine" be changed to "Such information and document requests may include, but shall not be limited to the following". Similarly, the OMS recommends that the phrase, "Informal and Formal Challenges shall be limited to" be changed to "Informal and Formal Challenges may include, but shall not be limited to".

2. The Commission Must Reject the Filing Parties' Proposal to Require All Formal Challenges to "be filed under and satisfy all requirements established under 18 C.F.R. § 385.206."

In addition to the requirement that the protocols must include an informal challenge procedure, the Commission has determined that interested parties must be permitted to raise a formal challenge with the Commission. The Commission has made clear that, in such formal

⁶¹ May 16 Order, at P 120

challenges, the transmission owner - as the utility proposing to charge the updated or true-up rate - must bear the burden of demonstrating the correctness of its update/ true-up.⁶²

Specifically, the Commission stated, “the transmission owner will bear the burden of demonstrating the justness and reasonableness of the implementation of its formula rate in the context of a formal challenge.”⁶³ This is distinctly different from the burden in an FPA Section 206 complaint case, where the complainant would bear the burden of proof to show that the update/true-up is unjust and unreasonable.⁶⁴

Similarly, the Commission emphasized in its May 16 Order that interested parties must continue to have the option to make a formal challenge separate and distinct from a Section 206 complaint,⁶⁵ making clear that the processes, rules and standards for each are to be distinctly different.

However, the MISO/TOs and NIPSCO protocols each include provisions that require formal challenges to satisfy all requirements of the section of the Code of Federal Regulations (18 C.F.R. § 385.206) applicable to Federal Power Act Section 206 complaint cases.

Specifically, Section IV.B of both Exhibit I and Exhibit II in the MISO/TOs Filing states:

Formal Challenges shall be filed pursuant to these protocols and shall be filed under and satisfy all requirements established by 18 C.F.R. § 385.206.⁶⁶

Likewise, Section 4.B. of the NIPSCO Filing states:

Formal Challenges shall be filed pursuant to these protocols and shall be filed under and satisfy all requirements established by 18 C.F.R. § 385.206.⁶⁷

⁶² May 16 Order, P 120.

⁶³ May 16 Order, P 120. The Commission has made clear that “any challenge to the projected costs, True-Up Adjustment or Material Accounting Change would not require the complainant to bear the ultimate burden of proof.” See, *e.g.*, American Electric Power Service Corporation, 124 FERC ¶ 61,306 (2008), at P 36.

⁶⁴ 18 C.F.R. § 385.206.

⁶⁵ May 16 Order, at P 119 and 120.

⁶⁶ Emphasis added.

The application of the Federal rule establishing filing requirements for FPA Section 206 complaints to formal challenges under the formula rate protocol includes requirements of Section 206 complaints that are inapplicable to formal challenges. In particular, the application of such rules would shift the burden of proof in formal challenges under the formula rate protocol, in contravention to the Commission’s rulings regarding burden of proof in formal challenges, as discussed in the May 16 Order.⁶⁸

For example, the title of 18 C.F.R. § 385.206 is “Complaints” and Paragraphs (b)(1) and (b)(2) of 18 C.F.R. § 385.206 require the “complainant” to:

- (1) Clearly identify the action or inaction which is alleged to violate applicable statutory standards or regulatory requirements; and
- (2) Explain how the action or inaction violates applicable statutory standards or regulatory requirements.

First, formal challenges under the formula rate protocol cannot strictly be called “complaints,” rather they are, more appropriately, “challenges.” More importantly, Paragraphs (b)(1) and (b)(2) of 18 C.F.R. § 385.206 would improperly impose the burden of proof on the challenger.

Imposing the regulations and filing requirements for FPA Section 206 complaints on challengers under the formula rate protocols would conflate Section 206 complaints with formal challenges under the formula rate protocol in violation of the Commission’s practice and precedent. Doing so would eliminate any distinction between the processes, rules and standards

⁶⁷ Emphasis added.

⁶⁸ May 16 Order, at P 120.

to be applied to formal challenges as opposed to Section 206 complaints, contrary to the Commission's clear intent that these be separate and distinct options.

For these reasons, the OMS recommends that the Commission direct MISO and the TOs to delete any language that would require formal challenges to be filed under and satisfy all filing requirements applicable to Section 206 complaints.

3. An Informal Challenge Should Not Be a Prerequisite for Interested Parties to File a Formal Challenge.

The OMS notes that the proposed protocols require Interested Parties to first file an informal challenge with the TO before filing a formal challenge.⁶⁹ While it is desirable to provide a TO with the opportunity to resolve an Interested Party's concern before proceeding to a formal challenge before the Commission, circumstances may exist that prevent parties from doing so. Indeed, under some of the proposed update/true-up timelines, the information exchange window could be compressed to the point where a comprehensive informal challenge may not be possible. As such, TOs should not be allowed to preclude the ability of Interested Parties to file formal challenges with the Commission. In this respect, the OMS notes the precedent established by Section 3.b of the challenge protocols on file for American Electric Power ("AEP") which state:

Parties shall make a good faith effort to raise all issues in a Preliminary Challenge prior to filing a Formal Challenge; provided, however, that a Preliminary Challenge shall not be a prerequisite for bringing a Formal Challenge. Failure to notify AEP East Companies of an issue with respect to an Annual Update shall not preclude an Interested Party from pursuing such issue in a Preliminary Challenge or Formal Challenge.

The OMS recommends that the Commission direct MISO and its TOs to remove from their proposed protocols, any language requiring that Interested Parties first submit an informal

⁶⁹ MISO/TOs Filing, Exhibits I and II, Section IV.L.

challenge to the TO before filing a formal challenge with the Commission and to replace it with a provision like that in AEP's protocol.

F. Recommended Modifications to the Information Exchange Process.

1. The TOs Should be Required to Provide Information on Procurement Methods and Cost Control Methodologies So That Interested Parties Have the Means to Assess Prudence.

In its Initial Brief, the OMS emphasized the importance of having a formula rate protocol process in place sufficient to enable interested parties to assess, and challenge, the prudence of the costs sought to be flowed through the formula rate by the transmission utility. Specifically, the OMS stated,

Finally, since the Commission has ruled that transparency includes the provision of information sufficient for interested parties to assess the reasonableness and prudence of costs that are proposed to be flowed through the formula rate, the protocols must describe in detail the cost data that MISO and the transmission owners should be required to collect, compile and provide to interested parties. Particularly, as costs for new transmission investment rapidly increase, the transmission protocols must provide a meaningful forum to assess the prudence of costs. The opportunity for interested parties to challenge the prudence of costs can serve as a needed check on transmission owners' incentives to inflate their rate base. Reasonable measures for controlling costs in the context of new transmission investment are vitally important in a formula rate and CWIP environment where traditional tests of prudence, such as used and useful, are not applied.⁷⁰

In the May 16 Order, the Commission shared the OMS's concerns with regard to prudence of costs. In addition to requiring that the protocols require the transmission utility to provide information and documents to enable interested parties to assess prudence of costs and expenditures and enabling interested parties to pursue informal and formal challenges regarding the prudence of utility costs and expenditures, the Commission stated as follows:

⁷⁰ OMS Initial Brief in Docket No. EL12-35, at 14.

we find that during the review period, interested parties must be allowed to obtain upon request information on procurement methods and cost control methodologies used by transmission owners in order to facilitate interested parties' analysis of whether the transmission owners' costs were prudently incurred.⁷¹

OMS recommends that the Commission direct MISO and the TOs to explicitly include this provision regarding procurement methods and cost control methodologies directly in the formula rate protocols.

It is important for interested parties to specifically have the right to obtain this data. As the Commission made clear,

parties seeking to challenge the prudence of a transmission owner's expenditures must first create a serious doubt as to the prudence of those expenditures before the burden of proof shifts to the transmission owner.⁷²

As the OMS explained in its Initial Brief, if an interested party is expected to carry this burden of first creating serious doubt about the prudence of a utility's expenditures, the interested party must be able to secure accurate and complete information from the utility. This includes information on procurement methods and cost control methodologies used by the utility.

For these reasons, the OMS recommends that the Commission reiterate the decision made in its May 16 Order and direct MISO and the transmission owners to submit protocol language that specifically provides to interested parties data and information on "procurement methods and cost control methodologies used by transmission owners."

2. The Commission Must Reconcile the Treatment of Confidential Data and the Need to Provide Information to Interested Parties.

Section 4.G. of the NIPSCO Filing states:

⁷¹ May 16 Order, at P 90.

⁷² May 16 Order, at P 121.

NIPSCO will cause to be posted on the MISO internet website and OASIS all information and document requests from Interested Parties and NIPSCO's response(s) to such requests. Such posting will be subject to all applicable confidentiality protections under the Tariff.

Similar language regarding confidentiality appears in the MISO/TOs Filing under Section III.C and Section IV.E. of Exhibit I and Exhibit II:

The Transmission Owner will cause to be posted on OASIS all information requests from Interested Parties and the Transmission Owner's response(s) to such requests. Such posting will be subject to all applicable confidentiality protections under the Tariff.

And,

[Transmission Owner] will cause to be posted all Informal Challenges from Interested Parties and [Transmission Owner's] response(s) to such Informal Challenges. Such posting will be subject to all applicable confidentiality protections under the Tariff.

The OMS acknowledges the Commission's past decisions regarding the treatment of confidential information. However, the language proposed by MISO and the TOs could result in Interested Parties not being granted access to information necessary to allow a proper and thorough analysis of the update/true-up or the crafting of meaningful Informal/Formal Challenges. For example, the OMS notes the instance where Southwestern Electric Cooperative was provided information by a TO, but was unable to use it to challenge an update because the TO had designated all of the information as "confidential". The concern here is significant, as it is the data and information that makes up the inputs to the formula rate components.

The Commission has, in other cases, approved protocol language that specifically permits an interested party to base its challenges on use confidential data provided by the TO. In particular, Commonwealth Edison's protocol provides that "In making or resolving any Preliminary or Formal Challenge under this Section, a party may rely on all information

provided by ComEd, including information provided under the terms of a confidentiality agreement or protective order. . .”⁷³

If the Commission intends to rely heavily on Interested Parties to identify flawed updates and true-ups, then access to the confidential information by Interested Parties is critical. Moreover, the inability to access information necessary to address concerns with an update/true-up will likely result in increased formal challenges before the Commission. Accordingly, if the formula rate protocols are to be effective, the Commission must reconcile the proposed confidentiality language and the need of Interested Parties for access to information. In addition, OMS recommends that the Commission direct the TOs to include a provision enabling challenges to be based on confidential information, such as the provision cited above from the ComEd protocol.

G. Finality of Formula Rate Charges.

Section IV.I of Exhibit I and II of the MISO/TOs Filing and the NIPSCO Filing address the finality of a formula rate update and state:

Subject to judicial review of FERC orders, each Annual Update shall become final as to the Annual Transmission Revenue Requirement calculated for the Rate Year for which the Annual Update was calculated and no longer subject to challenge pursuant to these Annual Review protocols or by any other means by FERC or any other entity on the later to occur of (i) passage of the thirty (30) day period (or extended period, if applicable) for making a Formal Challenge if no such challenge has been made and FERC has not initiated a proceeding to consider the Annual Update, or (ii) a final FERC order issued in response to a Formal Challenge or a proceeding initiated by FERC to consider the Annual Update.

The OMS appreciates the TOs’ concern that they not be subject to continual review of past years’ updates/true-ups. However, at the same time, the TOs should not be allowed to keep

⁷³ PJM Tariff, Attachment H-13B, at Section 3.g.

revenues that were collected under charges that were/are unjust and unreasonable due to the inclusion of improper formula rate inputs.

The Commission's long-standing precedent is that, under formula rates, parties have the right to challenge the inputs to or the implementation of the formula at whatever time they discover errors in the inputs to or implementation of the formula. Indeed, customers may not uncover errors in data or imprudent or otherwise inappropriate costs until well after the challenge period.⁷⁴

The Commission has made clear that “[w]hile prompt identification of disputes is certainly a reasonable goal to strive for, the Commission cannot allow utilities to recover excessive rates through automatic adjustment clauses because the customer did not complain in as prompt a manner as the company believes the customer should have.”⁷⁵ Similarly, the Commission has allowed review of potentially imprudent costs charged to customers in prior-year formula rates.⁷⁶ Accordingly, in that previous case, the Commission rejected the utility's proposal to limit the period of review to the prior 12 months. Furthermore, the Commission has ruled that it may order refunds for past periods where a utility has either misapplied a formula rate or otherwise charged rates contrary to the filed rate.⁷⁷

On these bases, the OMS recommends that the Commission follow its established practices under the law and direct the TOs to remove the proposed language that would limit interested parties' rights to review past charges flowing out of the formula rate. The Commission has made clear in previous cases that it will not allow utilities to recover excessive rates through automatic adjustment clauses because the customer did not complain in as prompt a

⁷⁴ *American Electric Power Service Corporation*, 124 FERC ¶ 61,306 (2008), at P 35.

⁷⁵ *North Carolina Electric Membership Cooperative v. Carolina Power & Light Co.*, 57 FERC ¶ 61,332, at 62,065 (1991)

⁷⁶ *See, e.g., Yankee Atomic Electric Co.*, 60 FERC ¶ 61,316, at 62,096-97 (1992)

⁷⁷ *See Appalachian Power Co.*, 23 FERC ¶ 61,032 at 61,088 (1983); *DTE Energy Trading, Inc. v. Midwest Independent Transmission System Operator, Inc.*, 111 FERC ¶ 61,062, at P 28 (2005); *Quest Energy, L.L.C. v. The Detroit Edison Co.*, 106 FERC ¶ 61,227, at P 21 (2004).

manner as the company believes the customer should have. If charges are found to have been incorrectly or inappropriately applied, affected customers should receive refunds. The TOs' proposal to change the Commission's established practice in this regard should not be accepted.

H. The Commission Should Direct MISO to Delete Characterization of Its Role as "Approving" TOs' Formula Rate Updates.

The "Transmission Provider Formulaic Rates Description" section of MISO's Attachment O contains the following sentence:

After the Transmission Provider has reviewed the templates for accuracy, it will issue a letter to each Transmission Owner informing them that the rates and revenue requirements resulting from the template was reviewed and approved by the Transmission Provider.⁷⁸

The OMS wishes to call attention to the word "approved." In its May 16 Order, the Commission described MISO's function in reviewing the TOs' rate updates as follows:

MISO explains its review of transmission owners' populated formula rate templates. [footnote omitted] MISO states that it ensures that the populated Attachment O is populated in conformance with the Tariff by verifying that the amounts reported on the Attachment O correspond to the amounts reported on the FERC Form No. 1, Rural Utilities Service (RUS) Form 12 and Energy Information Administration (EIA) Form 412 financial statements. MISO states that it also verifies that any amounts not reflected in these financial statements are supported by other worksheets and will also require a transmission owner to provide supporting information in the event that there is a significant anomalous change in a line item as compared to the prior year. However, MISO states that any further review of accounting treatment of the inputs to FERC Form No. 1 is beyond the scope of MISO's review.⁷⁹

The OMS does not believe that the role performed and actions taken by MISO, as described by the Commission, constitute "approval" of the TOs' formula rate charges. Nor does the OMS believe that MISO, as a public utility, should have responsibility for "approving" the charges that another public utility will collect from its customers.

⁷⁸ MISO/TOs Filing, Attachment O/Formula Rate Protocols, Page 1 of 2.

⁷⁹ May 16 Order, at P 68.

In its Reply Brief, the OMS stated,

While MISO’s review of a transmission owner’s formula rate submission may ensure that the figures in the template match those in a FERC Form 1, it is not sufficiently rigorous to ensure that the inputs are both accurate and appropriate.⁸⁰

The OMS explained that,

Contrary to the claims of MISO and other supporters of the current MISO Attachment O protocols, MISO’s review appears to be largely clerical in nature and does not provide sufficient customer protection. While the OMS appreciates the review that MISO performs in the formula rate context, it appears that such a review is not sufficient to ensure that the resulting formula rate charges are just and reasonable.⁸¹

While restating here the OMS’s appreciation of the role performed by MISO in its review of the TOs’ formula rate updates, the OMS is concerned that retaining in the tariff the mis-characterization of MISO’s role in that regard as “approval” could lead to future misunderstandings and disputes. To preclude such future misunderstandings and disputes, the OMS recommends that the Commission direct MISO to delete the words “and approved” from Attachment O. As an alternative to its primary recommendation for striking those words without replacement, the OMS would find acceptable replacing those words with a phrase such as “and accepted by the Transmission Provider in its role as administrator of the Tariff.”⁸²

I. The Proposed Qualification on Merger Reporting Should be Removed.

The Commission’s May 16 Order requires that the protocols “must provide for identification of any reorganization or merger transaction and explain the effect of the accounting for such transactions on inputs to the formula rate.”⁸³ In response, the protocol

⁸⁰ OMS Reply Brief in Docket No EL12-35, at 6-7, emphasis in original.

⁸¹ OMS Reply Brief in Docket No EL12-35, at 7.

⁸² This alternative language mirrors the language the MISO routinely includes in its filings associated with TOs’ rates. For example, see the September 13 Filing, at 2.

⁸³ May 16 Order, at P 87.

proposed by the Filing Parties requires each TO's annual formula rate update to "[i]dentify any reorganization or merger transaction during the previous year that required submission of a filing under section 203 or 205 of the Federal Power Act and explain the effect of the accounting for such transaction(s) on inputs to the formula rate."⁸⁴ The Commission's Order clearly stated, "any reorganization or merger transaction." By qualifying their compliance proposal, the MISO TOs would remove the need to report reorganizations and mergers that do not require section 203 or 205 filings. Given the non-corporate nature of many MISO TOs, and the status of some as non-FERC-jurisdictional utilities, that loophole may be substantial. Accordingly, the OMS recommends that the Commission direct MISO to delete the words "that required submission of a filing under section 203 or 205 of the Federal Power Act" from this section.

V. CONCLUSION

Wherefore, for all of the reasons explained above, the OMS requests that the Commission take these Comments into account in its determinations and implement the recommendations made herein regarding formula rate protocols.

The OMS submits this request because a majority of its 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:

Arkansas Public Service Commission
Illinois Commerce Commission
Indiana Utility Regulatory Commission
Iowa Utilities Board
Kentucky Public Service Commission
Louisiana Public Service Commission
Michigan Public Service Commission
Minnesota Public Utilities Commission
Mississippi Public Service Commission

⁸⁴ MISO/TOs Filing, Attachment O/Formula Rate Protocols, at Section II.D.8.c (emphasis added).

Missouri Public Service Commission
Montana Public Service Commission
City of New Orleans
North Dakota Public Service Commission
South Dakota Public Utilities Commission
Public Utility Commission of Texas
Wisconsin Public Service Commission

The Manitoba Public Utilities Board took no part in preparing this pleading and therefore abstains.

The Indiana Office of Utility Consumer Counselor and the Minnesota Department of Commerce, as associate members of the OMS, participated in these Comments and generally support them.

Respectfully Submitted,

William H. Smith, Jr.
William H. Smith, Jr.
Executive Director
Organization of MISO States
100 Court Avenue, Suite 315
Des Moines, Iowa 50309
Tel: 515-243-0742

Dated: October 18, 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 Des Moines, Iowa, this 18th day of October, 2013.

William H. Smith, Jr.