

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

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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
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	)	
Midcontinent Independent System Operator, Inc. (Vectren)	)	Docket No. ER13-2375-000
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**MOTION FOR LEAVE TO ANSWER AND ANSWER  
OF THE ORGANIZATION OF MISO STATES**

Pursuant to Rule 212 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“Commission”), 18 C.F.R. § 385.212, the Organization of MISO States (“OMS”) respectfully submits the following Motion for Leave to Answer and Answer in the above-captioned dockets in response to the Answers submitted to the Commission by the MISO Transmission Owners (“MISO TOs”), Vectren Energy Delivery of Indiana, Inc. (“Vectren”), and Northern Indiana Public Service Company (“NIPSCO”) on November 15, November 1, and November 14, respectively.

**I. MOTION FOR LEAVE TO ANSWER**

Pursuant to Rule 212,<sup>1</sup> OMS respectfully requests leave to file this Answer. Generally, an answer to comments or a protest is not permitted;<sup>2</sup> however, the Commission allows such answers when the answer provides useful and relevant information that will assist the

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<sup>1</sup> 18 C.F.R. § 385.212 (2013).

<sup>2</sup> 18 C.F.R. § 385.213(a) (2013).

Commission in its decision-making process,<sup>3</sup> corrects factual inaccuracies and clarifies the issues,<sup>4</sup> assures a complete record in the proceeding,<sup>5</sup> provides information helpful to the disposition of an issue,<sup>6</sup> or permits the issues to be narrowed.<sup>7</sup>

OMS submits that this Answer satisfies the above criteria by aiding the Commission in its decision-making process, clarifying the record, assuring a complete factual record in the proceeding and providing information helpful to the disposition of the issue of whether the compliance filings submitted in these dockets constitute formula rate protocols that are just and reasonable and not unduly discriminatory.

## II. ANSWER

### A. Effective Date for the Protocols

In its comments submitted to the Commission in this proceeding on October 18, 2013, (“October 18 Comments”), the OMS noted the Commission’s Orders setting May 23, 2012, as the refund effective date for the compliance protocols directed by the Commission in this case.<sup>8</sup> The OMS requested that the Commission retain that date as the effective date for the protocols,

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<sup>3</sup> See e.g., *Pioneer Transmission, LLC v. Northern Indiana Public Service Co. and Midwest Independent Transmission Sys. Operator, Inc.*, 140 FERC ¶ 61,057 at P 93 (2012); *Midwest Independent Transmission Sys. Operator, Inc.*, 131 FERC ¶ 61,285 (2010); *Southwest Power Pool, Inc.*, 131 FERC ¶ 61,252 at P 19 (2010), *reh’g denied*, 137 FERC ¶ 61,075 (2011) (accepting answers that “provided information that assisted us in our decision making process”); *Duke Energy Kentucky, Inc.*, 122 FERC ¶ 61,182 at P 25 (2008) (accepting answers in proceeding on Wholesale Distribution Service agreements that “provided information that assisted us in our decision-making process”); *Tallgrass Transmission, LLC et al.*, 125 FERC ¶ 61,248 at P 26 (2008); *PJM Interconnection, L.L.C.*, 120 FERC ¶ 61,083 at P 23 (2007) (answer to protests permitted when it provides information to assist the Commission in its decision-making process).

<sup>4</sup> See e.g., *Entergy Services Inc.*, 123 FERC ¶ 61,227 (2009).

<sup>5</sup> See e.g., *Pacific Interstate Transmission Co.*, 85 FERC ¶ 61,378 at P 62,443 (1998), *reh’g denied*, 89 FERC ¶ 61,246 (1999); *Morgan Stanley Capital Group, Inc. v. New York Independent Sys. Operator, Inc.*, 93 FERC ¶ 61,017 at P 61,036 (2000) (accepting an answer that was “helpful in the development of the record...”).

<sup>6</sup> See e.g., *CNG Transmission Corp.*, 89 FERC ¶ 61,100 at P 61,287, n. 11 (1999).

<sup>7</sup> See e.g., *PJM Interconnection, L.L.C.*, 84 FERC ¶ 61,224 at P 62,078 (1998); *New Energy Ventures, Inc. v. Southern California Edison Co.*, 82 FERC ¶ 61,335 at P 62,323, n. 1 (1998).

<sup>8</sup> OMS Comments, at 9.

rather than January 1, 2014, as requested by the MISO TOs, Vectren, and NIPSCO.<sup>9</sup> As the OMS explained, the refund effective date, which was properly established by the Commission in its Orders pursuant to the Federal Power Act, must be respected and given meaning.<sup>10</sup> The OMS also proposed a workable remedy to the companies' inability to go back in time to implement the new protocol milestones and timelines for the period between May 23, 2012 and December 31, 2013, while still providing a means for review and challenge by Interested Parties.<sup>11</sup>

The MISO TOs, however, continue in their Answer to urge the Commission to ignore the Commission's previous determination establishing May 23, 2012, as the applicable refund effective date for the compliance protocols.<sup>12</sup> In particular, the MISO TOs state that the Commission has "equitable discretion" in establishing an effective date.<sup>13</sup> While the MISO TOs are correct about the Commission's equitable discretion in setting a refund effective date, they ignore the fact that the Commission has already exercised its discretion on this issue in this case by establishing the earliest refund effective date allowable under Section 206 of the Federal Power Act, rather than an alternative date up to five months thereafter.<sup>14</sup> The Commission specifically explained that its reason for choosing the effective date in this case was to "provide maximum protection to customers."<sup>15</sup> As the OMS explained, to make this maximum protection real, the Commission cannot accept a January 1, 2014, effective date in this case without adopting compensating measures for the period between May 23, 2012, and December 31, 2013.

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<sup>9</sup> OMS Comments, at 11.

<sup>10</sup> OMS Comments, at 11-12.

<sup>11</sup> OMS Comments, at 12-13.

<sup>12</sup> MISO TOs' Answer, at 29-30.

<sup>13</sup> MISO TOs' Answer, at 30.

<sup>14</sup> The OMS notes that it would have been statutorily impermissible for the Commission to have selected January 1, 2014 as the refund effective date in this case. Despite this statutory prohibition, the adoption of the MISO TOs' proposal would have the same effect.

<sup>15</sup> Midwest Indep. Transmission Sys. Operator, Inc., 139 FERC ¶ 61,127 (2012) at P 25.

The MISO TOs follow their “equitable discretion” statement with an attempt to tie the facts of the instant case to previous cases wherein the Commission also exercised its discretion to decide whether or not to actually order refunds, having previously set a refund effective date. In particular, the MISO TOs cite the following cases for the precept that the Commission has “discretion in fashioning remedies”<sup>16</sup> and, particularly, whether or not the Commission has discretion to order refunds:

- *Consolidated Edison Co. v. FERC*, 510 F.3d 333, 339 (D.C. Cir. 2007);
- *Town of Concord v. FERC*, 955 F.2d 67, 72-76 (D.C. Cir. 1992);
- *La. Pub. Serv. Comm’n v. FERC*, 174 F.3d 218, 225 (D.C. Cir. 1999).

However, the relevance of these cases to the issue at hand is suspect as they dealt directly with rates, rather than the processes by which transmission charges are developed under a formula rate approach. Furthermore, in this proceeding the Commission found that “the MISO and individual company formula rate protocols are insufficient to ensure just and reasonable rates.”<sup>17</sup> The Commission has also stated that “annual formula rate updates and informational filings are not themselves rates and do not constitute changes in the underlying rate itself (that is, the formula, which is the rate).”<sup>18</sup>

So, the Commission in this case has found that the MISO protocols that have been in effect, and which are part of the tariff and constitute a process by which the transmission charges are periodically updated pursuant to a formula rate, are unjust and unreasonable. The question at issue here is whether the Commission may (or must), once it determines the just and reasonable protocol process, establish and fix that just and reasonable protocol process and apply it to the period beginning with the refund effective date previously established. The OMS has

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<sup>16</sup> MISO TOs’ Answer, at 30.

<sup>17</sup> May 16 Order, at P 1.

<sup>18</sup> *Midwest Indep. Transmission Sys. Operator, Inc.*, 143 FERC ¶ 61,149 (2013), at P 85, (“May 16 Order”).

acknowledged that it is not possible in this case for the Commission to apply the new protocol process, including the timelines and mileposts, to past periods without some modifications.<sup>19</sup> Nevertheless, the Commission may (and perhaps must) apply a protocol process that the Commission determines to be just and reasonable to cover the period back to the established refund effective date, and that is what the OMS recommends the Commission do in this case. Once Interested Parties have access to use the revised protocol process to review charges levied under the formula rates in place during the period May 23, 2012 through December 31, 2013, it may be discovered that some charges may have been incorrectly or inappropriately levied and some revenues may have been improperly recovered. The OMS urges the Commission to explain in this case how such possibilities might be resolved. Options may include refunds, reconciliations or true-ups.

NIPSCO also continues to support January 1, 2014, as the effective date for the protocols in this case.<sup>20</sup> NIPSCO cites a sentence in the OMS's Comments as indicating "some confusion" on the OMS's part as to the findings in the Commission's May 16 Order<sup>21</sup> regarding the refund effective date.<sup>22</sup> The sentence in the OMS's forty-one page Comments that NIPSCO refers to states as follows:

The Commission has found that the formula rates that have been in use since May 23, 2012, are unjust and unreasonable.

The OMS wishes to concede that this sentence should have stated as follows:

The Commission has found that the formula rates protocols that have been in use since May 23, 2012, are unjust and unreasonable.

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<sup>19</sup> OMS Comments, at 12.

<sup>20</sup> NIPSCO Answer, at 4.

<sup>21</sup> May 16 Order, at P 1.

<sup>22</sup> NIPSCO Answer, at 4, citing to 2 and 9-13 of the OMS Comments.

The OMS regrets the inadvertent drafting error in this regard and appreciates NIPSCO's attention to detail, but wishes to assure both NIPSCO and the Commission that OMS has no confusion about the Commission's clear statements regarding the refund effective date in this case.<sup>23</sup>

NIPSCO also asserts that the letter to MISO from the Commission's Penny S. Murrell (Director, Division of Electric Power Regulation – Central) dated October 31, 2013, somehow supports NIPSCO's proposal to make January 1, 2014 the effective date for the protocols in this case, rather than May 23, 2012.<sup>24</sup> However, as the OMS reads Ms. Murrell's letter, it merely points out that the MISO TOs and NIPSCO submitted their September 13, 2013, filings under the wrong eTariff filing code.<sup>25</sup> Ms. Murrell's letter clearly states that the protocol tariff submitted to the Commission by the MISO TOs, NIPSCO, and the other transmission owners was "submitted to comply with the Commission's directives in the May 16 Order."<sup>26</sup> The refund effective date that the OMS supports was established by the Commission in the May 16 Order, so NIPSCO's suggestion that the letter pointing out NIPSCO's filing error somehow supports NIPSCO's proposed effective date has no substance or basis and should be ignored.

Vectren also opposes application of the Commission's May 23, 2012, refund effective date to the protocols in this case.<sup>27</sup> Vectren asserts that that the May 23, 2012, refund effective

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<sup>23</sup> The OMS also wishes to point out that, although NIPSCO asserts that the OMS made this drafting error on both page 2 and pages 9-13 of its Comments, NIPSCO is incorrect. The OMS made the drafting error only on page 2 of its Comments, which was in the Summary section and not in the detailed section of the OMS's Comments.

<sup>24</sup> NIPSCO Answer, at 4.

<sup>25</sup> The MISO TOs and NIPSCO apparently used Code 10 (Rate Schedule Change Other Than Rate Increases) rather than Code 80 (Compliance Filing).

<sup>26</sup> Murrell letter, at 2.

<sup>27</sup> Vectren Answer, at 3.

date is not applicable because “there are no monies to be refunded.”<sup>28</sup> However, it is unclear how Vectren can assert with such confidence that there are no monies to be refunded for rate years in which there was no effective protocol process in place to allow interested parties to review or challenge Vectren’s formula rate updates. Indeed, Vectren’s conclusion can be reached only after the revised protocol process is applied. Accordingly, the OMS requests that the revised protocol process be applied to the maximum extent possible.

Vectren also argues that application of a May 23, 2012, refund effective date to the protocols in this case would “require that two years’ annual updates be re-opened.”<sup>29</sup> The OMS would point out that under the Commission’s rules and requirements, charges produced under formula rates are always “open” until definitively closed by the Commission. As the Commission stated in the May 16 Order,

We reject the arguments made by certain parties that, after its initial review, the Commission has no authority under section 205 of the FPA to review a formula rate or the formula rate inputs, as well as the arguments that it is beyond the Commission’s authority to require informational filings, additional audits, etc.<sup>30</sup> Transmission owners are responsible under the FPA for demonstrating that the charge produced by a formula rate complies with the requirements of section 205. Further, the Commission has discretion to prescribe the manner in which public utilities are to make available their books and records to the Commission. [footnote omitted] We find that, pursuant to the FPA, and exercising such discretion, the Commission does, in fact, have the authority to require utilities to make available detailed information regarding their formula rates and inputs.<sup>31</sup>

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<sup>28</sup> Vectren Answer, at 3.

<sup>29</sup> Vectren Answer, at 3.

<sup>30</sup> See *PJM Interconnection, L.L.C.*, 110 FERC ¶ 61,053 at P 120 & n.105 (explaining that although the Commission’s acceptance of a formula rate authorizes a utility to use the formula rate on an ongoing basis, the costs used in applying the formula rate are not part of the rate and are subject to both challenge and review).

<sup>31</sup> May 16 Order, at P 84.

In this context, the Commission has clearly stated, “the costs used in applying the formula rate are not part of the rate and are subject to both challenge and review”<sup>32</sup> and that the transmission owner “continues to bear the burden of demonstrating the justness and reasonableness of the rate resulting from its application of the formula.”<sup>33</sup> So, establishing May 23, 2012, as the refund effective date in this case would not “re-open” the charges imposed by Vectren under the previous two rate updates. Rather, those rate updates are, and always have been, open and subject to refunds. Accordingly, the question at hand is what review and challenge processes should be available to Interested Parties with respect to those two rate updates.

The OMS continues to recommend, consistent with the Commission’s May 16 Order, that the protocols approved by the Commission in this case be applied, to the greatest extent possible, to the formula rate charges levied between May 23, 2012 and December 31, 2013 and that the full applicability of the protocols be applied going forward from January 1, 2014.

#### **B. Application of the Protocols to Forward Net Revenue Requirement Projections<sup>34</sup>**

In its October 18 Comments, the OMS noted that the MISO TOs proposing to use a forward formula rate process have not proposed, in this case, a uniform approach for applying the formula rate protocols to their net revenue requirement projections.<sup>35</sup> Indeed, the OMS pointed out that only NIPSCO proposes to apply the protocol processes of notice, review, information exchange, challenge, and informational filing to their forward formula rate projections.<sup>36</sup> Accordingly, the OMS recommended that the Commission direct MISO and all

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<sup>32</sup> *PJM Interconnection, L.L.C.*, 110 FERC ¶ 61,053 at P 120 & n.105.

<sup>33</sup> May 16 Order, at P 120, underlining added.

<sup>34</sup> The Public Service Commission of Wisconsin does not join in this section of the pleading.

<sup>35</sup> OMS Comments, at 24.

<sup>36</sup> OMS Comments, at 24.

MISO TOs using a forward formula rate approach to revise their Attachment O protocols to make the formula rate projection step subject to all aspects of the protocol process.<sup>37</sup>

In their Answer, the MISO TOs argue that applying the protocols to the projected net revenue requirements is not required by the Commission's Order and would provide little benefit to Interested Parties.<sup>38</sup> The MISO TOs assert that the Commission should focus on "the actual costs that customers pay", rather than the projected net revenue requirement.<sup>39</sup> Such a recommendation ignores the fact that customers do actually pay the costs reflected in the MISO TOs' projected net revenue requirement. Indeed, if those projections are inflated, customers will not obtain a refund of the improperly collected rates until several years later, and, even then, only if the subsequent challenge process is successful at the true-up stage.<sup>40</sup>

The MISO TOs assert that applying the formula rate protocols to "costs that are only preliminary in nature" would be "wasteful, duplicative, and administratively burdensome."<sup>41</sup> However, from the customer's perspective, it would not be wasteful to have access to a review and challenge process for revenue requirement projections that customers will actually have to pay. Indeed, it is unreasonable to expect customers to pay inflated rates for a year and only after that year has passed, have access to a process for reviewing and challenging costs that they have already been forced to pay. There would be no waste, duplication, or administrative burden if Interested Parties had an opportunity to review and challenge a MISO TO's inflated and unreasonable rate projection at the projection stage, and obtain relief at that stage, rather than only at the true-up stage.

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<sup>37</sup> OMS Comments, at 26.

<sup>38</sup> MISO TOs' Answer, at 31.

<sup>39</sup> MISO TOs' Answer, at 31.

<sup>40</sup> This lag is at the heart of the intergenerational equity concern discussed in the OMS's Comments (at 25).

<sup>41</sup> MISO TOs' Answer, at 31.

As to the MISO TOs' argument that applying the protocols to the projected net revenue requirements is not required by the Commission's Order,<sup>42</sup> the OMS notes the following statements from the Commission's May 16, 2013 Order in this case:

- We find that MISO's formula rate protocols provide insufficient transparency with respect to information about the transmission owners' costs and revenue requirements.<sup>43</sup>
- Having reviewed and considered the various arguments raised in the briefs filed, we find that the transparency currently provided by the MISO formula rate protocols is insufficient to ensure that transmission customers pay just and reasonable rates.<sup>44</sup>
- Both a formula rate and its inputs must be transparent; it is essential to their being just and reasonable.<sup>45</sup>
- To this end, to be just and reasonable, the MISO formula rate protocols must be revised to provide interested parties with the information necessary to understand and evaluate the implementation of the formula rate for either the correctness of inputs and calculations, or the reasonableness of the costs to be recovered in the formula rate.<sup>46</sup>
- The MISO formula rate protocols must include greater detail regarding the financial and cost information upon which a transmission owner's rates are developed.<sup>47</sup>
- Transmission owners are responsible under the FPA for demonstrating that the charge produced by a formula rate complies with the requirements of section 205.<sup>48</sup>

These statements summarize the extent of the Commission's concern for transparency in MISO's formula rate protocols, including the reasonableness of the projected costs to be recovered in the formula rate. The Commission has been clear that the MISO TOs are responsible under the FPA for demonstrating that the charge produced by a formula rate

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<sup>42</sup> MISO TOs' Answer, at 31.

<sup>43</sup> May 16 Order, at P 81.

<sup>44</sup> May 16 Order, at P 81.

<sup>45</sup> May 16 Order, at P 83.

<sup>46</sup> May 16 Order, at P 83, underlining added.

<sup>47</sup> May 16 Order, at P 86.

<sup>48</sup> May 16 Order, at P 84.

complies with the requirements of Section 205 of the FPA. The Commission's expression of concern regarding transparency and the Commission's reiteration of the MISO TOs' responsibility to demonstrate the just and reasonableness of the charges produced by the formula rate apply to charges produced in the revenue requirement projection stage as well as the true-up stage. The protocol process, likewise, must be applied in both contexts as the OMS recommends.

Finally, in response to the OMS's concern that a lack of transparency in projected rate inputs makes it difficult for federal and state regulators and other stakeholders to compare projections to actual expenditures in a meaningful way<sup>49</sup>, the MISO TO's argue that the proposed protocols provide defined and well-structured procedures pursuant to which all Transmission Owners will make actual data available, and by which Interested Parties (including OMS and each state commission) can submit Information Requests and make Informal or Formal Challenges.<sup>50</sup>

The OMS acknowledges the TOs' willingness to make data available to interested parties and would reiterate that comparing projected costs to actual expenditures over the construction and life of a transmission project cannot be done optimally in the proposed Annual True-Up process without similar and complementary access to projected and actual numbers. Without consistent and continuing details on projections it is difficult, if not impossible, for any stakeholder to assess whether actual numbers are accurate, prudent, or appropriate. This need for information is necessary for state commissions to meet federal and state regulatory due diligence and statutory oversight responsibilities. Without the ability to make such comparisons, the

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<sup>49</sup> OMS Comments, at 24-25.

<sup>50</sup> MISO TOs' Answer, at 34-35.

proposed protocols could still result in unjust and unreasonable rates. Moreover, well-defined and well-structured protocols need to include the ability to make available projected and actual data so OMS and each state commission, as well as other Interested Parties, can submit meaningful information requests and make informal or formal challenges based on comparisons of projected and actual data.

### **C. Timeline and Date for the Annual Meeting**

In its October 18 Comments, the OMS noted the MISO TOs' proposal would permit delay of the annual meeting up to, and including, October 1.<sup>51</sup> The OMS described various problems that such a delay could create.<sup>52</sup> To address these concerns, the OMS proposed that the annual meeting be held no later than 30 days after the posting of a MISO TO's formula rate update/true-up and no earlier than 10 days of such posting.<sup>53</sup>

In their Answer, the MISO TOs acknowledged various parties' concerns about the MISO TOs' proposed timeline for the annual meetings.<sup>54</sup> The MISO TOs state that they have no intent to use the timeline they proposed to "prevent Interested Parties from being able to submit information requests."<sup>55</sup> Nevertheless, the MISO TOs accede to change the allowed date for the annual meeting from October 1 to September 1, if so directed by the Commission.<sup>56</sup>

The OMS appreciates the MISO TOs' reconsideration of this issue and their 30 day concession. Nevertheless, that concession does not satisfy the concerns expressed in the OMS's comments. In addition, whether or not the MISO TOs have the intent to create the kinds of problems described in the October 18 Comments is irrelevant. If the timeline permits those

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<sup>51</sup> OMS Comments, at 15.

<sup>52</sup> OMS Comments, at 15-16.

<sup>53</sup> OMS Comments, at 17.

<sup>54</sup> MISO TO Answer, at 15.

<sup>55</sup> MISO TO Answer, at 15.

<sup>56</sup> MISO TO Answer, at 15.

kinds of problems to develop and those problems could be obviated by making modifications to the annual meeting timeline, such modifications should be made. Prevention of potential abuse at the outset, rather than delayed and/or disputed remediation after the fact, better serves the interests of efficiency and stability in the protocols finally adopted. Accordingly the OMS continues to recommend that the annual meeting be held on the timeline proposed in the OMS's Comments.

**D. Joint Annual Meeting and Information Exchange Process for Transmission Projects Having Shared Costs**

In its October 18 Comments, the OMS noted that transmission project cost sharing is widespread in the MISO region.<sup>57</sup> The OMS observed that a transmission customer physically located in one MISO TO's footprint will be required to contribute payments (through the TO's transmission rates) to the costs of projects physically located in the footprint of other MISO TOs.<sup>58</sup> If such a transmission customer participates in only its local TO's annual rate update meeting, it would not find out about transmission projects physically located in other TOs' footprints, and the costs of those projects, even though the transmission customer will be making payments towards the costs of those other projects. Indeed, in order to obtain detailed information about all of the transmission projects throughout the MISO region for which a transmission customer contributes through its rates, the transmission customer would need to participate in the annual meetings of all, or nearly all of the MISO TOs. This is an exceedingly high burden on transmission customers borne just because of the transmission cost sharing in the MISO region.

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<sup>57</sup> OMS Comments, at 18-19.

<sup>58</sup> OMS Comments, at 19.

Because of these circumstances, the OMS recommended that a joint annual meeting and joint informational exchange process be held each year wherein all transmission owners charging shared project costs could explain to all interested parties how these costs are reflected in each MISO TO's formula rate update, rate projection or true up. Such a joint and centralized meeting and information exchange process would streamline the review that an interested party would otherwise have to undertake by separately participating in each MISO TO's annual meeting and information review process. For ease of administration, the OMS recommended that MISO serve as host or otherwise annually facilitate such a joint centralized meeting and information exchange process.<sup>59</sup>

In their Answer, the MISO TOs asserted that a joint annual meeting and information exchange process for MISO TOs charging shared transmission project costs is not required by the Commission's May 16 Order<sup>60</sup> and argued that such a joint process is unnecessary.<sup>61</sup> The MISO TOs offered two points in support their argument that the OMS's joint process proposal is unnecessary:

- (1) "Information concerning a Transmission Owner's costs for both cost-shared and non-cost shared projects will be available both in the information posted for each transmission owner and in information that is currently available on the MISO website;" and
- (2) "[E]ven for cost-shared projects, Transmission Owners develop their company's portion of the revenue requirement based on their company's individual costs."<sup>62</sup>

Neither of these two points addresses the OMS's observations about shared transmission project costs in the MISO region and the lack of transparency regarding rate recovery for those

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<sup>59</sup> OMS Comments, at 19.

<sup>60</sup> MISO TOs' Answer, at 15.

<sup>61</sup> MISO TOs' Answer, at 16.

<sup>62</sup> MISO TOs' Answer, at 16.

projects. The OMS did not assert that the MISO TO responsible for the transmission project does not cause populated Attachments O, GG and MM worksheets to be posted on MISO's website. Nor did the OMS assert that the MISO TO responsible for the transmission project does not develop its portion of its revenue requirement based on its individual costs. Rather, the OMS's proposal stemmed from its observation about the lack of transparency for Interested Parties in the rate recovery for shared transmission project costs in the MISO region. For example, it is unrealistic to expect transmission customers located in Otter Tail's service territory to know to go to MISO's website to view, for example, International Transmission Company's posted Attachments O, GG and MM worksheets to assess the reasonableness and prudence of certain ITC project costs being recovered through Otter Tail's transmission rates. Moreover, even if the transmission customer in the Otter Tail service territory knew where to find such information on MISO's website, that Otter Tail transmission customer would still not receive notice of ITC's annual meeting or be familiar with the timeline and procedures for ITC's information exchange process and challenge process. This is an unwieldy and burdensome process at best and the OMS' concerns are compounded by the fact that there are millions of end-use customers throughout the MISO region that could potentially become Interested Parties. Without a joint centralized meeting and information exchange process the inefficiency, burdensomeness and lack of transparency of the process advocated by the MISO TOs for shared transmission project cost review becomes manifest.

In addition, the scattering of rate recovery across the MISO region for shared transmission projects likely diminishes the attention of the MISO TO responsible for the transmission project in regards to cost containment. In contrast, when the full cost of a transmission project is recovered from the transmission customers in a MISO TO's own service

territory, the process for rate recovery of that project's costs is more transparent and the MISO TO's formula rate updates and/or projections are more likely to receive the appropriate level of scrutiny and possibly, prudence challenges. Such attention is likely to foster enhanced project cost control on the part of the MISO TO responsible for the transmission project. On the other hand, if a significant portion of transmission project costs is borne by ratepayers outside the service territory of the MISO TO responsible for the project, as is the case for many cost shared projects in the MISO region, focus on reasonableness or prudence of the project costs is, at best, scattered across the MISO region.

The OMS's proposal for a joint annual meeting and information exchange process for transmission projects having shared costs is an administratively efficient first step toward improving the transparency of rate recovery for shared project costs in formula rates. As the magnitude of shared project costs continues to increase across the MISO region, the Commission must begin to put in place processes to improve the transparency of the rate recovery procedures and to develop mechanisms by which transmission project costs will be controlled and imprudent costs avoided. For all these reasons, the OMS urges the Commission to disregard the MISO TOs' objections and the OMS recommends that the Commission make the OMS's proposal for a joint annual meeting and information exchange process for transmission projects having shared costs part of the protocol process.

#### **E. Requirement to Make a Good Faith Effort to Consolidate Information Requests**

In its October 18 Comments, the OMS noted the MISO TOs' proposal to "require that 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.”<sup>63</sup> The OMS explained how this requirement places an unrealistic burden on Interested Parties.<sup>64</sup> The OMS pointed out that an Interested Party may not know the identities of other Interested Parties, let alone whether or not they have shared concerns.<sup>65</sup> Consequently, the OMS recommended that this provision of the MISO TOs’ proposed protocol be deleted.<sup>66</sup>

In their Answer, the MISO TOs note some (but not all) of the concerns expressed by the OMS and other parties, and respond by asserting that their proposed provision “will promote efficiency by discouraging duplicative requests.”<sup>67</sup> In addition, the MISO TOs clarified that they “will not decline to respond to an information or document request on the basis that it is duplicative of another request.”<sup>68</sup>

The OMS appreciates the MISO TOs’ concession on this issue. But, given the concerns raised by the OMS and other parties regarding the MISO TOs’ proposal to require Interested Parties to coordinate and consolidate information requests, and given that the administrative burden on the part of Interested Parties to attempt to comply with this requirement will likely exceed the administrative burden on a MISO TO to respond to duplicative information requests (if any), the OMS continues to recommend that the Commission direct the MISO TOs to delete the provision from the protocol.

If the Commission, nevertheless, decides not to delete the provision entirely and, instead decides to accept the MISO TOs’ commitment that they will not decline to respond to

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<sup>63</sup> OMS Comments, at 16.

<sup>64</sup> OMS Comments, at 16.

<sup>65</sup> OMS Comments, at 17.

<sup>66</sup> OMS Comments, at 18.

<sup>67</sup> MISO TOs’ Answer, at 19-20.

<sup>68</sup> MISO TOs’ Answer, at 20.

duplicative information requests, the OMS requests that the Commission make that commitment part of the protocol tariff.

#### **F. MISO TOs' Proposed Merger Reporting Qualification**

In its October 18 Comments, the OMS noted the Commission's directive that "the formula rate 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."<sup>69</sup>

The OMS noted the MISO TOs' proposal to avoid full compliance with the Commission's directive by proposing to limit and qualify the extent of their merger reporting.<sup>70</sup> In their Answer, the MISO TOs admit that they proposed to qualify and limit their compliance with the Commission's directive, and defended that qualification by asserting that their proposed limited merger reporting would be sufficient to capture "transactions that are likely to affect the charges that result from the formula rate calculations."<sup>71</sup>

In their Answer, the MISO TOs characterize the Commission's directive to report "any reorganization or merger transaction and explain the effect of the accounting for such transactions on inputs to the formula rate" as imposing a different standard than would otherwise apply under the generally applicable provisions of Section 203 and 205 of the Federal Power Act.<sup>72</sup> The MISO TOs fault the OMS for not explaining why the MISO TOs should be held to what they characterize as a different standard than generally applies.

In response, the OMS would point out that it is the responsibility of the MISO TOs to comply with Commission directives. If the MISO TOs object to the merger reporting

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<sup>69</sup> OMS Comments, at 41, citing the Commission's May 16 Order, at P 87.

<sup>70</sup> OMS Comments, at 41.

<sup>71</sup> MISO TOs' Answer, at 14, underlining added.

<sup>72</sup> MISO TOs' Answer, at 14.

requirement in the Commission's May 16 Order, the proper venue for pursuit of redress would have been to seek rehearing on that issue. Contrary to the MISO TOs' characterization, although the OMS supports the Commission's merger reporting directive, the OMS bears no burden to explain or defend that directive. Nevertheless, the OMS did explain in its Comments why the Commission's merger reporting decision is reasonable in the context of MISO TO formula rate protocols. In particular, the OMS pointed out the variety of corporate forms exhibited by the MISO TOs and their various jurisdictional statuses.<sup>73</sup> The Commission's directive would achieve uniformity of merger and reorganization reporting amongst the MISO TOs with respect to formula rate cost recovery.

The Commission has decided that it would not be appropriate for the MISO TOs to have the continued discretion to decide which merger or reorganization transactions to report in the formula rate protocols context and which ones not to report.<sup>74</sup> The Commission directed that any reorganization or merger transaction be reported and that an explanation of the effect of the accounting for such transactions on inputs to the formula rate be provided.<sup>75</sup> The MISO TOs' judgment regarding which reorganization or merger transactions are likely to affect the charges that result from the formula rate calculations is not relevant.

For these reasons, the OMS recommends that the Commission disregard the MISO TOs' objections and further recommends that the Commission implement its merger reporting requirement as directed in the May 16 Order.

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<sup>73</sup> OMS Comments, at 41

<sup>74</sup> May 16 Order, at P 87.

<sup>75</sup> May 16 Order, at P 87.

## **G. Filing Requirements for Formal Challenges**

In its October 18 Comments, the OMS objected to the MISO TOs' proposal to require parties submitting formal challenges to comply with all filing requirements applicable to formal complaints under Section 206 of the Federal Power Act.<sup>76</sup> The OMS explained that "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."<sup>77</sup> The OMS explained that applying the rules in 18 C.F.R. § 385.206 to formal challenges would eliminate any distinction between the processes, rules and standards 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.<sup>78</sup> The OMS explained that application of those rules would improperly shift the burden of proof from the MISO TO to the party submitting the formal challenge.

In their Answer, the MISO TOs defend their proposal to apply the Commission's FPA Section 206 complaint rules to formal challenges in the formula rate context.<sup>79</sup> The MISO TOs point to the existence of another sentence in the proposed protocol tariff language that discusses the burden of proof and argue that, because that sentence exists, the Commission should ignore the contradictory provision, also in the proposed protocol tariff, which the OMS objects to here. The MISO TOs provide no explanation for why one of these tariff sentences should be read to

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<sup>76</sup> OMS Comments, at 30-32.

<sup>77</sup> OMS Comments, at 32-33

<sup>78</sup> OMS Comments, at 32-33

<sup>79</sup> MISO TOs' Answer, at 24-25.

trump the other. Given their contradictory nature, the two sentences cannot simultaneously apply.

In their Answer, the MISO TOs also challenge the OMS and other parties protesting this provision of the proposed formula rate protocol to identify exactly which filing procedures they would propose to apply to formal challenges.<sup>80</sup> In response, the OMS notes that MISO and the MISO TOs are responsible for demonstrating that tariff language they propose is just and reasonable. Such a burden does not belong to the OMS and other parties in this case. With response to the provision identified by the OMS herein, MISO and the MISO TOs have failed to carry their responsibility.

However, having been challenged by the MISO TOs, and in the spirit of being helpful, the OMS would suggest that appropriate and workable filing requirements for formal challenges could be crafted from amongst provisions in the Commission's Rules 207 (Petitions), 211(Protests) and 212 (Motions).

In its May 16 Order, the Commission specifically stated that applying the section 206 framework to formula rate challenges "imposes significant informational and financial obstacles that interested parties must overcome in order to raise issues with a transmission owner's implementation of its formula rate. [footnote omitted] Such a burden could be particularly onerous for smaller entities. Further, such impediments could discourage interested parties from raising issues of less financial significance, even when their concerns are valid."<sup>81</sup>

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<sup>80</sup> MISO TOs' Answer, at 25.

<sup>81</sup> May 16 Order, at P 115

For all these reasons, the OMS continues to recommend that the Commission direct the deletion of any tariff language that would require formal challenges to be filed under and satisfy all filing requirements applicable to Section 206 complaints.

#### **H. Time Limit on Interested Parties' Right to Challenge**

In its October 18 Comments, the OMS noted the MISO TOs' proposal to place a time limit on Interested Parties' right to submit a formal challenge to a MISO TO's formula rate update/true-up.<sup>82</sup> The OMS opposed such limitation, citing extensive Commission precedent.

In their Answer, the MISO TOs do not attempt to refute the extensive Commission precedent cited by the OMS. Indeed, the only argument raised by the MISO TOs in defense of their proposal to limit formal challenges is that the Commission has, apparently, accepted some provisions limiting formal challenges in the cases of Atlantic City and Commonwealth Edison.<sup>83</sup>

In response, the OMS points out that the preponderance of precedent supports the OMS's position, not that of the MISO TOs. In addition, the OMS notes that the Commission has specifically addressed this issue in the May 16 Order, which applies specifically to the MISO TOs' compliance obligation in this case. Specifically, the Commission addressed the informal challenge process and indicated that compliance procedures proposed by the MISO TOs may feature a time limit. In particular, with respect to informal challenges, the Commission stated,

Such procedures must, at a minimum, permit interested parties to raise informal challenges for a reasonable period of time after transmission owners initially propose their annual updates.<sup>84</sup>

With respect to formal challenge procedures, the Commission stated in the May 16 Order that "interested parties must be permitted to raise a formal challenge with the Commission."<sup>85</sup>

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<sup>82</sup> OMS Comments, at 37-38.

<sup>83</sup> MISO TOs' Answer, at 27.

<sup>84</sup> May 16 Order, at P 119, underlining added.

The Commission did not put a time limit on this right. Indeed, the Commission stated that the transmission owner “continues to bear the burden of demonstrating the justness and reasonableness of the rate resulting from its application of the formula.”<sup>86</sup>

For all these reasons, the OMS continues to recommend that the Commission direct the MISO TOs to remove the proposed language that would put a time limit on interested parties’ rights to formally challenge charges flowing out of the formula rate.

### **I. Use of Confidential Information in Formal Challenges**

In its Comments, the OMS recommended that the Commission direct the MISO TOs “to include a provision enabling challenges to be based on confidential information,” citing the ComEd protocol as an example.<sup>87</sup> The OMS explained how the inability of an Interested Party to use confidential information in its formal challenge can dramatically hinder the Interested Party’s ability to exercise its challenge rights.<sup>88</sup>

In its Answer, the MISO TOs state that the OMS’s request in this regard is “not justified.”<sup>89</sup> The MISO TOs cite to a statement in a footnote 197 of the Commission’s May 16 Order to support their objection to the OMS’s proposal.<sup>90</sup> However, that footnote is inapplicable to the OMS’s recommendation. The Commission’s statement in footnote 197 of the Commission’s May 16 Order applies to the informal challenge process, in particular, the process of having a senior representative of the MISO TO to “work with” the interested party toward of resolution of its informal challenge. The Commission was indicating that nothing about the nature of that aspect of the informal challenge process necessarily needs to conflict with the

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<sup>85</sup> May 16 Order, at P 120.

<sup>86</sup> May 16 Order, at P 120, underlining added.

<sup>87</sup> OMS Comments, at 36-37.

<sup>88</sup> OMS Comments, at 36-37.

<sup>89</sup> MISO TOs’ Answer, at 29.

<sup>90</sup> MISO TOs’ Answer, at 29.

confidentiality provisions in the MISO Transmission Owners Agreement and the Tariff. The OMS agrees with the Commission on that point. But the statement is irrelevant to the issue of whether, or how, confidential information may be used in formal challenges.

For these reasons, the OMS continues to recommend that the Commission direct the MISO TOs to include a provision in the protocol specifically providing that formal challenges may be based on confidential information.

### **III. CONCLUSION**

Wherefore, the OMS respectfully requests leave to file this Answer.

The OMS submits this pleading because a consensus 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 Manitoba Public Utilities Board did not participate in this pleading.

Respectfully Submitted,

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Dated: December 5, 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 5th day of December, 2013.

*William H. Smith, Jr.*