**UNITED STATES OF AMERICA**

**BEFORE THE**

**FEDERAL ENERGY REGULATORY COMMISSION**

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| Midwest Independent Transmission System Operator, Inc.Midwest ISO Transmission Owners | **:****::****:** | Docket No: ER12-715-000 |

**PROTEST**

**SUBMITTED ON BEHALF OF**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

**January 19, 2012**

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# INTRODUCTION

 Pursuant to Rule 211 of the Federal Energy Regulatory Commission's (FERC’s or Commission’s) Rules of Practice and Procedure, 18 C.F.R. § 385.211, the Combined Notice of Filings issued on Jan 3, 2012, the Public Utilities Commission of Ohio (PUCO or Ohio Commission) hereby submits its protest responding to the Midwest Independent System Operator, Inc.’s (“MISO’s”) December 29, 2011 in the above-captioned pro­ceeding. The Ohio Commission filed a timely notice of intervention on January 13, 2012, and is a party to this docket.

# BACKGROUND

 On December 29, 2011, pursuant to section 205 of the Federal Power Act[[1]](#footnote-1) (FPA) and Part 35 of the Commission’s rules, MISO filed for approval of its proposed Schedule 39 tariff (Multi-Value Project [MVP] Financial Obligations and Cost Recovery for With­drawing Transmission Owners) to be effective January 1, 2012. The proposed Schedule 39 tariff establishes the mechanisms by which MISO will render charges annually to transmission owners that withdraw from MISO for MVPs constructed, or approved for construction, prior to withdrawal. The proposed tariff also sets forth a distribution of such revenues collected by transmission owners in MISO.

 The proposed tariff, at Appendix A, identifies the single MVP project which the American Transmission System, Inc. (ATSI) is responsible. The proposed tariff, at Appendix B, identifies 17 MVP projects to which Duke Energy Ohio and Duke Energy Kentucky (“Duke-OK”) are responsible, 16 of which were approved by the MISO Board of Directors (“Board”) on December 8, 2011. The expected cost of the 17 MVPs is $5.6 billion.

# DISCUSSION

## Cost Causation and Beneficiary Pays

 The Ohio Commission believes that the beneficiary pays costing approach ensures that FERC will realize its obligation to ensure just and reasonable rates by making certain that those causing costs are being rendered the appropriate charges. Conversely, here, MISO is attempting to socialize 17 MVP costs without providing any benefit to its cus­tomers. MISO is not authorized to approve a pricing scheme that requires a group of utilities to pay for facilities from which its members de­rive no benefits, or benefits that are insignificant in relation to the costs. The proposed Schedule 39 tariff is unwarranted and unlawful because it continues to base its funding on the postage stamp cost socializa­tion methodology and does not fairly distinguish those who actually benefit from the con­struction of individual transmission expansion projects from those who do not benefit at all or benefit only marginally. This situation is further exacerbated by the fact that the proposed Schedule 39 tariff requests authorization to render cost assessments to transmis­sion providers that are no longer MISO member companies and, therefore, are realizing no benefits for their respective MVP charges. MISO should not be permitted to assign costs to any transmission owner prior to demonstrating a commensurate tangible benefit. Regional cost allocations absent such a demonstration are outside the law and contrary to good public policy.

 Under the beneficiary pays approach, MISO should only assign cost responsibility to the transmission zones that would actu­ally benefit from the new facilities. To be clear, the beneficiary pays approach does not preclude the spreading of costs on a region-wide basis, but spreading such costs is only viable if all customers in a certain region benefit to the same relative degree. Here, MISO is attempting to assign its socialized costs to another Region Transmission Operator’s (RTO’s) zone prior to any of these projects being built. The Ohio Commission’s mission has always been to protect consumers from unnec­essary costs and to ensure that any warranted costs are prudently incurred and have correlating material benefits to consumers. MISO’s 17 MVP cost allocations lack a correlating material benefit to Ohio consumers. No Ohio transmission provider is cur­rently even a MISO member. Consequently, it is unreasonable to ask Ohio’s consumers to subsidize the construction of transmission facilities. FERC must ensure that costs are recovered from those customers who will benefit from lower rates and not those who will experience higher rates.

 MISO has failed to demonstrate the material benefits needed to justify the costs allocated to Ohio consumers. MISO’s proposal in this regard surpasses the realm of rea­sonableness for RTO exit fees. FERC’s requested approval of the proposed Schedule 39 charges will result in the exiting transmission providers paying transmission expansion charges to both the prior and new RTO. If FERC intends to entertain this proposed last-minute tariff, in hindsight, FERC should have never determined Duke- OH and ATSI’s request to integrate with PJM to be reasonable.

## Seventh Circuit Remand

 MISO’s proposed Schedule 39 tariff cost allocation methodology is inconsistent with U.S. Court of Appeals for the Seventh Circuit’s (“Seventh Circuit”) remand to FERC on cost socializa­tion. On April 19, 2007 FERC issued Opinion No. 494 - an order on an initial decision concerning PJM’s Transmission lines.[[2]](#footnote-2) In this order, FERC, decided to adopt the post­age-stamp cost allocation method for the recovery of the cost of investment in new facili­ties that operate at or above 500 kV. Upon further review, in its August 6, 2009 order, the Seventh Circuit found that FERC had not cited sufficient record evidence to justify its adoption of a postage stamp cost allocation methodology for new transmission facilities operating at or above 500 kV.[[3]](#footnote-3) Making matter worse, a vast majority of the 17 MVPs identified in MISO application consists of 345 kV lines. The Seventh Circuit also noted that FERC had not justi­fied the allocation of costs on the basis of reliability provided to the PJM system.[[4]](#footnote-4) Subse­quently, FERC issued an *Order Estab­lishing Paper Hearing Procedure* in response to the Seventh Circuit’s decision and has yet to issue an order after receiving comments from various parties.

 FERC’s continued approval of applications for cost socialization of transmission expansion projects will result in appeals. These will unnecessarily delay needed trans­mission expansion projects harming those who will actually benefit from the construction of such facilities via enhanced reliability and/or decreased capacity and energy charges. Moreover, FERC’s approval of MISO’s proposed Schedule 39 tariff will be contrary to the Seventh Circuit decision on transmission cost allocation.

## FERC Order 1000

 MISO’s proposed Schedule 39 tariff cost allocation proposal is inconsistent with the intent of FERC’s transmission cost allocation principles established in Docket No. RM10-23-000; Order No. 1000. On July 21, 2011, FERC issued a final rule in Order 1000, establishing six transmission cost allocation principles.[[5]](#footnote-5) The most relevant include:

1. The cost of a new interregional transmission facility must be allocated to each transmission planning region in which that transmission facility is a manner that is at least commensurate with the estimated benefits of that transmission facility in each of the planning regions. In determining the beneficiaries of interregional transmission facilities, transmission planning regions may consider benefits including, but not limited to, those associated with maintaining reliability and sharing reserves, production cost savings and congestion relief, and meeting Public Policy Requirements.
2. Those that receive no benefit from transmission facilities, either present or in a likely future scenario, must not be involuntarily allocated any of the costs of those transmission facilities.[[6]](#footnote-6)

There are no commensurate benefits to Ohio consumers resulting from MISO’s proposed Schedule 39 tariff. In accordance with FERC’s second principal, Ohio consumers should not be allocated any costs resulting from projects that do not meet FERC’s first principal. Here, MISO has failed to demonstrate benefits that will be provided by its proposed tariff Schedule 39 to the Duke-OK footprint. Without providing such benefits, MISO’s pro­posed cost allocations should be considered “involuntary” under FERC’s second princi­ple in Order 1000. In addition, MISO’s proposed tariff filing is inconsistent with FERC Order 1000’s stated policies concerning inter-regional cost allocation because neither ATSI nor Duke-OK consented to the interregional cost allocation. Specifically, FERC’s order at paragraph 657 reads as follows:

Interregional Cost Allocation Principle 4: Costs allocated for an interregional transmission facility must be assigned only to transmission planning regions in which the transmission facility is located. Costs cannot be assigned involuntarily under this rule to a transmission planning region in which that transmission facility is not located.However, interregional coordination must identify consequences for other transmis­sion planning regions, such as upgrades that may be required in a third transmission planning region and, if the transmis­sion providers in the regions in which the transmission facil­ity is located agree to bear costs associated with such upgrades, then the interregional cost allocation method must include provisions for allocating the costs of such upgrades among the beneficiaries in the transmission planning regions in which the transmission facility is to be located.[[7]](#footnote-7)

Consequently, the Ohio Commission urges FERC to take into consideration its current cost allocation principals when reviewing MISO’s proposed Schedule 39 tariff.

## Unjust and Unreasonable

 FERC should consider whether the allocation of MVP costs to Duke-OK and its customers is unjust, unreasonable or unduly preferential under FPA section 206. Duke-OK gave written notice to FERC of its withdrawal from MISO, well before MISO’s pro­posed MVP cost allocation on July 15, 2010. Considering the lack of benefit that will be provided to Duke-OK, ATSI, and ultimately Ohio consumers, it is inconsistent with the FPA’s just and reasonable mandates to require customers not benefiting from an eco­nomic transmission project to share in the cost. Moreover, the proposed Schedule 39 tar­iff charges are tantamount to retroactive ratemaking because they propose to be rendered subsequent to each companies exit from MISO. Therefore, the Ohio Commission rec­ommends that FERC take into consideration the lack of benefit and potential detriment Ohio consumers will experience when considering the “just and reasonableness” of MISO’s proposed Schedule 39 tariff cost allocation.

## The Transmission Owners’ Agreement

 Contrary to MISO’s allegations, the MISO transmission owners’ agreement does not contemplate the situation at hand. That is, MISO does not possess the authority after the fact to retroactively render charges to companies that have had their application to withdraw from MISO approved by FERC. This lack of authority is evidenced by this instant proceeding and MISO’s corresponding request for its Section 39 tariff approval. When the 16 most recent MVPs were approved by the MISO Board, the process by ATSI and Duke-OK to exit MISO and integrate with PJM were either significantly underway or complete. MISO does not hold the discretion to create a new customer class to render charges to transmission providers that are no longer members. Moreover, a majority of transmission owners voting to render charges to other transmission owners that have already exited MISO (or have implemented their plans to exit) does not constitute a rea­sonable approach under a beneficiary pays cost methodology. To the contrary, the majority in this instance simply voted to impose an unwarranted tax on the exiting trans­mission owners, and is in conflict with the intent of FERC Order 1000, the 7th Circuit remand regarding transmission cost allocation, and the FPA.

## FERC’s MVP Order

 FERC’s MVP order does not accommodate the payment of transmission cost alloca­tion after a company has joined another RTO. MISO’s proposed Schedule 39 tariff is inconsistent with FERC’s MISO MVP order at paragraph 383.[[8]](#footnote-8) In that decision, FERC determined that rather than making an upfront allocation of costs based on an analysis of benefits and usage at a specific point in time, the proposed MVP rate design allocates costs based on usage over time. Consequently, FERC determined that this approach to cost allocation review allows an allocation of costs to load in a manner that reflects changes in MVP beneficiaries over time. Because Duke-OK and ATSI’s usage within MISO is reduced to zero as result of their respective exit from MISO, any periodic re-evaluation of MVP cost allocations for these companies must also represent an MVP cost allocation assessment equal to zero. FERC cannot allow MISO to base its updated cost allocations to Duke-OK and ATSI based on their usage in another RTO.

## Impact on Future RTO Membership

 On a practical basis, FERC should take into consideration the impact its approval of this proposed tariff would have on future RTO membership. That is, the proposed Schedule 39 tariff creates a huge disincentive for a state to permit transmission owners to join an RTO. States will recognize Schedule 39 for what it is, a massive, unjustified pen­alty imposed as a punishment for leaving an RTO. Any transmission owner or state reg­ulatory body will be extremely averse to agreeing to join an RTO with the specter of a huge and arbitrary fine should it become advisable to switch RTO’s in the future. Further exacerbating this perceived action is the fact that MISO’s Board approved an additional 16 MVPs just weeks prior to Duke-OK integration with PJM. If these perceived punitive measures are sanctioned by FERC, it could incent other jurisdictions, and transmission operators in those jurisdictions, to re-evaluate whether to join an RTO. In contrast, a rejection of Schedule 39 supports additional RTO participation by encouraging added value and additional economies to participants by the RTO.

## Request for Waiver

 MISO has requested that FERC waive its 60-day notice as required by Section 35.3(a) of the Commission’s regulations[[9]](#footnote-9) and make its proposed filing effective January 1, 2012. The Ohio Commission opposes this request. No good cause has been shown to approve a rate filing that is both inconsistent with the FPA’s just and reasonable standard and is in conflict with the 7th Circuit’s decision regarding transmission cost recovery. FERC should not rush to judgment on this matter. MISO’s hurry to render unwarranted and unreasonable charges to transmission owners that have already exited must be thoroughly vetted and MISO’s actual intentions must be rejected. It should be noted that 16 of the MVPs at issue were only recently approved by the MISO Board on December 8, 2011, and the instant application was filed on December 29, 2011, just two days prior to Duke-OK’s final integration into PJM. Moreover, FERC’s public notice inviting comments on this application was issued on January 3, 2012, two days after MISO’s requested effective date.

# CONCLUSION

 The Ohio Commission thanks FERC for the opportunity to file its protest in this proceeding.

Respectfully submitted,

*/s/ Thomas W. McNamee*

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**Attorney for the**

**Public Utilities Commission of Ohio**

# CERTIFICATE OF SERVICE

 I hereby certify that the foregoing have been served in accordance with 18 C.F.R. Sec. 385.2010 upon each person designated on the official service list compiled by the Secretary in this proceeding.

*/s/ Thomas W. McNamee*

**Thomas W. McNamee**

Assistant Attorney General

Dated at Columbus, Ohio this 19th day of January 2012.

1. 16 U.S.C. § 824d (2012). [↑](#footnote-ref-1)
2. *PJM Interconnection, L.L.C*., Docket No. EL05-121-002 (119 FERC ¶ 61,063) (April 19, 2007). [↑](#footnote-ref-2)
3. Under the postage stamp method, all targeted transmission service customers in a region pay a uniform rate per unit-of-service, based on the aggregate cost of all covered transmission facilities in the region. *PJM Interconnection, L.L.C.,* Docket No. EL05-121-006 (130 FERC ¶ 61,052 at 2) (2010). [↑](#footnote-ref-3)
4. *Illinois Commerce Comm’n v. FERC*, 576 F.3d 470 (7th Cir. 2009). [↑](#footnote-ref-4)
5. *Transmission Planning and Cost Allocation by Transmission Owning and Operating Pub. Utils.*, Order No. 1000, Docket No. RM10-23-000 (136 FERC ¶ 61,051) (July 21, 2011). [↑](#footnote-ref-5)
6. *Id.* at 586. [↑](#footnote-ref-6)
7. *Transmission Planning and Cost Allocation by Transmission Owning and Operating Pub. Utils.*, Order No. 1000, Docket No. RM10-23-000 (136 FERC ¶ 61,051) (July 21, 2011). [↑](#footnote-ref-7)
8. Docket No. ER10-1791-000, *Order Conditionally Accepting Tariff Revisions*, issued December 16, 2010, (133 FERC ¶ 61,22). [↑](#footnote-ref-8)
9. 18 C.F.R. § 35.3(a) (2012). [↑](#footnote-ref-9)