UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Coalition of MISO Transmission Customers, Industrial Energy Consumers of America, LS Power Midcontinent, LLC	)	
Complainants,	)	**Docket No. EL20-19-000**
Midcontinent Independent System Operator, Inc.	)	
Respondent	)	

ANSWER OF COMPLAINANTS IN OPPOSITION TO ORGANIZATION OF MISO STATES, INC.'S MOTION TO DISMISS COMPLAINT

Pursuant to Rule 213 of the Federal Energy Regulatory Commission's ("Commission") Rules of Practice,[1] the Coalition of MISO Transmission Customers, the Industrial Energy Consumers of America, and LS Power Midcontinent, LLC (collectively, "Complainants"), respond in opposition to the Motion to Dismiss Complaint Without Prejudice and Comments ("Motion to Dismiss")[2] filed by the Organization of MISO States, Inc. ("OMS").[3] Because the Motion to Dismiss offers no legal basis upon which the Commission can dismiss the Complaint,[4] it should be summarily denied.

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1 18 C.F.R. § 385.213 (2020).

2 *Organization of MISO States, Inc.*, Motion to Dismiss, filed in Docket No. EL20-19-000 on March 26, 2020 ("Motion to Dismiss").

3 OMS's Motion to Dismiss is not supported by all OMS members. Illinois Commerce Commission, the Iowa Utilities Board, and the Kentucky Public Service Commission abstained, and the Manitoba Public Utilities Board did not participate in the vote on the Motion to Dismiss. *Id.* at 4 n.12.

4 *Coalition of MISO Transmission Customers, Industrial Energy Consumers of America, LS Power Midcontinent, LLC v. Midcontinent Indep. Sys. Operator, Inc.*, Complaint, filed in Docket No. EL20-19-000 on January 23, 2020 ("Complaint").

I. ANSWER TO MOTION TO DISMISS

A. Section 206 Of The Federal Power Act ("FPA") Does Not Require Complainants To Solicit Stakeholder Input Prior To Asserting That A Cost Allocation Methodology Is Unjust And Unreasonable

OMS moves to dismiss a fully supported Complaint under Section 206 of the FPA[5] but does not argue that the existing cost allocation methodology for Baseline Reliability Projects is just and reasonable.[6] This is not surprising given the overwhelming precedent that a location based cost allocation methodology that does not reflect identifiable regional beneficiaries fails cost causation principles and is therefore legally deficient.[7] In *ODEC v. FERC*, the United States Court of Appeals for the D.C. Circuit ("D.C. Circuit") rejected the categorical refusal to measure regional benefits while allocating costs based exclusively on the location of the transmission additions, vacating the Commission's order accepting the methodology. On remand, the Commission accepted that its original order was in legal error and ordered refunds from the inception of the cost allocation change.[8]

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5 16 U.S.C. § 824e.

6 In fact, the OMS Motion to Dismiss notes that the Public Service Commission of Wisconsin, the Missouri Public Service Commission and the Michigan Public Service Commission "have previously commented [that] the cost allocation for baseline reliability projects does not comport with the beneficiaries pay principle." Motion to Dismiss at 2 n.3.

7 *Old Dominion Elec. Coop. v. FERC*, 898 F.3d 1254 at 1262-1263 (D.C. Cir. 2018), *reh'g denied*, 905 F.3d 671 (D.C. Cir. 2018)("ODEC v. FERC")(finding that the cost-causation principle requires "comparing the costs assessed against a party to the burdens imposed or benefits drawn by that party" and "the cost-causation principle prevents regionally beneficial projects from being arbitrarily excluded from cost sharing—a necessary corollary to ensuring that the costs of such projects are allocated commensurate with their benefits"); *Midcontinent Indep. Sys. Operator, Inc.*, 170 FERC ¶ 61,241 at P 59 (2020)(rejecting for a second time as inconsistent with the cost causation principle and therefore unjust and unreasonable MISO's proposed cost allocation methodology that would allocate all costs of a project based solely on the project's physical location even though the projects are known to have regional benefits).

8 *PJM Interconnection, L.L.C.* (Order on Remand), 168 FERC ¶ 61,133, at P 2 (2019) *reh'g denied*, 171 FERC ¶ 61,012 (2020).

The Midcontinent Independent System Operator, Inc.'s ("MISO") cost allocation methodology for Baseline Reliability Projects is precisely the kind of location-based cost allocation methodology rejected by the D.C. Circuit and ultimately the Commission as failing the cost causation principles.[9] Expedited Commission action applying an appropriate cost allocation methodology to Baseline Reliability Projects for the 2019 MISO Transmission Expansion Plan ("MTEP 2019") and subsequently forward, is warranted.

Instead of addressing the substance of the Complaint and the Complainants' legal authority to bring the Complaint, OMS argues – without reference to any relevant precedent or legal authority – that dismissal is appropriate because the Complainants did not first initiate a stakeholder process through MISO to address the cost allocation issues raised in the Complaint.[10] Contrary to OMS's unsupported legal position, the Commission has held that a complainant has no obligation to seek a stakeholder process resolution before filing a complaint under Section 206 challenging the justness or reasonableness of a tariff provision.[11] While the Commission has encouraged parties to seek other avenues for resolution of disputes, such as the stakeholder process, before filing a complaint, the Commission has explicitly recognized that its preference does not bar a party from exercising its statutory right to file a complaint under Section 206.[12]

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9 *PJM Interconnection, L.L.C.* (Order on Remand), 168 FERC ¶ 61,133, at P 2 (2019), *reh'g denied*, 171 FERC ¶ 61,012 (2020).

10 Specifically OMS argues for dismissal "because the changes to the MISO tariff that the complainants request have not been subjected to a rigorous stakeholder process." Motion to Dismiss at 2-3.

11 *EDF Renewable Energy, Inc. v. Midcontinent Independent System Operator, Inc.*, 163 FERC ¶ 61,003, at P 46 (2018); *see* 16 U.S.C. § 824e; *see also* 18 C.F.R. § 385.206 ("Any person may file a complaint seeking Commission action against any other person alleged to be in contravention or violation of any statute, rule, order, or other law administered by the Commission, or for any other alleged wrong over which the Commission may have jurisdiction.").

12 *EDF Renewable Energy*, 163 FERC ¶ 61,003, at P 46 (denying a motion to dismiss a complaint filed without starting with the stakeholder process because the complainant "has a statutory right to file [the] complaint under section 206 of the FPA.").

Ignoring this precedent, OMS nevertheless argues that the Commission's 2013 acceptance of the current cost allocation methodology as just and reasonable "should not be disturbed at this time" so that stakeholders have "time to understand the views of all stakeholders on the existing method's purported shortcomings, consider the appropriateness and need for possible modification, and then suggest refinements to any proposed changes."[13] Such an approach might be appropriate *if* the existing methodology were just and reasonable and stakeholders were simply considering a change to the existing cost allocation methodology for other reasons. But the unrefuted evidence is that it that the existing methodology is not just and reasonable and waiting though a stakeholder process would leave ratepayers subject to unjust and unreasonable rates.

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[13] Motion to Dismiss at 3-4. As support for its objection that this Complaint should be dismissed because there has not been a stakeholder process, OMS cites the complaint that LS Power filed regarding the voltage threshold for MISO Market Efficiency Projects. Motion to Dismiss at 2-3 (citing *LS Power Transmission Holdings II, LLC, Cardinal Point Electric, LLC, and LS Power Midcontinent, LLC v. Midcontinent Indep. Sys. Operator, Inc.*, Complaint, filed in Docket No. EL19-79-000 on June 5, 2019). In doing so, OMS misstates the factual background of that Complaint. According to OMS, LS Power "sought to cut that stakeholder process short" by filing its complaint after the stakeholder process was completed and MISO and certain MISO Transmission Owners filed revisions under Section 205 in Docket No. ER19-857-000. *Id.* at 3. However, LS Power did not file its complaint until after a Section 205 filing had been made and protested, and the filing parties argued in response to protests that the Commission did not have the authority to grant the relief requested by the protests, *i.e.*, lowering the Market Efficiency Project threshold to 100 kV. *See, e.g.*, *Motion for Leave to Answer and Answer of the Midcontinent Independent System Operator, Inc. and MISO Transmission Owners*, filed in Docket Nos. ER19-1124-000 and ER19-1125-000 on May 10, 2019 at 8; *Motion for Leave to Respond and Response of the MISO South Regulators*, Docket Nos. ER19- 1124-000 and ER19-1125-000 filed on April 11, 2019 at 5, 14-15. LS Power's complaint, brought under Section 206, directly addressed the arguments that the Commission lacked the authority to mandate a lower voltage threshold for Market Efficiency Projects by asserting, with evidence, that the existing threshold is unjust and unreasonable.

1. The Complaint Established That The Cost Allocation Methodology For Baseline Reliability Projects Fails To Adhere To Cost Causation Precedent And Is Unjust And Unreasonable

OMS' dismissal motion does not argue, let alone demonstrate, that Complainants have failed to state a claim upon which relief may be granted or have failed to set forth sufficient facts and allegations that would support their request for relief under Section 206 of the FPA that the current cost allocation methodology for Baseline Reliability Projects is unjust and unreasonable. The Complainants have brought compelling evidence – the engineering analysis in the Pterra Report[14] – that there are Baseline Reliability Projects that have significant regional benefits yet the cost allocation methodology prohibits MISO from recognizing those benefits in the allocation of costs.[15] This finding is supported by MISO's own analysis.[16] The Pterra Report identified that for at least one-third of the projects reviewed, under the line outage distribution factor ("LODF") methodology (the methodology that MISO previously used to allocate the costs of Baseline Reliability Projects) a zone other than the zone where the Baseline Reliability Project is physically located received more than *de minimis* benefits from the project.[17] In several instances, another zone received more than 50% of the benefits and yet was allocated no costs, while the zone where the project was physically located was allocated all of the costs.

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14 Pterra, "LODF-Mile Cost Allocations for Selected Transmission Projects in MISO" Final Report (Jan. 16, 2020)("Pterra Report"). The Pterra Report was attached as Attachment B to the Complaint.

15 *See* Complaint at 25-30.

16 *See* Midcontinent Independent System Operator, Inc. Informational Filing, Docket Nos. ER13-186-000 and ER13-187-000 filed on August 1, 2016; Midcontinent Independent System Operator, Inc. Supplemental to Informational Filing, Docket Nos. ER13-186-000 and ER13-187-000 at page 2, filed on March 17, 2017.

17 The 12 projects are summarized in a table on pages 26-29 of the Complaint.

The existing cost allocation methodology does not identify the actual beneficiaries of Baseline Reliability Projects because MISO is restricted to allocating costs based only on the physical location of a project. This is not a matter of "quibbling about 'exacting precision'"[18] of cost allocation nor is it a "mere spillover of benefits"[19] as FERC originally presumed; it is a refusal to measure benefits at all. MISO "must make some reasonable effort to match costs to benefits."[20] The significant mismatch of costs to benefits identified in the Pterra Report demonstrates a clear violation of the cost causation principle that the OMS Motion to Dismiss does not challenge.[21]

The Commission recently reiterated the importance of matching costs to benefits in rejecting MISO's proposed cost allocation method for a potential new category of economically beneficial projects with voltages between 100 kV and under 345 kV.[22] MISO proposed to allocate all the costs of regionally beneficial economic projects with voltages between 100 kV and under 230 kV solely to the zone where the project is located.[23] The Commission rejected the cost allocation method because it would require MISO to ignore, for purposes of cost allocation, that some of the projects would benefit more than one zone, which is inconsistent with the cost

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[18] *Old Dominion Elec. Coop. v. FERC*, 898 F.3d 1254 at 1261 (D.C. Cir. 2018), *reh'g denied*, 905 F.3d 671 (D.C. Cir. 2018)("ODEC v. FERC").

[19] *MISO Transmission Owners v. FERC*, 819 F.3d 329, 336 (7th Cir. 2016).

[20] *ODEC v. FERC* at 1263, *citing BNP Paribas Energy Trading GP v. FERC*, 743 F.3d 264, 268 (2013).

[21] In *ODEC v. FERC*, the United States Court of Appeals for the District of Columbia Circuit ("the Court") vacated a Commission Order accepting a stakeholder approved cost allocation methodology similar to MISO's Baseline Reliability Project methodology – all costs of a category of projects allocated to the zone where the project was physically located.

[22] *See, Midcontinent Indep. Sys. Operator, Inc.*, 167 FERC ¶ 61,258 (2019)("MISO I"); *Midcontinent Indep. Sys. Operator, Inc.*, 170 FERC ¶ 61,241 at PP 59-69 (2020)("MISO II").

[23] *MISO I*, 167 FERC ¶ 61,258 at PP 9-14; *MISO II*, 170 FERC ¶ 61,241 at PP 12-18.

causation principle.[24] Because the Complaint has been fully supported with evidence and legal precedent, dismissal based on a lack of a stakeholder process is not appropriate under Section 206 of the FPA.

2. The Existing Unjust And Unreasonable Methodology Was Not The Product Of A Stakeholder Process

While OMS seeks a stakeholder process related to cost allocation, the Motion to Dismiss does not recognize the fact that the challenged cost allocation methodology was not subject to a stakeholder process. The challenged cost allocation methodology was presented by incumbent MISO transmission owners, with MISO concurrence, and filed without stakeholder process. MISO and the supporting incumbent transmission owners presented the full proposal to change the cost allocation for Baseline Reliability Projects on September 17, 2012, at its last Order No. 1000[25] Task Force meeting, roughly a month before making its Order No. 1000 and cost allocation filings on October 25, 2012, and without any substantive stakeholder input.[26]

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24 *MISO I*, 167 FERC ¶ 61,258 at PP 63-64; *MISO II*, 170 FERC ¶ 61,241 at P 59.

25 *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, FERC Stats. & Regs. ¶ 31,323, at PP 11, 499 (2011), *order on reh'g*, Order No. 1000-A, 139 FERC ¶ 61,132, *order on reh'g*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012), *aff'd sub nom. S. C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014).

26 The creation of an entirely separate docket to change the MISO cost allocation methodology was first announced at the Order No. 1000 Task Force meeting orally on August 23, 2012. While there had been MISO references earlier in the stakeholder process to concerns on subjecting reliability projects to competition, the August 23, 2012 meeting in St. Paul, MN was the forum for the first announcement that MISO intended to actually change the cost allocation of baseline reliability projects, in a separate docket, at the same time it made its Order No. 1000 compliance filing. In fact, several parties in Docket No. ER13-186-000, including OMS members, protested the lack of a sufficient stakeholder process. *See, e.g.*, *Notice of Intervention, Protest and Comments of the Public Service Commission of Wisconsin and the Michigan Public Service Commission, and the Comments and Protest of the Missouri Public Service Commission*, filed in Docket No. ER13-186, et al on December 10, 2012 at P 10 ("MISO gave short shrift to the stakeholder process. Nor did MISO afford stakeholder the amount of time needed to fully participate in the development of the ultimate proposal filed by MISO."); *Motion to Intervene and Protest of the Indiana Office of Utility Consumer Counselor*, filed in Docket No. ER 13-186, et al on December 10, 2012 at 3-4 ("any proposal to simply end all cost-sharing on such projects should have been thoroughly vetted within the MISO's stakeholder process, in order to fully

3. The LODF Cost Allocation Methodology Was Subject to an Extensive Stakeholder Process

While the existing cost allocation methodology was not subject to a stakeholder process, the LODF cost allocation methodology applicable to Baseline Reliability projects before its 2013 change was developed through an extensive stakeholder process. The predecessor stakeholder-approved LODF methodology is the methodology the Complaint requests that the Commission reinstate as relief from the existing unjust and unreasonable methodology.[27]

The history of the existing cost allocation methodology for Baseline Reliability Projects does not support the concept advanced by OMS that a stakeholder process (actually, an additional stakeholder process as concerns the LODF methodology) is required. Moreover, a stakeholder process is not a prerequisite to the filing of a Section 206 complaint and is not a substitute for the Commission's statutory obligation under Section 206 of the FPA to ensure that rates, and practices affecting those rates, are just and reasonable.[28] Because the Commission

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evaluate the extent to which ending all such cost-sharing was appropriate and as to whether alternative approach might have been viable."); *Motion for Leave to File Comments Out of Time and Comments of the Iowa Utilities Board*, filed in Docket No. ER13-186 on December 18, 2012 (noting that MISO suggested eliminating all cost-sharing for Baseline Reliability Projects "at the end of the stakeholder process when time did not allow for a full vetting by the stakeholders prior to the proposed revisions.").

[27] *See Midwest Indep. Sys. Operator, Inc.*, Transmittal Letter, filed in Docket No. ER06-18-000 at 2-8 (summarizing the history of stakeholder efforts over almost two years to develop a regional transmission planning process and applicable cost allocation methodology for reliability and economic projects in the MISO region).

[28] While the Commission may prefer outcomes that are the result of a stakeholder process, it is not a decisive factor. The Commission "must make its own independent assessment" that the resulting outcome is just and reasonable. *Pub. Serv. Comm'n of Wisconsin v. FERC*, 545 F.3d at 1062-65 (D.C. Cir. 2008)("while the Commission may give weight to negotiated stakeholder process, it must make its own independent assessment that the policy is just and reasonable."); see also *ISO New England, Inc. & New England Power Pool Participants Comm'n New England Power Generators Ass'n*, 135 FERC ¶ 61,029, at P 41 (2011)(In discussing whether the Commission has to view a multi-part proposal as a single package, the Commission explained that compromises made during the stakeholder process does not substitute for Commission review of the individual parts).

cannot delegate, and has not delegated, that obligation to regional stakeholder processes, dismissal of the Complaint based on OMS's Motion is improper.

B. OMS Has Not Established That A Stakeholder Process Is An Appropriate Means To Establish A Just and Reasonable Cost Allocation Methodology In MISO For Baseline Reliability Projects

Although OMS suggests that a stakeholder process should have been pursued prior to the filing of a complaint, OMS offers the Commission no information on which to find that a stakeholder process would proactively, efficiently, or promptly address the unjust and unreasonable cost allocation methodology for Baseline Reliability Projects. Nor should ratepayers be forced to continue to pay unjust and unreasonable rates while MISO conducts a stakeholder process.

Recent events also have demonstrated that, because of the large size of the MISO footprint and divergent interests of MISO stakeholders, the MISO stakeholder process is not always an efficient avenue for developing a just and reasonable alternative cost allocation methodology.[29] Further, the fact that OMS' recently negotiated right to request that MISO file for a new or amended regional cost allocation methodology for certain projects specifically excludes OMS requesting changes to the cost allocation methodology for Baseline Reliability Projects,[30] demonstrates that a stakeholder process is highly unlikely to be successful, if

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29 *See, e.g.*, MISO I, 167 FERC 61,258 (2019) and MISO II, 170 FERC ¶ 61,241 (2020).

30 MISO Transmission Owners Agreement, Appendix K, Article II, Section E.3. In fact, OMS cannot even request a stakeholder process to address Baseline Reliability Project cost allocation, much less change that cost allocation. *Id*. at Appendix K, Article II, Section E.3.a.ii. and b. Those provisions, with emphasis added, provide:

> E.3.a.ii. Upon the OMS Committee request that MISO (1) examine a change or changes in methodology, or (2) make minor technical and clarification Tariff changes, which MISO shall not unreasonably deny, and subject to the commencement of a stakeholder process as provided and modified in Article II, Section 3.E.d below, in which MISO concludes to make a change or changes in methodology. Once an examination is

initiated.[31] As such, the Motion to Dismiss is not only factually misplaced and legally unsupported, it also proposes a poor policy outcome.

II. CONCLUSION

Commission precedent establishes that Complainants were not required to seek or exhaust stakeholder process options before filing a complaint under Section 206 of the Federal Power Act asserting that the cost allocation for Baseline Reliability Projects is unjust and unreasonable. Lacking legal merit, the Motion to Dismiss should be summarily denied. The Commission has recognized that uncertainty surrounding cost allocation can stymie the efficient deployment of capital for transmission investment.[32] As such, Complainants sought reversion to the methodology that was previously in place, that was approved by stakeholders and the Commission, and that no party had challenged as being unjust and unreasonable.[33] Complainants respectfully request that the Commission deny OMS's Motion to Dismiss, and

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> requested under (1) or (2), MISO shall begin the requested stakeholder process not more than 60 days after the date of the OMS Committee's request.
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> *For purposes of this Article II, Section 3.E.a.ii, "examine a change or changes in methodology" shall not include the methodologies and definitions employed for Baseline Reliability Projects*, but shall mean changing any other MISO regional cost allocation methodology, changing the definition of the classes or types of transmission projects subject to any MISO regional cost allocation methodology, or any combination of the foregoing.
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> E.b. The OMS Committee's right described in Article II, Section E.3.a of this Appendix K applies to the regional cost allocation methodology being applied to new regional projects, *other than Baseline Reliability Projects*.

[31] MISO is not required to initiate a stakeholder process to consider whether the current cost allocation methodology for Baseline Reliability Projects is just and reasonable or whether an alternative methodology would be more appropriate. *See EDF Renewable Energy, Inc. v. Midcontinent Independent System Operator, Inc.*, 163 FERC ¶ 61,003, at P 33 (noting EDF's unsuccessful attempts to get MISO to initiate a stakeholder process).

[32] *See, e.g.*, Order No. 1000, FERC Stats. & Regs. ¶ 31,323, at PP 11, 499 (2011).

[33] Of course nothing would prevent a MISO stakeholder process from considering a methodology to replace LODF after the Commission grants the Complaint and applies the LODF methodology as a just and reasonable solution.

grant the relief requested in the Complaint regarding the unjustness and unreasonableness of MISO's cost allocation methodology for Baseline Reliability Projects.

April 10, 2020

Respectfully submitted,

By: /s/ Robert A. Weishaar, Jr.
McNees Wallace & Nurick, LLC
1200 G Street, NW
Suite 800
Washington, DC 20005
Tel. (202) 898-0688
Email: bweishaar@mcneeslaw.com

Kenneth R. Stark
100 Pine Street
Harrisburg, PA 17101
Tel. (717) 237-5378
Email: kstark@mcneeslaw.com

Counsel to the Coalition of MISO Transmission Customers

By: /s/ Paul N. Cicio
Industrial Energy Consumers of America
1776 K Street, NW, Suite 720
Washington, DC 20006
Tel. (202) 223-1661
Email: pcicio@ieca-us.org

President, Industrial Energy Consumers of America

By: /s/ Michael R. Engleman
Robert C. Fallon
Christina Switzer
Engleman Fallon, PLLC
1717 K Street, NW. Suite 900
Washington, DC 20006
Tel. (202) 464-1330
Email: mengleman@efenergylaw.com
rfallon@efenergylaw.com
cswitzer@energylaw.com

Counsel for LS Power Midcontinent, LLC

CERTIFICATE OF SERVICE

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

Dated at Washington, DC this 10th day of April 2020.

By: ***/s/ Michael R. Engleman***
Michael R. Engleman
Engleman Fallon, PLLC
1717 K Street, NW
Suite 900
Washington, DC 20006
Tel. (202) 464-1332
Email: mengleman@efenergylaw.com